

Judicial Culture and Social Rights: A  
Comparative Study of How Social Rights  
Develop Within Common Law Legal Systems

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A thesis submitted to the School of Law in the Faculty of Arts, Humanities and Social Sciences at Trinity College, the University of Dublin, in partial fulfilment of the requirements of the degree of Doctor in Philosophy.

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**James Rooney**

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# DECLARATION

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## SUMMARY AND METHODS

My doctoral thesis explores the conditions under which judicial protection of social rights develops within common law jurisdictions. Social rights relate to material interests necessary for human survival and flourishing, such as the right to adequate shelter, healthcare, water, and education. The judicial protection of social rights is controversial as, for the effective protection of such rights, an unelected judiciary must be capable of directing the elected branches of government to positively expend resources to cure rights breaches. My research is motivated by an interest in how some common law jurisdictions have overcome these objections and enabled social rights to develop into practically enforceable legal claims against the State.

I examine the social rights jurisprudence of Ireland and South Africa. Both constitutional texts include express protection for social rights, with South Africa's Constitution containing considerably more express social rights than Ireland's. In Ireland, social rights protection has failed to develop, whilst South Africa is arguably the leading common law jurisdiction in regards social rights adjudication. I explore what factors informed the judiciaries in both jurisdictions to adopt divergent attitudes toward social rights.

I have conducted an comprehensive overview of the primary materials including constitutional texts and case laws, and secondary materials including academic and extrajudicial commentaries. From a critical engagement with the key cases in both jurisdictions, I argue the crucial determinant for the development of effective social rights protection in common law systems is the dominant cultural attitude within the judicial community to its rights protecting role. In

particular, the attitude of the judicial community towards three central contentions - the importance of judicial rights review, the breadth of its remedial discretion, and the acceptance of social rights as legal rights - determine the likelihood of developing effective social rights protection.

My comparative study of Irish and South African constitutional rights law focuses on these three dimensions. I analyse how the attitude of the Irish and South African judiciaries towards judicial review, remedies for rights breaches, and social rights have developed over time, and note the impact which fluctuations in judicial attitudes towards these contentions corresponds with fluctuations in rights protection.

By understanding what has informed the Irish judiciary's restrained attitude to such remedies, and contrasting with the South African jurisprudence the difference in rights protection within the two jurisdictions is explained, and general observations about the impact of judicial culture on rights protection in common law systems will be made. In particular, I show that the disparity in social rights protection between Ireland and South Africa results from diverging judicial attitudes towards the breadth of the remedial power. This supports my thesis that the predominance of particular cultural attitudes within the judiciary determines whether social rights protection can develop within a common law system.

In my doctorate, I have endeavoured to state the law as of 28<sup>th</sup> August 2020.

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## INTRODUCTION

This thesis is a study of how social rights protection develops in common law legal systems. I explore which factors lead some common law judiciaries to assume a role as an arbiter of the state's social rights obligations, and also what leads other judiciaries to reject such a role. From this, I make sense of how the divergent social rights regimes of the two jurisdictions under review developed and identify what possible factors may induce a culture conducive to social rights protection to develop within presently-resistant judicial communities, such as Ireland.

The term 'social rights' refers to the collection of rights claims that concern resources essential for human existence and basic flourishing. The canon of social rights includes, but is not limited to, the right to (or of access to) housing, healthcare, social security, and a primary education.<sup>1</sup> Whilst the necessity of these essentials for human existence and flourishing is indisputable, the classification of an interest in these essentials as a legal *right* - an entitlement imposing duties and obligations - is deeply controversial.<sup>2</sup>

The controversy centres on the degree of power granted to the judicial branch by recognising interests in such essentials as *rights* imposing legal duties. In the contemporary common law world, the judiciary are the primary determinant of what duties and obligations constitutional rights impose. In such a legal system, by saying we ought to be entitled to, for example, adequate housing (or at least to access such housing) *as a right*, we are saying the judiciary in that legal system should be empowered to discern what positive obligations should be imposed on the elected branches of government to ensure that rights-

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<sup>1</sup> These rights are also commonly referred to as 'socio-economic rights', 'economic social and cultural, or 'ESC' rights' or 'second generation rights,' with the latter two definitions generally including cultural or group rights. The choice in this doctorate to refer to 'social rights' is a stylistic decision and is not made as a critique of these alternative terms. In a similar way, civil-political rights are referred to as 'civil rights' rather than civil-political or 'first generation' rights.

<sup>2</sup> See, for instance, Frank B. Cross, 'The Error of Positive Rights' (2001) 48 *UCLA Law Review* 857, Gerard Hogan, 'Directive Principles, Socio-Economic Rights and the Constitution' (2001) 36(1) *Irish Jurist* 174; Onora O'Neill, 'The Dark Side of Human Rights' (2005) 81(2) *International Affairs* 427; and the essays contained in Tom Campbell, Keith Ewing, Adam Tomkins (eds) *The Legal Protection of Human Rights: Sceptical Essays* (OUP 2011).



bearers get the housing to which they are entitled. Alongside concerns that the judiciary are institutionally incapable of properly determining such cost-sensitive and polycentric disputes,<sup>3</sup> critics frequently argue that making an unelected judiciary the arbiter of how the elected government expends finite resources is counter-democratic.<sup>4</sup>

The presence of a judiciary, whose interpretations of what rights obligations exist within the constitutional order are considered authoritative has become general across the common law world. All common law legal systems share an ancestor in an English legal order that promoted judicial deference to an elected and unrestricted parliament. However, in 2020 this position has become an exception not the norm.<sup>5</sup> Tushnet has observed how, ‘a fixed point in *modern* constitutionalism is that first-generation rights *must* be enforced by the courts.’<sup>6</sup> As across common law legal systems, the judicial branch is composed of unelected legal professionals, these capacity and democracy-based objections arise in all such systems.

Most common law systems resolve the social rights controversy by not engaging in the legal protection of constitutional social rights.<sup>7</sup> As I show, this is the case even in common law systems which expressly *include* social rights in their constitutional texts.<sup>8</sup> These regimes leave the provision of the above-mentioned essentials exclusively to the elected branches. However, alternatively some common law jurisdictions have successfully integrated

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<sup>3</sup> Lon L. Fuller ‘The Forms and Limits of Adjudication’, 92(2) (1978) *Harvard Law Review* 353; David Landau, ‘The Reality of Social Rights Enforcement’ (2012) 53(1) *Harvard International Law Journal* 189.

<sup>4</sup> Jeremy Waldron, ‘The Core of the Case Against Judicial Review’ (2006) 115 *Yale Law Journal* 1346; Richard Bellamy *Political Constitutionalism: A Republican Defence of the Constitutionality of Democracy* (CUP 2009); Adam Tomkins *Our Republican Constitution* (Hart 2015).

<sup>5</sup> See Chapter Two of this doctorate.

<sup>6</sup> Mark Tushnet *Weak Courts Strong Rights: Judicial Review and Social Welfare Rights in Comparative Constitutional Law* (Princeton University Press 2009) 251. (emphasis added).

<sup>7</sup> Indeed, protection of social rights is much more prevalent in civil law systems. However, as the judicial role within civil law systems is distinct from that in the common law world, they are not considered in this doctorate. See Courtney Jung, Ran Hirschl, and Evan Rosevear, ‘Economic and Social Rights in National Constitutions’ (2014) 62 *American Journal of Comparative Law* 1043, 1047.

<sup>8</sup> See Part Two of this doctorate.

social rights into their legal order. In this doctorate, I examine what factors determine which of these two paths a common law legal system takes.

## I: Methodology

To study what inclines a common law system towards or away from developing social rights protection, I employ a comparative analysis of two jurisdictions - Ireland and South Africa. These jurisdictions have been chosen as they are both common law jurisdictions with express social rights contained (to varying extents) within their bills of rights. Despite this commonality, only in one of the two jurisdictions, South Africa, has legal protection for social rights developed. By studying what inclined South Africa both to include a broad basket of social rights and, crucially, to develop a robust jurisprudence of social rights protection; and by studying what disinclined Ireland from taking a similar approach, the factors that determine whether social rights protection can develop within a common law system are identified.

As I explain in Part One, whether or not a common law system develops social rights protection is not definitively determined by the text of its constitution. Rather, it is largely dependent on attitudes dominant within the judicial culture of the jurisdiction. My understanding of the impact of culture upon judicial reasoning, and thereby on the degree of protection afforded to rights bearers, is considerably informed by critical legal theory. The concept of ‘interpretative communities’ particularly associated with Stanley Fish is employed to explore the constitutive impact of cultural norms upon the role conception of members of the judicial community.<sup>9</sup>

My research undertakes an in-depth historical analysis of the development over time of judicial attitudes towards rights in both jurisdictions. In this, I analyse both the ‘big C’ and ‘small c’ constitutions of both Ireland and South Africa.<sup>10</sup>

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<sup>9</sup> Stanley Fish, *Doing What Comes Naturally: Change, Rhetoric, and the Practice of Theory in Literary and Legal Studies* (Clarendon Press, 1989); Stanley Fish, *There’s No Such Thing as Free Speech and it’s a Good Thing Too* (OUP 1994); see also Robert Cover, ‘Nomos and Narrative’ (1983) 97(4) *Harvard Law Review* 4; Richard A. Posner, ‘Legal Pragmatism’ (2004) 35(1-2) *Metaphilosophy* 148.

<sup>10</sup> This language is adopted from Hirschl, see Ran Hirschl, *Comparative Matters: The Renaissance of Comparative Constitutional Law* (OUP 2014); Ran Hirschl ‘From Comparative

That is, I study both the text of the Constitutions themselves,<sup>11</sup> and how they have been used in practice.<sup>12</sup> I follow Young's observation, that:

In order to understand the effect of a constitution, legal philosophers have presented various analytical distinctions, such as the distinction between the 'written' versus 'unwritten' constitution [Dicey], the formal 'Capital-C Constitution' versus the informal 'small-c constitution' [Hirschl]. Into the first part of each distinction usually falls the text, or what has been called 'the document.' In the second part of the distinction belongs the broader practices, institutions and norms that are just as essential for our understanding of the constitutional project. Without a combination of the two, constitutional comparison may lead to arid, and often misleading constitutional analysis. Such analysis may attribute too much importance to constitutional text and too little importance to the broader judicial and political practices and ideas that contribute to the success, or failure, of constitutional arrangements.<sup>13</sup>

In Part One, particularly in Chapter Three, I defend my thesis that the degree to which judicial culture informs the judiciary's interpretation of the 'capital-C Constitution' is the predominant factor in determining the degree of rights protection in contemporary common law systems. In my 'small-c' research, I have undertaken a study of both legal doctrine and the norms and values dominant over time within the judicial communities that are given expression through their adjudication. In this my work has a strong socio-legal focus.

For my research I conducted a 'small-N study.'<sup>14</sup> I study primarily two jurisdictions, from which I inductively make observations pertaining to common law systems generally. Selecting which jurisdictions to compare is an integral preliminary step in any comparative research. Given my small-N sample size, I

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Constitutional Law to Comparative Constitutional Studies' (2013) 11 *International Journal of Constitutional Law* 1.

<sup>11</sup> See Chapters Three and Nine of this doctorate.

<sup>12</sup> See Chapters Four, Five, Six, Seven, Eight, Ten, Eleven, and Twelve of this doctorate.

<sup>13</sup> Katherine G. Young, 'On What Matters in Comparative Constitutional Law: A Comment on Hirschl' (2016) 96 *Boston University Law Review* 1375, 1379 - 1380.

<sup>14</sup> Ran Hirschl, 'The Question of Case Selection in Comparative Constitutional Law' (2005) 53 *American Journal of Comparative Law* 125.

was mindful when making my case selection of Hirschl's observation that, in comparative constitutional law:

[s]election biases abound. The result is that purportedly universal insights are based on a handful of frequently studied and not always representative settings or cases. Instrumentalist considerations such as availability of data or career planning often determine which cases are considered. Descriptive, taxonomical, normative, and explanatory accounts are often conflated, and epistemological views and methodological practices vary considerably.<sup>15</sup>

The choice to comparatively study Ireland and South Africa was made for a number of reasons. First, structural similarities within the judicial systems of the two jurisdictions make a comparative study viable. This is not to make a false equivalence in the wider social structures of these two jurisdictions. In terms of geography, colonial history, population, social and linguistic diversity, Ireland and South Africa are radically dissimilar. However, following the observation that judicial culture is the primary determinant of whether social rights protection develops in a common law system, this thesis concentrates its inquiry upon the judicial community in both jurisdictions. The presence of relevant similarities in their judicial structure - and the similar influence these structural similarities have upon both the composition of the judiciary and the bench's understanding of their role within the legal system - enables constructive comparisons to be drawn.

Both Ireland and South Africa maintained an adversarial common law system after the end of British colonial rule.<sup>16</sup> In both, the doctrine of *stare decisis* is generally followed, vesting within these constitutional orders considerable law-making authority to the judicial branch. In both, the English bifurcation of the legal system into barristers and solicitors,<sup>17</sup> with similar educational systems of

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<sup>15</sup> Hirschl (n 10) 4 - 5.

<sup>16</sup> The South African legal system is a syncretic mix of Roman-Dutch private law laid over by English common law rules. By this, whilst maintaining the Roman-Dutch common law, English constitutional theory, gained a position of unrivalled dominance within the judicial community. See Alfred Cockrell, 'Rainbow Jurisprudence,' (1996) 12 *SAJHR* 1, 7.

<sup>17</sup> In Ireland, solicitor and barrister; in South Africa, attorney and advocate.

devilling and traineeship respectively prevail. Further, both legal systems share a trend whereby the bench is composed largely, but not wholly, of members of the bar - a proportionately small pool of candidates demographically unrepresentative of the wider population.

At the moments of constitutional transition, the judiciaries of both jurisdictions remained largely unchanged. However, over time they have shifted significantly, from cleaving strongly to the Westminster model of parliamentary supremacy towards a much more robust, antagonistic understanding of the judicial role that substantively engages with a textual constitution and an enumerated bill of rights. Crucially, as noted above, the bills of rights of both jurisdictions also expressly include both civil-political and social rights, with broad constitutional discretion vested in the judiciary to determine how best to remedy breaches of these obligations.

I argue the fact that Ireland and South Africa possess a common law foundation, and in both jurisdictions the courts have developed from this foundation a practice of strong-form judicial rights review is not coincidental. Rather, in Part One, I suggest this reflects the existence and influence of a relevantly similar judicial culture, arising from a shared common law foundation. Notwithstanding the wider cultural differences between the two states, these commonalities between the Irish and South African judicial communities make a comparison of rights protection within these judicial systems compelling, explaining the selection of these legal systems in this study.<sup>18</sup>

Whilst the structural similarities between Ireland and South Africa provide one reason to examine these jurisdictions, paradoxically, their relevant *dissimilarity* in social rights *protection* provides the second key reason for the selection of these jurisdictions. In Ireland, as Part Two of the doctorate details, social rights have been interpreted so restrictively by the Courts as to render the practical enforceability negligible. In contrast, Part Three of this doctorate shows how the South African judiciary have taken a noteworthy active approach to social rights adjudication.<sup>19</sup> Whilst the reasoning of this Court is

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<sup>18</sup> See Vicki C. Jackson *Constitutional Engagement in a Transnational Era* (OUP 2010).

<sup>19</sup> As noted by Hirschl: 'Drawing on a new constitutional framework, the newly established South African Constitutional Court turned itself, in the first decade of its existence, into one

frequently criticised domestically for its restraint, in South Africa a robust, articulated jurisprudence of social rights adjudication *has* developed.

This divergence reflects a difference in cultural attitude towards social rights within their judicial cultures. Given the similarities in legal structures, and the inclusion of *some* social rights within both constitutional texts, this divergence is noteworthy. Studying the development of rights protection in both jurisdictions provides a way to understand what factors led to this divergence. In regards the differences in rights adjudication, then, the dissimilarity strengthens the propriety of selecting these jurisdictions for analysis, as it suggests the existence of identifiable variables within the legal systems of both jurisdictions that causes this divergence to occur.

In choosing which jurisdictions to study, I was mindful of which jurisdictions I thereby would be excluding from the research. I had initially planned to include India within my analysis as, alongside South Africa, it is the common law jurisdiction with the most developed culture of social rights adjudication.<sup>20</sup> However, a third case study would dilute the depth of research I could commit to any one jurisdiction; and it would not be possible to show, within the dimensions of a doctoral study, how judicial culture informs the development of social rights protections within three common law systems to a compelling level of detail. Thus the depth of jurisdictional analysis I have undertaken limited me to a close examination of two jurisdictions.

Resolving to include Ireland as the case study of how social rights adjudication does *not* always develop despite textual license, I chose South Africa as the comparator. This decision was made both given the greater legal and cultural similarities that are shared between Ireland and South Africa compared with Ireland against India; and also of the fact that, unlike India, South Africa *includes* an express textual license for social rights protection. Whilst the development of justiciable social rights in India *despite* their express inclusion in the text is fascinating, the divergence between Ireland and South Africa is a

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of the most innovative and impressive tribunals in the world with respect to the adjudication of social and economic rights.’ Hirschl (n 10) 222.

<sup>20</sup> Arun K Thiruvengadam, *The Constitution of India: A Contextual Analysis* (Bloomsbury 2017).

more compelling lens to study how judicial culture informs rights protection than would be a study substituting either case study for a more radically dissimilar, if highly interesting jurisdiction, such as India. Going forward, I would be interested in undertaking a similarly in-depth study of the development of social rights protection in India to further test the generality of my findings. However, this is too great a task to complete in this doctoral study.

My thesis is inductive. It also adopts a pragmatic lens. To paraphrase William James, I observe rights as they work in particular cases, and generalise.<sup>21</sup> I argue it is possible to discern, from the experiences of the case studies, trends in regards the relationship of judicial culture and the degree of rights protection afforded by the legal system which replicate in common law systems generally. Whilst Ireland and South Africa are the case studies for this doctorate, additional comparator jurisdictions are referred to, such as India, Canada, and the United States of America.<sup>22</sup> These examples buttress my contention that my findings are of general interest to common law legal systems.

In researching this doctorate, I have undertaken an exhaustive review of the legal literature of both jurisdictions. I read all the pertinent primary sources - judgments of the Courts and legislation - and secondary materials, such as articles, textbooks, and commentaries from both academics and judges. In my literature review of secondary materials, my study expanded to include texts from political science, history, and in the Irish study, religious sources. To ensure completeness in my primary research, cases cited within key judgments were followed up on and were read where available. As a further check, I used legal search engines, particularly JustisOne, Saflii and Westlaw, and conducted word searches ('social rights', 'socio-economic rights', 'right to housing', 'right to education') for pertinent terms and read the cases which were returned. To

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<sup>21</sup> William James, *Pragmatism* (Dover, 1995) 24. See also Richard Posner, *Law, Pragmatism and Democracy* (Harvard, 2003); Brian Tamanaha, 'Pragmatism in U.S. Legal Theory: Its Application to Normative Jurisprudence, Sociological Studies, and the Fact-Value Distinction' (1996) 41 *American Journal of Jurisprudence* 315.

<sup>22</sup> See in particular Chapter Thirteen of this doctorate.

enable me to understand the preceding legal order and the impact of the pre-democratic judicial cultures on that of the community engaging with the present constitutions, my literature review commences prior to the constitutional dispensation in both jurisdictions.

Social rights protection challenges conventional common law understandings of the role of the judiciary within the separation of powers. This is not merely, nor perhaps predominantly, a legal controversy. Rather, it is an intensely political controversy as well, as legal protection of social rights limits the range of acceptable political decision-making in sensitive areas such as the distribution of state finances. In my study then, I also rely on materials from constitutional politics.<sup>23</sup> By broadening my analysis with reference to socio-legal and political theory, a broader and more fully theorised understanding of what causes social rights protection to develop emerges.

This thesis does not seek to make a normative case for social rights protection. There are strong reasons to justify the constitutional protection of social rights. Counterarguments against such protection, particularly those grounded in democratic concerns, frequently also make compelling points. This thesis proceeds from the premise that it is important to understand *how* it is such rights protection develops, whether this understanding is hoped to hasten its development or prevent its emergence.

There is nothing conceptually incompatible with social rights protection developing within contemporary common law legal systems. Further, social rights protection *exists* in the common law world. South Africa's social rights regime demonstrates this. The question is: what affects whether or not social rights protection comes into existence?

## II: Outline of Thesis

I split my doctorate into four parts. Part One expands upon the central research question of the thesis. The next chapter provides the definition of 'rights,' and 'social rights' that has informed my research. The definitions are founded upon

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<sup>23</sup> Ibid.



my study of rights protection as a positively observable social phenomenon in contemporary common law legal systems. Then, in Chapter Two, I explain why studying rights protection in common law systems requires examining in depth the judicial community of that jurisdiction. In the contemporary common law world, for better or worse, the judicial branch *are* viewed as the arbiters of what constitutional rights protection entails. In light of this, Chapter Two justifies the centring of the comparative research on the judiciary.

In Chapter Three, the focus on judicial attitudes towards judicial rights review, remedial breadth, and the justiciability of social rights respectively is defended. In the judiciary's attitude towards these three central issues rests the viability of social rights protection in common law systems. I show a connection between the development of threshold consensus within the judiciary in regards all three of these issues, and the emergence of social rights protection. This also shows the inverse: that, where one of these central issues, a threshold conducive consensus is not met, social rights protection cannot develop. Thus, by the end of the first part of the doctorate, the focus of inquiry is sufficiently established that an analysis of the influence of judicial culture on the development (in Ireland, underdevelopment) of regimes of social rights protection can be presented.

Part Two of the doctorate charts the development of social rights protection in Ireland with reference to changes over time within the judicial culture. There have been four dominant 'waves' of rights adjudication in Ireland - from 1937 - 1965; 1965 - 1993; 1993 - 2013; and 2013 to today.<sup>24</sup> I examine the Court's reasoning in each period.

To set up my analysis of these waves, in Chapter Three, I describe the texts of the two successive Constitutions of Ireland, the circumstances of their drafting, and the restrained rights reasoning of the Court in the first decades after independence. This chapter notes the main influences on the rights provisions

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<sup>24</sup> The concept of 'waves' of rights reasoning is imported from the analysis of the South African Constitutional Court by Stuart Wilson and Jackie Dugard, 'Constitutional Jurisprudence: The First and Second Waves' in Malcolm Langford, Ben Cousins, Jackie Dugard, Tshepo Madlingozi, (eds) *Socio-Economic Rights in South Africa: Symbols of Substance* (Cambridge University Press 2014) 35.

of the Constitution and defends the thesis that the current Constitution was drafted to include a 'social dimension' that supports the judicial protection of social rights.

The period of rights jurisprudence covered in Chapter Three provides a prologue to the second wave, wherein 'a [rights] veritable revolution occurred in the legal system.'<sup>25</sup> In Chapter Four I study how effective rights protection in Ireland developed during this second wave. By the middle 1960s, with the rise of a younger generation of jurists, a new wave in judicial engagement with rights emerged. Now, the Courts were keenly interested in adjudicating rights disputes, most noteworthy shown by their assertion that a basket of unenumerated rights, not known before to be constitutionally protected, also existed. This chapter explains what cultural and institutional factors informed rights activism to flourish on the bench in this period. Through this, the contingency of rights protection upon cultural attitudes within the judicial community supportive of rights review is demonstrated. By the end of this chapter, then, how the threshold requirement of judicial willingness to engage in rights adjudication developed in Ireland is understood.

Chapter Five examines how the Irish Court's attitude towards rights adjudication waned in the last decade of the Twentieth Century. In the third wave - 1995 to 2013 - the Court adopted a much cooler attitude in its rights case law. I study what caused this change in disposition towards rights - and the attendant change in degree of rights protection afforded to rights-bearers - to come about.

Chapter Six studies the Irish judiciary's changing attitudes in the second and third waves towards the Court's remedial capacity in cases of rights breach. The text of the Constitution does not impose clear limits on the Court's powers to cure rights breaches. During the second wave, the Court initially expressed a broad understanding of its remedial discretion, but in practice did not engage in much remedial experimentation. Chapter Six shows how the ability for rights breaches to be effectively remedied is itself conditional predominantly upon

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<sup>25</sup> Bryan McMahon, 'A Sense of Identity in the Irish Legal System' in Joseph Lee (ed) *Ireland: Towards a Sense of Place: The UCC- RTÉ Lectures* (Cork University Press 1985) 34, 34 - 35.

judicial culture. Crucially, this chapter documents the reluctance of the Irish judicial community to issue orders compelling the state to positively cure declared rights breaches. This reluctance, I will later argue, has prevented the threshold remedial breadth from developing in Ireland necessary for social rights protection.

In Chapter Seven, the Court's case law on positive rights during the second and third waves is looked at with a specific focus on social rights cases. Notwithstanding the presence of an express social right to provision for free primary education within the text of the Constitution, in this Chapter I show how the Court's restrictive interpretation of this right has denuded this provision of any capacity to secure education provision. In the Court's response to claims to adequate shelter and secure facilities for minors, a similar reticence is evident. Whilst the judiciary admit the justiciability of social rights disputes, they reject the capacity to positively cure rights breaches.

In this chapter, I document this tension within the Irish Court's rights adjudication, and provide an explanation for this jurisprudence based in the cultural influences upon the bench. The underdevelopment of social rights protection in Ireland is due to an absence within the judicial culture of a willingness to impose positive obligations on the State to cure rights breaches. This resistance comes in large part from the judiciary's cleavage to a negative liberal conception of the State largely inspired by American constitutionalism and unreflective of the Constitution's social dimension. In the difference between the big-C text of the Constitution and its small-c practical application, the importance of judicial culture to social rights protection is demonstrated.

Chapter Eight brings the analysis up to the present day. Since roughly 2013, there has been a discernible shift towards greater openness to rights adjudication amongst the Irish judiciary. In this Chapter I explain this shift and note its potential for social rights protection in the future. At the end of Part Two, then, I have shown the benefit of a socio-legal analysis of how judicial culture affects social rights protection, by showing how the (under)development of Ireland's social rights jurisprudence has corresponded with developments and changes in judicial culture.

Part Three of this doctorate applies the same socio-legal analysis to the emergence of social rights protection in South Africa. Rights protection in South Africa has a shorter history than in Ireland. There are two broad waves to South African rights protection - 1995 to 2005, and 2005 to 2020. Also, the disposition amongst the South African judiciary towards rights has not oscillated from committed rights activism to greater conservatism to the same extent as Ireland.

Unlike Ireland, the social rights provisions of the Constitution of South Africa *are* used as a means of protecting essentials to which rights-bearers are entitled. Part Three also commences with an overview of the text of the Constitution. As with Ireland, a proper textual analysis is only possible with the appropriate context. The preceding apartheid regime, the drafting of the social rights provisions, and the creation, in the space of three years, of a strong rights reviewing judiciary is explained in Chapter Nine. This enables the succeeding three chapters to study the development of judicial engagement with the remedial power, and its application to social rights cases in particular.

Chapter Ten provides an overview of the Court's development of its positive remedial capacity in rights cases. The text of the Constitution permits broad remedial powers to cure rights breaches, and from early on the South African Constitutional Court has exercised its discretion to 'fashion new remedies' to ensure the State's rights obligations are met.<sup>26</sup> In this chapter I look in particular at the development of orders of *mandamus* and structural injunctions in South Africa, the primary means by which the Court will ensure the State acts to positively vindicate social rights. Further, I explain what factors informed South Africa's development of these remedies (which are so notably absent in Ireland).

In Chapter Ten, I also note how the Court's attitude towards the elected branches has hardened over the last fifteen years, since roughly the rise to power of Jacob Zuma. I show how changes in the Court's relationship to the ANC can be plotted alongside greater expansions in the Court's remedial

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<sup>26</sup> *Fose v Minister of Safety and Security* [1997] ZACC 6 [19].

capacity. In this, the process by which the Court has acquired *greater* remedial powers over the last fifteen years is also explored.

South Africa's sizeable social rights jurisprudence is the focus of Chapters Eleven and Twelve. This jurisprudence has developed considerably in the past twenty years. Where first the Court exercised caution in determining breaches of social rights and confined their orders in cases of breach to requirements for improved state provision, in recent cases concerning the right to basic education the judiciary have proven themselves particularly exercised, with this right developing into something close to an entitlement to a minimum core of essentials needed for a basic education, with obligations directly imposable upon the State. Over these two chapters, this development is explained, and the contextual factors which have framed the judiciary's understanding of their social rights protecting capacities are noted.

In Part Four I draw together my case study research with my broader comparative research. Chapter Thirteen constitutes my main contribution to the state of the art. Having shown the utility of analysing the development of rights protection in common law systems alongside changes in their judicial cultures, I apply this research in a study of how judicial communities develop the cultural commitments necessary for social rights protection. This chapter then distils from my preceding research the cultural features which can cause a common law system to develop social rights protection.

### III: Objectives

I aim to show that how rights jurisprudence in common law systems reflects dominant cultural attitudes within the judicial community of that jurisdiction; and how cultural shifts within the judicial community result in substantive shifts in rights protection. The variances in judicial approaches to rights come most prominently not from differences in constitutional texts, but in the working out of variant cultural stimuluses on judiciaries' understanding of their rights protecting role.

Upon demonstrating the usefulness of this form of socio-legal analysis, I aim to show how applying this approach can explain how social rights protection *in*

*particular* practicably develops within common law systems. Mostly, academic literature on social rights protection focuses not on *how* social rights protection may develop, but on *why* such rights protection may or may not be necessary, with, as Hirschl and Rosevear noted, ‘little attention [...] given by legal academics to questions such as what prompts countries to constitutionally entrench socioeconomic rights.’<sup>27</sup> My doctorate focuses on this underexplored area. Through my comparative study, I am endeavouring to broaden the analysis of social rights in common law systems, providing a defensible explanation of their emergence.

By this, I aim not just to advance the social rights discourse in Irish and South African academia, but also to expand the state of the art in common law scholarship generally, in regards the judicial power and social rights protection. Whether this secondary objective is also met, provided I show the value of studying the relationships between judicial cultural influences and a Court’s rights reasoning, I believe my research makes a valuable contribution to our understanding of how social rights protection develops within common law systems.

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<sup>27</sup> They continued: ‘to facilitate the realisation of socioeconomic rights it is necessary to go beyond the largely insular constitutional discourse concerning such rights to identify the political and judicial conditions that are conducive to such a realisation.’ Ran Hirschl and Evan Rosevear, ‘Constitutional Law Meets Comparative Politics: Socioeconomic Rights and Political Realities’ in Tom Campbell, KD Ewing, Adam Tomkins (eds) *The Legal Protection of Human Rights: Sceptical Essays* (OUP 2011) 207, 207 - 208.

# PART ONE: OUTLINE OF THE THESIS ARGUMENT

## Chapter One: Defining Social Rights

Even in an inductive thesis as this, to ensure clarity in the argument, the working definition of an open-ended concept such as ‘rights protection’ needs to be explained, and the reasons for its adoption defended. This chapter explains and defends the concept of ‘rights protection’ which I employ. My study is on how social rights protection develops within common law systems. I am not making a normative claim as to the necessity of social rights protection. Nor am I making a jurisprudential argument as to what the proper content of social rights ought to be. These are interesting inquiries and my research is heavily influenced by the contribution of rights theorists in these areas. However, my research does not engage substantively with these debates. Rather, I am concentrating on the existence of rights as observable phenomena within contemporary common law systems.

First, I provide a general definition of legal rights, based on a study of what rights observably ‘do’ within social and/or legal systems. Often, rights protection is affirmed as existing within legal systems but in reality the interest that the right is meant to protect is not afforded any substantive protection by the legal order.<sup>1</sup> This chapter explains the focus of the doctorate on the creation and maintenance of systems whereby claims deemed due ‘as of right’ to rights-bearers are *treated* as meriting a remedial response in cases of breach.

Having provided a general definition of rights, my focus narrows to examining what philosophical values and concepts inform the content of rights in contemporary common law systems. Drawing largely on Anglo-American Enlightenment thinking, a liberal-democratic rights ideology provides the common foundation on which common law rights regimes have developed. With this established, I look at *social* rights in common law systems. Whilst often excluded from protection, recognising social rights as *legal* rights coheres with the same foundational premises which justify the protection of more common

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<sup>1</sup> As O’Neill has noted, ‘a premature rhetoric of rights can inflate expectations while making a lack of claimable entitlements.’ Onora O’Neill *Towards Justice and Virtue: A Constructive Account of Practical Reasoning* (CUP 1996) 133.



civil rights in such systems. There is not then any conceptual incompatibility in viewing entitlements to necessities such as housing, healthcare, and education as also deserving of protection by contemporary common law rights regimes.<sup>2</sup>

## I: What are Rights?

Before examining rights protection in common law systems, it is necessary to consider what is meant by ‘rights protection.’ The concept of ‘a right’ is not exclusively nor even paradigmatically a legal concept. As Sen has noted, ‘human rights can be seen as primarily ethical demands. They are not principally ‘legal’ ‘proto-legal’ or ‘ideal-legal’ commands. Even though human rights can, and often do, inspire legislation, this is a further fact, rather than a constitutive characteristic of human rights.’<sup>3</sup> In philosophy and religion, the language of ‘rights’ is frequently invoked to refer to entitlements to forms of treatment which those identified as rights-bearers morally deserve.<sup>4</sup> The pre-eminence of these understandings of the foundations of rights is reflected in how legal rights claims are typically defined by reference to such moral conceptions of what rights-bearers *deserve*.

Simplified, these moral theories divide into those which argue that rights - entitlements to certain forms of treatment - are naturally occurring,<sup>5</sup> and those who contend that these entitlements are socially constructed.<sup>6</sup> The latter approach is presently the most dominant in legal thought. This positivist school, while contending that rights are not preternaturally-endowed phenomena, also

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<sup>2</sup> ‘Common law systems’ is used synonymously with ‘liberal democratic common law systems.’ This is used for ease, aware that there are contemporary common law systems such as Zimbabwe and Pakistan which cannot as accurately be described as ‘liberal democratic.’

<sup>3</sup> Amartya Sen, ‘Elements of a Theory of Human Rights’ (2004) 32(4) *Philosophy and Public Affairs* 315. A legal conception of rights however is also of considerable vintage. As Moyn noted, ‘From a very early date, legal systems have afforded ‘rights’, notably the Roman legal system of which most branches of Western law are tributaries.’ Samuel Moyn, *The Last Utopia: Human Rights in History* (Belknap 2010) 20.

<sup>4</sup> As Raz noted, ‘any moral theory allows for the existence of rights if it regards the interests of some individuals to be sufficient for holding others to be subject to duties.’ Joseph Raz, ‘Rights-Based Moralities’ in Jeremy Waldron (ed) *Theories of Rights* (OUP 1984) 182, 182.

<sup>5</sup> See, for instance, John Finnis, *Natural Law and Natural Rights* (2<sup>nd</sup> edn. Oxford University Press 2011); Robert George, *In Defence of Natural Law* (Oxford University Press 1999); John Finnis, *Aquinas: Moral, Political and Legal Theory* (OUP 1999); Richard Ekins, ‘Human Rights and the Separation of Powers’ (2015) 34 *Queensland Law Journal* 217.

<sup>6</sup> John Rawls, *A Theory of Justice* (Harvard University Press 1971); Raz (n 4); Ronald Dworkin, *Taking Rights Seriously* (Harvard University Press 1977); Robert Alexy, *A Theory of Constitutional Rights* (OUP 2010).

grounds its rights reasoning in assertions of what is of innate, foundational value to rights-bearers: for instance living a life where you can autonomously make good choices of personal value,<sup>7</sup> or a life of non-domination.<sup>8</sup>

More relevant than their differences, both schools of thought converge in the understanding that what one is due as of right deserves *protection*. In identifying certain treatment of rights-bearers to be due *as of right*, these theories thus assert the propriety (if not necessity) of creating socially constructed means of protecting the treatment to which the rights-bearer is entitled. Thus, as Fabré observed, ‘the reason why it is important that the law recognise people’s rights is that without the law, these rights would be nominal only, and would offer little guarantee that the interests they protect morally are effectively safeguarded.’<sup>9</sup>

This leads to the development of rights as socially enforced regulations.<sup>10</sup> While often motivated by moral philosophy, the definition of rights proposed here is not premised on any particular morality, but on an understanding of how rights observably operate as social phenomena within contemporary societies. Rights work as:

- 1) A form of claim
- 2) that identifiable rights-bearers can make
- 3) when they have a socially legitimated reason to believe they are entitled to something
- 4) which is made in the reasoned understanding

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<sup>7</sup> Raz (n 4); Amartya Sen (n 3); Martha Nussbaum *Creating Capabilities: The Human Development Approach* (Harvard University Press 2011); Amartya Sen ‘Human Rights and Capabilities’ 6(2) (2005) *Journal of Human Development* 151.

<sup>8</sup> Philip Pettit, *Republicanism: A Theory of Freedom and Government* (Oxford University Press 1999); Eoin Daly and Tom Hickey, *The Political Theory of the Irish Constitution* (Manchester University Press 2015). An arguable mainstream exception to this claim relates to those theories which value rights for their ability to secure collective goods, most frequently democracy. See for instance, Ronald Dworkin, *Freedom’s Law: The Moral Reading of the American Constitution* (Harvard University Press 1999) and Ronald Dworkin, *Sovereign Virtue: The Theory and Practice of Equality* (Harvard University Press 2000)

<sup>9</sup> Cecile Fabré, *Social Rights Under the Constitution: Government and the Decent Life* (Clarendon 2000) 91.

<sup>10</sup> As Young has observed:

‘First rights are ‘pronouncements of ethics, sustainable by open public reasoning.’ Secondly, rights are pronouncements in law, in Bills of Rights, in human rights instruments, or in other constitutional, legislative, or common law forms. This understanding of rights as products of both morality and law, relies on the often-observed constitutive relationship of morality to law, on the one hand, and the sometime observed constitutive relationship of law into morality, on the other.’

Katherine G Young *Constituting Economic and Social Rights* (OUP 2012) 2 - 3.

that making the claim *may* lead to a procedure whereby an authority secures their entitlement or compensates them for its restriction.<sup>11</sup>

This is a general definition of rights, with the identification of rights-bearers and the nature of the interest protected contingent upon whatever moral code may inform the rights regime. Common law tort and contract rights, as well as statutory rights, operate as such claims which plaintiffs make understanding that they are entitled to something, in the expectation the restriction of their entitlement will be remedied.<sup>12</sup>

My focus is on how rights work. The requirement for the person to have a socially legitimate reason to believe they are entitled to something means that they have good reason to believe the relevant authority will act to secure their entitlement. As Doyle has argued, ‘master-text constitutions derive their legal status through *patterns of acceptance by legal officials*.’<sup>13</sup> Where rights-bearers ground their claimed entitlements within other objects which the authority such as a legal official, considers persuasive - religious texts, statutes, precedent - rights-bearers may have socially legitimate reasons to believe they are entitled as of right to the entitlement claimed *because* of the belief of the authority in the rights-significance of this object.<sup>14</sup>

Where there is no legitimate reason to believe the rights claim will succeed - that is, no hope the authority will act in your favour - the claim which one is making is dislocated from the possibility of remedy. Dislocated from any

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<sup>11</sup> This conception of rights is considerably influenced by the writings of Joseph Raz. See, in particular, Joseph Raz, *The Morality of Freedom* (Clarendon Press 1984).

<sup>12</sup> Stephen Holmes and Cass Sunstein, *The Cost of Rights: Why Liberty Depends on Taxes* (Norton 2013). Non-legal rights, such as rights to the enforcement of the rules of a game can also be understood by this definition. In a supervised game of chess, if one player refuses to give up his piece when his contestant has seized it in accordance to the rules, the second player can (correctly) claim he has a right to take that piece, in the reasoned understanding that the supervisor will authoritatively decide in their favour. See Ronald Dworkin, ‘Hard Cases’ (1975) 88(6) *Harvard Law Review* 1057.

<sup>13</sup> Oran Doyle, ‘Informal Constitutional Change’ (2017) 65 *Buffalo Law Review* 1021, 1036; See also HLA Hart *The Concept of Law* (2<sup>nd</sup> edn, Clarendon 1997).

<sup>14</sup> As Doyle continued, ‘Legal officials may also accept other laws and practices, independent of the master text constitution, as being valid within their legal system. For example, in Ireland, legal officials all accept that previous judicial decisions are a source of law for future cases, despite the fact that nothing in the constitution or any law validated by the constitution established a doctrine of precedent. Ibid.

possibility of remedy, claims to entitlements *as of right* are inert, akin to wishes.<sup>15</sup> Sedley LJ provided an evocative legal illustration of this:

‘If the judges are not prepared to speak for it, the constitution is nothing. Stalin’s successive constitutions for the USSR set out rows of shining rights, but with courts that lacked the means or the will or both to make anything of them they protected nobody and left the political executive in undisputed command of society.’<sup>16</sup>

This factor complicates the ability to determine what rights operate within a social order. Even when a rights-bearer can ground their claimed entitlement within an object the authority generally considers persuasive, such as a Bill of Rights, if the authority refuses to sanction any curative actions on foot of such assertions, the putative rights claim fails, and the right cannot be said to practically exist.<sup>17</sup> Per Rudovsky, ‘rights may exist on paper as a matter of court decision or legislation, but their viability, indeed their very essence, depends in large part on the effectiveness of remedial and enforcement measures.’<sup>18</sup>

Where the authority upon which the rights claim relies changes their understanding of what rights protection should be, the content of what is due to the rights-bearer *as of right* changes accordingly.<sup>19</sup> This understanding of

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<sup>15</sup> This definition also permits that, where the claimed entitlement is not expressly enumerated but is relevantly related to an enumerated right (e.g. a right to marry is claimed but not enumerated within a bill of rights, whereas rights of marital families are enumerated), the rights-bearer may have a socially legitimate reason to believe they can claim the entitlement ‘by right’ as the authority is *likely* to affirm the right. See Martha Minow, ‘Interpreting Rights: An Essay for Robert Cover’ (1987) 96(8) *Yale Law Review* 1860, 1867.

<sup>16</sup> Stephen Sedley, *Ashes and Sparks: Essays on Law and Justice* (CUP 2011) 72.

As Humphreys J noted extrajudicially, ‘without an effective remedy, rights, and more generally any legal provisions, may as well not be there.’ Richard Humphreys, ‘The Constitution and Law as Living Instruments for a Living Society’ (2017) 40 *DULJ* 45, 68.

<sup>17</sup> This distinction is also drawn by Katherine Young contrast between ‘constituting’ and ‘constitutionalising’ rights. Young (n 10) 6.

<sup>18</sup> David Rudovsky, ‘Running in Place: The Paradox of Expanding Rights and Restricted Remedies’ (2005) 5 *University of Pennsylvania Law Review* 1199, 1200. Importantly, this is not asserting that all failed rights claims relate to non-existent rights. It is consistent with the existence of a right for an authority to opt not to always sanction remedial procedures, provided that in different circumstances the same rights claim will lead to a remedy. However, where remedial procedures *never* follow such claims, under this phenomenological definition of rights, the right does not exist.

<sup>19</sup> On the impact of cultural changes on rights protection in an Irish context see David Kenny, ‘Remedial Innovation, Constitutional Culture, and the Supreme Court at a Crossroads’ (2017) 40(2) *DULJ* 85, 103; see also the changing judicial attitude towards the Fifteenth Amendment

rights permits regimes of rights protection to change, develop, and even die away, where the rights-bearer stops being able to rely upon an expectation that making a rights claim will lead the authority to respond curatively.<sup>20</sup> As I discuss in the next chapter, this grants considerable power to the person or body considered the authority within the rights regime. It suggests that the study of the nature of rights protection within a society should concentrate on factors influencing the authority's determination of what claims should be remedied, and thereby what entitlements one can actually claim 'as of right'.

This understanding of rights is compatible with rights being understood within legal systems to work either as 'trumps'<sup>21</sup> or as lesser 'optimisation requirements,' depending on how the authority views both the valid rights claim and the limits upon their powers to act authoritatively to protect rights.<sup>22</sup>

As Minow noted:

Although particular rights by their very content may assert a power to 'trump,' both their origins and future viability depend upon a continuing, communal process of communication. No rights are self-enforcing. Enforcement remains contingent upon the willingness of the community's officials to signal their meaning to the community through force or threatened force.<sup>23</sup>

The definition advanced here is amoral, and is compatible with regimes by which identified rights-bearers can make claims relating to interests to which they have reasoned beliefs to feel entitled and from which they have cause to anticipate a remedial procedure, irrespective of the moral code which informs that regimes conception of rights. Evil social orders can have stable rights

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to the US Constitution discussed in Michael Klarman *From Jim Crow to Civil Rights: The Supreme Court and the Struggle for Racial Equality* (OUP 2004).

<sup>20</sup> Given this, 'to understand law in the world today it is more important than ever to penetrate beneath the surface of official legal doctrine to reach the realities of all forms of law as social practices.' William Twining, *General Jurisprudence: Understanding Law from a Global Perspective* (CUP 2009) 7.

<sup>21</sup> Ronald Dworkin, 'Rights as Trumps' in Jeremy Waldron (ed) *Theories of Rights* (OUP 1984) 153; Dworkin (n 6).

<sup>22</sup> Alexy (n 6). In this, textual limitations clauses such as those contained in s36 of the Constitution of the Republic of South Africa 1996, and s1 of the Canadian Charter of Rights and Freedoms can play a significant role.

<sup>23</sup> Minow (n 15) 1876ff.

regimes, where the rights claims made by rights-bearers are made with a reasonable expectation of State performance to remedy whatever it is the rights-bearer has reason to feel entitled.<sup>24</sup>

I am focusing on rights as social phenomena. Whilst the amorality of this definition advanced permits for a broad range of possible rights regimes, including normatively unjustifiable ones, it also means that regimes without a social structure that remedies rights claims cannot be considered 'rights regimes'. In this, as noted by Levinson, 'rights are dependent on remedies not just for their application to the real world, but for their scope, shape, and very existence.'<sup>25</sup>

Take two societies. In one, there is no socially understood right to silence however as a matter of fact a person's silence is never used against them. In the other, there is a socially understood right to silence, perhaps enumerated in a bill of rights, and sometimes the State attempts to compel a rights-bearer to speak. The definition of rights employed in this doctorate proposes that in the former case, the right to silence does not exist *notwithstanding* that the State acts in what we would consider in conformity with such a right, because were a person compelled to speak, they would not be able to claim a remedy. Meanwhile, in the latter regime, provided that there is a reasonable likelihood (even one which does not always bear out) that pleading the right to silence will lead to a procedure that will cure a breach of that right, the right to silence does exist. It is these latter systems with which the doctorate is concerned.

So far, I have defended an amoral definition of rights, based on an empirical assessment of what rights *do* in contemporary social and legal orders. I have provided an understanding of what rights are without expanding on any particular moral conception of what rights *should* do. As my doctorate is a study of social rights protection in common law systems, it is necessary to move now

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<sup>24</sup> It may thus be possible, if not necessarily helpful, to compare and contrast the South African rights regimes both pre- and post- the constitutional dispensation in 1995. See David Dyzenhaus *Hard Cases in Wicked Legal Systems: South African Law in the Perspective of Legal Philosophy* (Clarendon Press 1991); Robert Cover, *Justice Accused: Antislavery and the Judicial Process* (Yale University Press 1975).

<sup>25</sup> Daryl Levinson, 'Rights Essentialism and Remedial Equilibration' (1999) 99(4) *Columbia Law Review* 857, 858.

beyond this general definition of rights, and evaluate the moral foundations informing rights protection within common law systems in particular.<sup>26</sup> From this, an understanding of what *social* rights are within common law systems can be provided.

## II: Constitutional Rights in Common Law Systems

Constitutional rights are a species of entitlements which rights-bearers can claim *as of right* to challenge the actions of those institutions normally charged with the creation and enforcement of rights. That is, constitutional rights are entitlements which can be claimed against the law-making and law-enforcing institutions of the state in the reasoned expectation of protection for such entitlements.<sup>27</sup>

The concept of a constitutional right does not presuppose *per se* the existence of a judiciary with the role of guarding and vindicating rights.<sup>28</sup> Hypothetically, a system could be constructed in which an unamendable bill of rights includes a right to X; in which if rights-bearer Y claims her rights to X has been restricted by a legislative act; upon Y claiming X right, the act must be suspended and another vote taken. Alternatively, a differently elected second chamber could be tasked with ensuring the lower house observed prescribed rights commitments, with the power to invalidate legislation they deemed in default of such commitments.

Within such systems, it would be consistent to claim Y has a right to X, even if the rerun or second chamber decision did not ensure Y's security of X. Y 1) made a claim 2) to which Y had legitimate cause to believe she was entitled 3) in the reasoned understanding that this may enable Y to access X. As the next chapter discusses, in contemporary common law systems, as this rights-

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<sup>26</sup> See Mark Tushnet, 'An Essay on Rights' (1984) 62(8) *Texas Law Review* 1363.

<sup>27</sup> Per Zackin, 'Claims about constitutional rights are typically claims about the treatment that government is obliged to provide to the claimants.' Emily Zackin, 'Positive Rights' in Mark Tushnet, Mark Graber and Sanford Levinson (eds) *The Oxford Handbook of the U.S. Constitution* (OUP 2015) 717, 717.

<sup>28</sup> In this, I agree with Ekins that, 'nothing in the idea of rights, properly understood (as objects of sound government action and as restriction on the means reasonably adopted to other objects) entails a separation of powers in which judges alone, or primarily, have the task of promoting human rights.' Ekins (n 5), 220.

determining role is primarily performed by the judicial branch, the rights reasoning of the community which populates that branch is the relevant population to study.

The common law legal world consists of the United Kingdom,<sup>29</sup> and those countries colonised by the British which kept the existing colonial legal structures upon achieving self-government.<sup>30</sup> Consistent with the centrality of Britain to the emergence of the common law, the normative foundations upon which constitutional rights protection has developed within the common law world are to found in western moral and political philosophy.

The first common law jurisdiction to recognise constitutional rights was the United States of America, and the United States Bill of Rights remains the paradigmatic charter of constitutional rights protections in the common law world. Drafted during the Age of Enlightenment, the liberal democratic political philosophy of the age, particularly the thinking of John Locke, Thomas Paine and Jean-Jacques Rousseau, informed the charter of rights drafted by the Founding Fathers.<sup>31</sup> The rights guaranteed in the Bill of Rights are founded on an understanding of the value of preserving the naturally-endowed autonomy of individual rights-bearers from the possibility of governmental overreach,<sup>32</sup> and also on the related value of democracy, and ensuring citizens are able to participate in the polity.<sup>33</sup> As Bilchitz observed:

The earliest Bills of Rights in North American and Western Europe [...] came about as a result of political repression and a struggle against the

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<sup>29</sup> With the exception, internally, of Scotland, which operates under a syncretic form of civil law.

<sup>30</sup> Either through independence from the Crown or the extension of responsible government.

<sup>31</sup> Akhil Reed Amar, *America's Constitution: A Biography* (Random House 2006); Jack Rakove, *Original Meanings: Politics and Ideas in the Making of the Constitution* (Random House 1997).

<sup>32</sup> Theodore Benditt discussing rights, noted, 'the idea of a right comes out of an era which saw the rise of the nation-state, and, as a concomitant, the rise of the individual, the citizen, a morally self-contained atom shorn of all the ties of family, class, and status which for so long defined people and their moral and social situations. The possession of a personal right means that people think of themselves as distinct from others, as having interests that differ from the interests of others.; Theodore Benditt, *Rights* (Rowman and Littlefield 1982), 2. For critical interpretation of the historical origins of liberal democratic rights, see 'Upendra Baxi' in William Twining (ed) *Human Rights Southern Voices: Francis Derg, Abdullahi An-Na'im, Yash Ghai and Upendra Baxi* (Cambridge University Press 2009) 162

<sup>33</sup> Dworkin (n 6); Alexander Meiklejohn, 'The First Amendment is an Absolute,' (1961) 1 *Supreme Court Review* 245.



deprivation of liberty. Thus, at the normative core of these Constitutions lie protections for the liberty of individuals against the power of the State and those in authority.<sup>34</sup>

The constitutional rights protected by all following common law systems are variations on the American paradigm. Across common law jurisdictions which enumerate constitutional rights, the rights protected invariably include certain civil rights innovated by the United States Bill of Rights, such as the rights to free expression, religious freedom, to the vote, to criminal due process, and to private property.<sup>35</sup> Tushnet is correct then that ‘a fixed point in modern constitutionalism is that *first-generation rights must be enforced by the courts.*’<sup>36</sup> While common law jurisdictions may develop further rights protections beyond the classic civil rights protected by the American model, no common law system with constitutional rights protection that I have encountered excludes from its coverage the basket of rights noted above.<sup>37</sup>

The foundational template for constitutional rights in the common law world is thus one premised on a liberal conception of rights as negative immunities protecting rights bearers *against* offensive state action. Perhaps only one other basis for asserting the existence of rights has approximated the philosophical influence of these values within common law systems. During the twentieth century, the claim that individuals are due rights protection because of their

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<sup>34</sup> David Bilchitz, ‘Constitutionalism, the Global South, and Economic Justice’ in Daniel Bonilla Maldonado (ed) *Constitutionalism of the Global South: The Activist Tribunals of India, South Africa, and Colombia* (CUP 2012) 41, 45.

<sup>35</sup> It is due to their enumeration in early rights documents such as the US Bill of Rights that these rights have been alternatively termed ‘first-generation’ rights.

<sup>36</sup> Mark Tushnet, *Weak Courts, Strong Rights: Judicial Review and Social Welfare Rights in Comparative Constitutional Law* (Princeton University Press 2008) 251. (emphasis added). In this, Australia can be seen as an outlier given it contains a written Constitution *without* a bill of rights. However, as Saunders noted, ‘Despite the extent of its reliance on democratic institutions for rights protection, Australia is not a classic example of political constitutionalism. The entrenched Australian Constitution, enforced through judicial review, provides some protection for some rights, both expressly and by implication.’ Cheryl Saunders, *The Constitution of Australia: A Contextual Analysis* (OUP 2010) 274. See *Australian Communist Party v The Commonwealth* [1951] HCA 5; *Australian Capital Territory v Commonwealth* [1992] HCA 45; *Lange v Australian Broadcasting Corporation* [1997] HCA 25; *Roach v Electoral Commissioner* [2007] HCA 43.

<sup>37</sup> This is not to suggest that all the rights protected within the United States Bill of Rights are ubiquitous within all common law rights regimes. The Second Amendment to the United States Constitution guarantees the right to bear arms. This right has not been adopted internationally.

inherent human dignity has also gained dominance.<sup>38</sup> Dignity as an alternate source of rights notably does not dispose of rights already canonically protected with reference to democracy or autonomy (although it may presuppose additional rights claims not resulting from pursuing those values).<sup>39</sup> This complementarity likely facilitated the accommodation of this possible foundation for rights within pre-existing common law rights regimes.

The rights so far discussed are commonly understood as first-generation, civil-political, or more troublesomely, 'negative' rights.<sup>40</sup> Charles Fried, advocating the latter term, explained how in contrast to positive rights to resource provision, negative rights, 'the rights not to be interfered with in forbidden ways, do not appear to have such natural, inevitable, limitation.'<sup>41</sup> The implication is that the protection of these rights can be infinite and resource-neutral. This is a misapprehension. For one, civil rights, most notably the right to vote, impose considerable resource costs on the state to ensure. Further, as King noted, 'all judgments against government have financial repercussions that affect the allocation of scarce resources in some way.'<sup>42</sup> Such rights require the maintenance of a rights-protecting administration capable of restraining the behaviour of (in most cases) the State, in order to preserve the personal interest protected by the right.<sup>43</sup>

By taking the resource-implications of this administration for granted, the cost of enforcing these rights can appear negligible. By being aware of the expensive

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<sup>38</sup> Christopher McCrudden (ed), *Understanding Human Dignity* (Oxford University Press 2014); James Griffin, *On Human Rights* (Oxford University Press 2008); Samuel Moyn, 'The Secret History of Constitutional Dignity' (2014) 17(1) *Yale Human Rights and Development Law Journal* 39.

<sup>39</sup> See Jeanne Woods, 'Justiciable Social Rights as a Critique of the Liberal Paradigm,' (2003) 38 *Texas International Law Journal* 763, 769

<sup>40</sup> Isaiah Berlin *Four Essays on Liberty* (OUP 1969).

<sup>41</sup> Charles Fried, *Right and Wrong* (Harvard University Press 1978) 110; see also Gerard Hogan, 'Directive Principles, Socioeconomic Rights and the Constitution' (2001) 36 *Irish Jurist* 174; Frank Cross, 'The Error of Positive Rights' 48 (2001) *UCLA Law Review* 857, 864.

<sup>42</sup> Jeff King, 'The Justiciability of Resource Allocation' (2007) 70(2) *MLR* 197, 197.

<sup>43</sup> David Bilchitz, in this vein, noted that 'in general, there will be resource implications to the enforcement of fundamental rights. Even orders in relation to negative duties will require enforcement by agencies and, as such, have an impact on the distribution of resources. Thus, if a society is justified in recognising fundamental rights, and has good reasons for granting judges review powers, then the society is justified in allowing its judges to ensure that resources are allocated in accordance with the demands of fundamental rights.' David Bilchitz, *Poverty and Fundamental Rights: The Justification and Enforcement of Socio-Economic Rights* (Oxford University Press 2007) 130.

maintenance of State apparatuses necessary for protection of these rights, however, it becomes more possible to view rights imposing further resource implications on the state as also cohering with a conventional common law constitutional order.

### III: Social Rights in Common Law Systems

The rights noted above are usually contrasted against the branch of rights with which I am particularly interested in this doctorate: social rights. The division of rights into these categories has been criticised as creating a false antithesis between the two.<sup>44</sup> The basis for this contrast is partially political. As Moyn noted: ‘a 1952 decision had split the two kinds of norms - civil and political rights on the one hand and economic, social and cultural rights on the others - into groups for the purposes of twin legal covenants,’<sup>45</sup> with the former associated with Western capitalist freedoms and the latter with the communist social agenda during the Cold War. Given the persisting nature of the distinction within the contemporary common law world, I conduct my analysis on this basis, mindful of the ways in which the positive/negative rights distinction grounding this dichotomy is incoherent.

Social rights claims relate to the entitlement of rights-bearers to material interests necessary for human survival and flourishing, such as the right to adequate shelter, healthcare, social security, and education.<sup>46</sup> Whilst construing such entitlements as due *individually as of right* may be relatively recent, ‘an obligation to protect fundamental material interests, through aid or remuneration, has long been established in the codes and declarations of both secular and monotheistic traditions.’<sup>47</sup>

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<sup>44</sup> ‘The separation of rights into categories endures due to the bifurcation of human rights into two foundational international human rights covenants, a bifurcation itself premised on analytical distinctions that have long been criticised.’ Young (n 10) 5.

<sup>45</sup> Samuel Moyn *Not Enough: Human Rights in an Unequal World* (Harvard University Press 2018) 110.

<sup>46</sup> Per Michelman: ‘As a class, the norms called ‘socio-economic rights’ envision a desired set of social outcomes - roughly, that the rights holder should at no time lack access to levels deemed adequate of subsistence, housing, healthcare, education, and safety, or the means of obtaining the same (say through available, remunerated work) for themselves and their dependents.’ Frank Michelman, ‘Socioeconomic Rights in Constitutional Law: Explaining America Away’ (2008) *American Journal of Constitutional Law* 663.

<sup>47</sup> Young (n 10) 27; Moyn (n 45).

As Tushnet observed, ‘to say that some specific right is (or ought to be) recognised in a specific culture is to say that the culture is what it is, ought to recognise what its deepest commitments are, or ought to be transformed into some other culture.’<sup>48</sup> The dominant philosophical justifications given for incorporating social rights within a common law rights regime track with the commitments on which civil rights are founded within such jurisdictions: namely, a commitment to personal autonomy,<sup>49</sup> dignity,<sup>50</sup> and advancing democracy.<sup>51</sup> Further, the benefit of civil rights for rights-bearers are argued to only obtain when a base level of social and economic security exists, such that these ‘first-generation’ rights can be properly exercised.<sup>52</sup> Given this, the incorporation of social rights within a pre-existing common law system protecting civil rights does not disturb the premises upon which the rights regime has been established, in the way in which, say the incorporation of non-individuated group rights founded on communitarian principles might.<sup>53</sup>

Two interrelated factors condition how a legal authority reasons about rights claims. First, does the claimed right comport with the authority’s understanding of the moral/jurisprudential foundation of rights within the legal system. Second, even if the entitlement claimed comports with the authority’s conception of what is deserving of rights protection, does the authority feel institutionally capable of ordering the remedy. As explained above, where the authority conclude they are *never* capable of remedying the breach, even if

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<sup>48</sup> Tushnet (n 26) 1365.

<sup>49</sup> Fabré (n 9).

<sup>50</sup> Marius Pieterse, ‘Eating Socio-Economic Rights: The Usefulness of Rights Talk in Alleviating Social Hardship Revisited,’ (2007) 29(3) *Human Rights Quarterly*, 796, 797; Woods (n 39); Young, (n 10) 42.

<sup>51</sup> Frank Michelman, ‘The Constitution, Social Rights, and Liberal Political Justification’ (2003) 1 *International Journal of Constitutional Law* 13. Contrary to this approach, Fabré noted that ‘however good a justification for constitutional social rights political participation may be, to rest the case for rights on that justification is to overlook what we would regard as the most important reason for the assignment of those rights [autonomy]. Indeed, people usually do not perceive welfare benefits as something that will enable them to be citizens; they value them for their effect on their wellbeing and autonomy, independently of any consideration about political rights. Fabré (n 9) 15. For a holistic approach to justifying these rights, see James Nickel ‘Poverty and Rights’ (2005) 55 *Philosophical Quarterly* 385; Young (n 10) 4

<sup>52</sup> Fabré (n 9).

<sup>53</sup> Will Kymlicka *Liberalism, Community and Culture* (Clarendon 1989); Yael Tamir *Liberal Nationalism* (Princeton University Press 1993).

the entitlement claimed conforms with other entitlements that are protected *as of right*, the right does not exist.<sup>54</sup>

It has been shown that the primary philosophical bases by which rights claims are recognised as valid within common law systems relate to human autonomy, dignity, or democracy. It was also shown that these foundations support the recognition of entitlements to essentials *as of right*, just as they support protecting civil-political rights. Save where this coherence is misunderstood, the primary basis on which social rights are presumptively precluded from recognition in common law systems relates to understandings of the institutional capacity of the rights authority - the judicial branch.

The conceptual tension with including social rights in common law systems results from the scale of obligation which recognising social rights imposes on the authority to actively ensure the provision of the stated entitlement. Whilst social rights can impose negative obligations, such as restricting unreasonable evictions, social rights more commonly are claimed in the expectation of *compelling* actions that ensure provision of the resource to which the rights claim relates, such as requiring a reasonable housing programme.<sup>55</sup> To understand the state through its actions positively *facilitating* rights protection, rather than protecting rights through exercising restraint is in tension with premises of the state as a necessary evil central to the liberal conception of the State.

Hogan commented that, 'socioeconomic rights are definitionally resource-dependent. Civil-political rights are not in all cases resource-dependent.'<sup>56</sup> The overlooking of the resource implications of protecting civil-political rights - not just the maintenance of a justice system, also the provision of polling booths to secure access to the paradigmatic civil right of voting - is less possible with social rights. The nature of these rights usually relates directly to the allocation of scarce resources. This overt centring of the State as a guarantor of the

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<sup>54</sup> 'Many critics of positive rights have focused not on the moral legitimacy of the welfare state per se but on the strong link they perceive between constitutional rights and judicial enforcement.' Zackin (n 27) 721.

<sup>55</sup> See the discussion of South African housing rights litigation in Part Three of this doctorate.

<sup>56</sup> Hogan (n 41).

content of a right, rather than as a threat to rights protection, is the largest *conceptual* obstacle for social rights being viewed as coherent with existing common law constitutional rights regimes. The degree to which this acts as an obstacle depends on the degree to which the rights authority - in common law systems, the judiciary - find liberal objections compelling.

Worries that the judiciary may usurp the executive and legislative powers are dominant factors which influence judicial rights deliberation. The weight given to these considerations by the judiciary will have profound implications for the viability of incorporating social rights protection developing in common law systems. Per O'Connell:

[T]he ultimate concern with the protection of socio-economic rights is the fear that providing constitutional protection for such rights will result in undermining the separation of powers by transferring too much authority to the courts, at the expense of elected branches of government.<sup>57</sup>

Three primary rationales predominate on why the judiciary should be precluded from policing the provision of basic essentials: the argument from democracy, the argument from effectiveness, and the argument of constitutional necessity. The argument from democracy hinges on the claim that it is democratically illegitimate to empower judges to remedy social rights given the resource implications.<sup>58</sup> This argument is a variation upon the argument against judicial review of rights generally. The presence of judicial review of *any* constitutional rights within a democracy appears to transgress this critique, which makes the incisiveness of this critique as an analysis of why *only* civil rights but not social rights should be permitted in a jurisdiction rather weak.

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<sup>57</sup> Paul O'Connell, *Vindicating Socio-economic Rights: International Standards and Comparative Experiences* (Routledge 2012) 2.

<sup>58</sup> Jeremy Waldron, 'The Core of the Case Against Judicial Review' (2006) 115 *Yale Law Journal* 1346; Richard Bellamy *Political Constitutionalism: A Republican Defence of the Constitutionality of Democracy* (CUP 2009); Adam Tomkins *Our Republican Constitution* (Hart 2015); Adrian Hardiman, 'The Role of the Supreme Court in our Democracy' in Joe Muholland (ed) *Political Choice and Democratic Freedom in Ireland: 40 Leading Irish Thinkers* (MacGill Summer School 2004) 32.

The argument from effectiveness contends that courts are not capable of making appropriate allocations of resources necessary to protect social rights due to deficiencies in knowledge inherent within the judicial branch. Common law judges deal with individuated cases that come before them with limited capacity to engage in a broader substantive overview of the area to which a rights claim relates.<sup>59</sup> Given this, the argument goes, the greater technocratic capacities of the legislative branch should be deferred to, especially where resource implications are considerable, as is commonly the case with social rights.<sup>60</sup>

This argument is more compelling as it posits a valid distinction between the planning required to effectively vindicate a right with considerable resource implications over the imposition of a negative injunction against action, and the general unsuitability of the judiciary to act on the former.<sup>61</sup> This is so even leaving aside the aforementioned observation that remedying non-social rights already has resource implications.<sup>62</sup>

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<sup>59</sup> See the discussion of the prevalence of common law reasoning within rights interpretation in Cian Henry, 'Standing on Thin Ice: Standing Rules and Public Interest Litigation in Ireland and the United States' (2017) 21 *TCLR* 315, 317.

<sup>60</sup> For the classic discussion of this issue, see Lon L. Fuller, 'The Forms and Limits of Adjudication', (1978) 92(2) *Harvard Law Review* 353; Tomkins (n 58) at 3 See also Jeffrey Jowell, 'Of Vires and Vacuums: The Constitutional Context in Judicial Review' in Christopher Forsyth (ed), *Judicial Review and the Constitution* (Bloomsbury Professional 2000) 327; David Landau, 'The Reality of Social Rights Enforcement' (2012) 53(1) *Harvard International Law Journal* 189. For a critical survey of the justiciability issue, see Jeff King, (n 42) 197.

<sup>61</sup> As Cross argued:

The case for positive rights ignores the ideological influences on judicial decision making, which renders the legislature presumptively a more suitable forum. The case ignores the strictures of the process of litigation, which is less promising for the poor than is the legislative process. The case erroneously presumes that the courts can discern the policy best suited to achieving the desired consequential ends, when in fact the legislature is better suited for this goal. Finally, the case presumes that judges can effectively implement their decisions, when in fact such implementation is highly uncertain and might in fact be counterproductive. These four failings doom any hopes that the recognition, of positive rights will improve, the lives of the intended beneficiaries.

Cross (n 41) 924.

<sup>62</sup> Consider the right to due process of law, especially where it includes a right to legal aid. Also consider the profound resource implications which can arise from deciding non-social rights cases, even where the remedy is a prohibitive injunction. Jeff King suggests as a paradigmatic example of this the lack of controversy in the case of *Bush v Gore* (2000) 531 U.S. 98, which had substantial resource implications by determining who was President of the United States, was justiciable. Jeff King *Judging Social Rights* (Cambridge University Press 2012) 194.

However, the strength of this argument depends on a simplified understanding of how social rights can be judicially protected. The issuing of mandatory injunctions to vindicate social rights does engage with effectiveness concerns, insofar as it is possible both for the judicial rights procedure to be abused by queue-jumpers, and because there are unavoidable limitations to the judicial comprehension of the nature of scarce resources.<sup>63</sup> However, the discussion of South Africa's jurisprudence in Part Three will show that it is possible to develop weaker remedial processes by which rights claims can be adjudicated and effective remedies ordered without arrogating competence over resource allocation to the judicial branch. Per Tushnet:

the concern over judicial capacity turns out to be a concern about the ability of courts to coerce the political branches into making substantial changes to background rules, typically by large programmes of social provision that require significant alterations in the distribution of wealth by means of taxation and transfer payments. That concern, though, rests on the assumption that judicial enforcement of social and economic rights must take the form of coercive orders to the political branches.<sup>64</sup>

The argument of constitutional necessity relates to the rhetorical claim that the judiciary are constitutionally prevented from developing effective protection for social rights.<sup>65</sup> This argument currently prevails in the Irish constitutional order, in the claim that the (constitutionally under-defined) separation of powers is a 'high constitutional value' which debars the development of social rights protection.<sup>66</sup> Just as with the argument from democracy, the potency of this argument is significantly diluted within common law systems which already possess constitutional rights actively vindicated by the positive expenditure of resources.<sup>67</sup>

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<sup>63</sup> For a discussion of the issues arising from judicial issuances of mandatory injunctions to vindicate socio-economic rights in Brazil, see Octavio Luiz Motta Ferraz, 'Harming the Poor through Social Rights Litigation: Lessons from Brazil' (2011) 89 *Texas Law Review* 1643.

<sup>64</sup> Tushnet (n 36) 227 - 228.

<sup>65</sup> See Hardiman (n 58).

<sup>66</sup> *Sinnott v Minister for Education* [2001] 2 IR 545, 702.

<sup>67</sup> See O'Connell (n 57) 171 - 172. See also *The State (Healy) v Donoghue* [1976] IR 325.



Finally, it is also objected that social rights are too vague and imprecise to admit of adjudication.<sup>68</sup> Not only does this assertion presuppose relative clarity in definitions of frequently-protected civil-political rights such as the right to privacy, but as O’Connell perceptibly highlighted there is a circularity to this argument. ‘If socio-economic rights are indeed vague and imprecise, as indeed in many respects they are, then,’ he suggests, ‘this is because most domestic courts have refused to engage with them over the years, and generate jurisprudence clarifying the contours of specific socio-economic rights.’<sup>69</sup>

Demonstrating these shortcomings in conventional apprehensions about the judiciary having the power to cure social rights breaches is useful as it shows there is nothing *essentially incompatible* between the separation of powers in common law systems and the incorporation of enforceable social rights. Adjudication of social rights is not institutionally incompatible from adjudication of civil-political rights, something almost every contemporary common law judiciary engages in. The institutional issue becomes one of scale.<sup>70</sup> The scale of the incursion into the power of branches with greater capacity to deal with the entitlements claimed as of right *is* a valid reason to encourage remedial restraint, however it is only a coherent reason if it is understood that remedies for social rights are not essentially different from remedies for civil-political rights breaches, but are on a spectrum with them.

By understanding that, in all common law systems - indeed in all legal systems - an authority plays a positive role in the protection of rights (if even only by policing rights breaches) the question of whether social rights that impose large obligations on the state are coherent with common law legal orders becomes resolvable. Through an examination of the deep commitments informing rights protection in such systems, it can be seen that social rights *are* coherent with

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<sup>68</sup> Fried (n 41); Alana Klein, ‘Judging as Nudging: New Governance Approaches for the Enforcement of Constitutional Social and Economic Rights,’ (2008) 29 *Columbia Human Rights Law Review* 351.

<sup>69</sup> O’Connell, (n 55) 8. See also Fons Coomans, who noted that ‘it is primarily the failure of national courts to give judicial consideration to economic and social rights which has meant that those rights have remained largely meaningless in practice.’ Fons Coomans ‘Some Introductory Remarks on the Justiciability of Economic and Social Rights in a Comparative Constitutional Context,’ in Fons Coomans (ed) *Justiciability of Economic and Social Rights: Experiences from Domestic Systems* (Oxford University Press 2006) 1, 3.

<sup>70</sup> Landau (n 60) 195 - 196.

the foundational values of common law legal orders.<sup>71</sup> The obligations social rights impose, whilst often more onerous on the state than classic civil rights, are not of a different character from the protection of such commonly-protected rights.<sup>72</sup> While it can be persuasively argued that judicial obligations *ought not* be imposable upon the state when they pass a certain threshold of complexity or polycentricity, it remains the case that *to* impose such obligations - while unadvisable - would still be consistent and coherent with the conception of rights that predominates within the common law world.

#### IV: Conclusion

In this chapter I have presented an amoral general conception of rights and explained how the regimes of the common law world fit into this model. Rights are claims to an entitlement of which rights-bearers have reason to feel entitled, made in the expectation of action to either cure or compensate for the absence of the entitlement. In the common law world, constitutional rights protection generally seeks to ensure that entitlements enabling the personal autonomy and democratic capacity of rights-bearers are secured. Social rights are claims that a rights-bearer is entitled to a specified resource essential for human survival. Social rights claims are made in the reasoned expectation of them leading to a correction by the state of an absence or interference with this essential resource. The protection of social rights, it has been shown, is readily coherent with the objectives that have animated rights protection generally within common law systems.

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<sup>71</sup> Per Young, 'The classical liberal paradigm of statist protection of the so-called 'negative' rights and market promotion of welfare, has now been overtaken by the legal protection of economic and social rights and the development of various institutional methods for their interpretation, enforcement and measurement. Liberal markets and liberal democracies now coexist with economic and social rights.' Young (n 10) 1.

<sup>72</sup> Note further, per David Bilchitz: It is not in fact true that significant budgetary implications inevitably follow from orders involving socio-economic rights: the enforcement of negative duties associated with socio-economic rights - for instance, preventing the state from demolishing houses or evicting persons - will not necessarily attract major budgetary consequences. In relation to positive duties: the exact nature of the budgetary consequences will depend on the order that is made and its context: the extension of an existing feeding scheme, for instance, may cost less than the creation of a new feeding programme. Bilchitz (n 43) 129.

Noting that social rights *can* consistently be protected within a common law legal order is not to suggest either that they *should* or that they inexorably *will* be protected by such an order. It does however resolve a misapprehension that protection of social rights are somehow incompatible with contemporary constitutional rights protection in common law systems. Further, as Landau has noted, ‘social rights are not mere paper rights; courts around the world are actively enforcing them.’<sup>73</sup> South Africa, as Part Three of this doctorate shows, demonstrates that social rights protection *can be* consistent with a common law constitutional order.

As Barrington J, writing extrajudicially, noted, ‘the value of a constitutional guarantee depends on the approach of those who interpret it.’<sup>74</sup> General across common law systems, the judiciary is a relatively homogenous ‘interpretative community’ of legal professionals that, with slight jurisdictional variations, come from the legal profession. The members of the judicial community, through sharing the experiences of legal education and professional practise, understand what is required of them in their judicial role. They know what they are and are not permitted to do if they want their actions to be understood as *legal*.<sup>75</sup> Without extending the interpretative community’s understanding of what is ‘legal’ to include adjudicating social rights claims then, social rights protection in common law systems does not develop.

In my doctorate, I expand the discourse on social rights protection from *what* social rights are, to *how* social rights develop in common law systems. With this explanation of what social rights ‘are’, in the next chapter I show how common law legal orders elevate to primacy the judiciary’s interpretation of what obligations flow from social rights. From this, it follows that to study how social

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<sup>73</sup> Landau (n 60) 190.

<sup>74</sup> Donal Barrington, ‘The Constitution in the Courts’ in Frank Litton (ed) *The Constitution of Ireland 1937 - 1987* (IPA 187) 110, 110.

<sup>75</sup> As Stanley Fish contended: ‘as a fully situated member of an interpretative community [...] you ‘naturally’ look at the objects of the community’s concerns with eyes already informed by community imperatives, urgencies, and goals. Therefore, if it is the goal of your community to derive single lines of direction from particular texts (identified as the Constitution, statutes, precedents), your *first* glance at such a text will be informed by that interpretative disposition (indistinguishable from what you think, in advance, the text is *for* and also from what you take to be your relationship to it), and you will see, and by seeing produce, that kind of text.’ Stanley Fish, *Doing What Comes Naturally: Change, Rhetoric, and the Practice of Theory in Literary and Legal Studies* (Clarendon 1989) 304.

rights protection develops within common law systems, one must study how judicial willingness to adjudicate upon social rights claims emerges. Parts Two and Three of this doctorate engage with this inquiry.

## Chapter Two: The Judiciary and Social Rights Protection

The preceding chapter closed on an examination of the compatibility of social rights within common law systems. I argued there is no conceptual incompatibility with entitlements to certain resource essentials such as housing or education *as of right* and the dominant understanding of rights within common law systems. Going beyond the protection of classic canon of civil-political rights to include social rights undoubtedly expands the rights obligations placed upon the State. However, this is a scalar change, not a transformation of the basis of rights protection within the common law order. I showed therefore that social rights *can* be protected within the existing model of common law rights regimes.

Having affirmed that there is no conceptual incompatibility to common law systems including social rights within their rights regimes, I advance the state of social rights scholarship by examining what it is that leads some common law rights regimes to develop social rights protection and not others. To understand the constitutional rights regimes of common law systems, it is necessary to examine how these legal systems construct institutions for rights identification and protection. I show in this Chapter that, across contemporary common law systems, a commonality prevails whereby the judiciary are understood to be the authority on the meaning of rights. This commonality supports my inductive approach, as it suggests that the jurisdictional analysis I provide is relevant to common law legal systems beyond my two case studies.

It is necessary therefore to examine how those who populate the judiciary reason about rights, and what factors influence their reasoning. Through understanding these influences, we can also understand what causes rights protection to develop within legal orders. And, by studying what influences the members of the judiciary to accept the role of protecting *social rights*, a crucial understanding of how protections for these rights emerge within common law systems is reached.

After this, the two following Parts of my doctorate analyse the development of social rights protection in Ireland and South Africa respectively. I show how the development of their jurisprudences can be constructively understood with reference to changes in their judicial cultures. From this, in Part Four, drawing my jurisdictional analyses together, I demonstrate how they show rights protection in common law systems is contingent upon judicial culture.

## I: The Emergence of Judicial Rights Review in the Common Law World

As the previous chapter noted, the common law legal world consists of the United Kingdom and those countries colonised by the British which maintained the existing colonial legal structures upon achieving self-government. These legal systems were founded on the ‘Westminster model’ of parliamentary sovereignty. On this model, all laws passed according to the specified parliamentary procedures are valid. The judiciary in such a system cannot challenge the validity of properly promulgated statutes. Consequently, under such a system, the concept of constitutional rights - individuated entitlements which can justify negating statutes to ensure their protection - does not exist.<sup>1</sup> As Erdos observed, under this model:

There is no (non-controversial) demarcation between constitutional and ordinary legislation. Moreover, the guarantee of individual rights depends on the goodwill of the executive coupled with the ability of parliament or the legislature to hold ministers to account.’<sup>2</sup>

Under this conception, rights are created *by* Parliament, but are not enforceable *against* Parliament. With the exception of the right of enfranchised rights-bearers to vote, and thereby change the composition of Parliament, constitutional rights - rights which empower a branch other than the legislature

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<sup>1</sup> Per Foley, ‘In a parliamentary supremacy, politics, in the sense under discussion, is by definition nothing to do with the judiciary, since concerns relevant to the justifications of laws will never, ever, come before the courts.’ Brian Foley, ‘Diceyan Ghosts: Deference, Rights, Policy, and Spatial Distinction’ (2006) 28(1) *DULJ* 77.

<sup>2</sup> David Erdos, *Delegating Rights Protection: The Rise of Bills of Rights in the Westminster World* (OUP 2010) 3.

to invalidate law passed legitimately by a majority of the legislature - did not exist within such systems.<sup>3</sup>

As the previous chapter noted, the American Revolution saw the introduction of constitutional rights in the common law world. Whilst ‘the US Constitution confers no express power of judicial review of legislation,’<sup>4</sup> this power was established shortly after independence in *Marbury v Madison*.<sup>5</sup> While not itself a rights case, the assertion of the power to strike down legislation for non-compliance with the constitutional text in *Marbury* left the door open for similar orders where legislation was considered incompatible with the Court’s conception of the commitments flowing from the Bill of Rights.<sup>6</sup>

Until the last hundred years, the norm within the common law world remained the Westminster model of ‘political constitutionalism,’ with the American approach a notable outlier.<sup>7</sup> However, a sea change has occurred, possibly spurred on by the atrocities of the Second World War,<sup>8</sup> to a position today

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<sup>3</sup> As noted in the previous chapter, systems can be conceived whereby expressed rights are claimable, with a possibility of remedial action, without empowering the judiciary, however these systems do not presently exist in the common law world.

<sup>4</sup> Gerard Hogan, ‘Declarations of Incompatibility, Inapplicability and Invalidity: Rights, Remedies and the Aftermath’ in Kieran Bradley, Noel Travers and Anthony Whelan (eds) *Of Courts and Constitutions: Liber Amicorum in Honour of Nial Fennelly* (Hart 2014) 233, 237.

<sup>5</sup> *Marbury v Madison* (1803) 5 US 137.

<sup>6</sup> JW Peltason, *Corwin and Peltason’s Understanding the Constitution* (14<sup>th</sup> edn. Harcourt Brace 1997); Akhil Reed Amar, *America’s Constitution: A Biography* (Random House 2006).

<sup>7</sup> In 1912, JH Morgan, in his discussion of the Irish Home Rule Bill which proposed ‘protecting the rights and privileges of minorities in Ireland by constitutional restriction’ noted, critically, how:

‘In no other Constitution in the Empire—with the exception of a single clause in the British North America Act—is any attempt made to fetter the discretion of Parliaments by the imposition of juristic limitations upon their legislative capacity [...] A more difficult problem it is impossible to conceive, because a Constitution of this kind runs counter to the whole tradition of Parliamentary sovereignty in this country and the colonies.’

JH Morgan, ‘The Constitution: A Commentary’ in JH Morgan (ed) *The New Irish Constitution: An Exposition and Some Arguments* (Hodder and Stoughton 1912) 1, 17 - 18. Donal O’Donnell, ‘“The Most Curious Forerunner” to the Fundamental Rights Provisions in the 1937 Constitution’ in Bláthna Ruane, Jim O’Callaghan, and David Barniville (eds) *Law and Government: A Tribute to Rory Brady* (Round Hall 2014) 139, 153.

<sup>8</sup> Per Young:

Before the rights entrenchments of the post-war paradigm, the conception of courts as the final arbiters in urgent matters of political or social conflict had been largely restricted to the United States. In that jurisdiction, rights without adjudication and enforcement were no rights at all; a position wholly foreign to the aspirational documents of many other constitutional systems.

Katherine G Young *Constituting Economic and Social Rights* (OUP 2012) 12; For a contrary position, see Moyn *The Last Utopia: Human Rights in History* (Belknap 2010) 83

where the norm in the common law world has become the American model of 'legal constitutionalism,' constitutional not parliamentary supremacy and judicial review.<sup>9</sup> As Young has noted:

The developments of the past fifty years have led to an increasing trend towards the judicial enforcement of rights. Consequently, there has been a resulting increase in judicial power, relative to other judicial branches, in matters of public policy affected by rights. This increase has been much criticised, a criticism which has itself been an enduring strand in the reluctance to legalise economic and social rights.<sup>10</sup>

Whilst common law systems of constitutional supremacy need not necessarily contain rights actionable against the legislature, it is the norm.<sup>11</sup> Further, within such common law systems, the power to determine authoritatively whether the legislature has breached its constitutional commitments - including therefore its rights commitments - has been vested in the judicial branch, whose interpretations of rights are final, save through constitutional amendment.<sup>12</sup> This is a source of considerable controversy. Political constitutionalist criticism arises both from the contention that judicial rights review costs elective representatives to lose primary role in protecting rights; and that in this, the role of ensuring rights compliance is given to the least democratic branch of government within the common law separation of powers.<sup>13</sup> In Allan's words, this:

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<sup>9</sup> Per Erdos, 'Legal constitutionalism, which in the last hundred years or so has become increasingly dominant, is grounded in the idea that legally codified and entrenched provisions should exert a wide-ranging and prior authority over the determination of the legislature as opposed to illegitimate and arbitrary exercises of power. Within his model, it is the judges who ultimately determine the normativity or otherwise of a particular state action. Erdos (n 2) 3. See also Ran Hirschl, *Comparative Matters: The Renaissance of Comparative Constitutional Law* (Oxford University Press 2014) 173.

<sup>10</sup> Young (n 8) 12.

<sup>11</sup> The Constitution of Australia is the exception as it limits the federal Parliament's power in order to protect the federal structure but does not limit its power in order to protect rights. See Cheryl Saunders *The Constitution of Australia: A Contextual Analysis* (OUP 2010).

<sup>12</sup> As Part Four discusses, this judicial power can result both from express constitutional recognition that the judiciary should exercise this function, e.g. under Article 34 of the Constitution of Ireland, 1937, S172 of the Constitution of the Republic of South Africa Act 1996; or by a successful judicial act of arrogating this power to that branch, e.g., *Marbury v Madison* (1803) 5 US 137; *United Mizrahi Bank Ltd v Migdal Cooperative Village* [1995] IsrSC 49 (4) 221.

<sup>13</sup> Per Adam Tomkins: 'Turning [...] to the courts to provide ways of holding the government to account endangers both democracy and effectiveness. No matter how democracy is defined



has created the situation in which the judges' view of what the rights-respecting outcome is magically transmogrified into the correct view. What *they say* our rights are, in effect, gets equated to what our rights actually are, as though these are not highly contentious issues of which committees of ex-lawyers have no pipeline to God, no special expertise, and no obvious grounds for being deferred to.<sup>14</sup>

These critiques raise important democratic and institutional shortcomings latent within regimes of constitutional judicial review and make compelling points against incorporating rights regimes within common law systems. However, over the past forty years, the practical relevance of these critiques has considerably diminished. Whereas previously the common law world was divided into two sizeable camps -the legal constitutionalist states,<sup>15</sup> and political constitutionalist states<sup>16</sup> - today, all but one of the former political constitutionalist jurisdictions have incorporated bills of rights, enabling judicial supervision of legislative deliberation of rights.<sup>17</sup>

Until relatively recently, Canada, the United Kingdom, and New Zealand operated traditional systems of parliamentary sovereignty. As Gardbaum has noted, these jurisdictions have since moved toward a weak form of judicial review that he termed the 'new Commonwealth model of constitutionalism.'<sup>18</sup> Under this model, judicial assessments that legislation is non-compliant with

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judges can never hope to match the democratic legitimacy of elected politicians. Adam Tomkins *Our Republican Constitution* (Hart 2015) 3; See also Richard Bellamy *Political Constitutionalism: A Republican Defence of the Constitutionality of Democracy* (Cambridge University Press 2007).

<sup>14</sup> James Allan, 'Statutory Bills of Rights: You Read the Words in, You Read the Words Out, You Take Parliament's Intention and you Shake it all About: Doin' the Sankey Hanky Panky,' in Tom Campbell, KD Ewing, and Adam Tomkins (eds) *The Legal Protection of Human Rights: Sceptical Essays* (Oxford University Press 2011) 108, 110. See also Jeremy Waldron, 'The Core of the Case Against Judicial Review' (2006) 115 *Yale Law Journal* 1346.

<sup>15</sup> The United States of America, Ireland, and India as notable examples.

<sup>16</sup> The United Kingdom, Canada, Australia, New Zealand and Israel as notable examples.

<sup>17</sup> Australia, (n 9). As Hogan Morgan and Daly have recently noted, 'By the late twentieth century, in the era of 'rights-based jurisprudence,' shares in the sovereignty of parliament were at a discount.' This appears to be only truer as the twenty-first century progresses.' Gerard Hogan, David Gwynn Morgan and Paul Daly, *Administrative Law in Ireland* (5<sup>th</sup> edn. Round Hall 2019) 10-24.

<sup>18</sup> Stephen Gardbaum, *The New Commonwealth Model of Constitutionalism* (Cambridge University Press 2012); Mark Tushnet, *Weak Courts, Strong Rights: Judicial Review and Social Welfare Rights in Comparative Constitutional Law* (Princeton University Press 2008). For criticism of the concept of 'the last word,' see Aileen Kavanagh, 'A Hard Look at the Last Word' (2015) 35(4) *Oxford Journal of Legal Studies* 825.

super-statutory bills of rights does not nullify the legislation *per se*. Therefore, the legislature maintains ‘the last word’ on rights protection, but judicial commentary on rights obligations is filtered into the process. The incorporation of this model was motivated by a desire to maintain parliamentary sovereignty, whilst incorporating greater rights reasoning into the constitutional order.<sup>19</sup> However, whilst maintaining overall legislative dominance in rights interpretation may have been the objective, as Erdos observed, ‘the decision to enact a bill of rights undoubtedly involves an important delegation of power over the interpretation of rights from the ordinary political branches to the judiciary.’<sup>20</sup>

There is a common trend among the jurisdictions which have incorporated these weak form bills of rights. The introduction of the Canadian Charter of Rights and Freedoms has arguably led to *de facto* strong form judicial review in that jurisdiction, given the development of a convention against using the judicial override power to enact legislation which, in the judiciary’s estimation, conflicts with the Charter.<sup>21</sup> The record in the United Kingdom largely conforms to this trajectory, with one notable use of legislative override of a judicial rights decision in relation to prisoner voting rights being the exception to the otherwise rigid norm of compliance. Further, in the UK, the power of the Courts to interpret statutes in a rights complaint manner has further expanded their power over the Parliament.<sup>22</sup>

New Zealand is the jurisdiction where the incorporation of a bill of rights is understood to have had the least effect on the power of parliament.<sup>23</sup> However

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<sup>19</sup> Per Janet Hiebert, ‘The optimistic expectation [of weak form judicial review] is that these new bills of rights will ratchet up the quality of decision-making by providing a different context (consistency with rights) along with introducing a new incentive (the prospect of judicial review) for public and political officials to take seriously in the calculations and deliberations over what constitutes good public policy decisions.’ Janet Hiebert, ‘Governing Like Judges?’ in Tom Campbell, KD Ewing, and Adam Tomkins (eds) *The Legal Protection of Human Rights: Sceptical Essays* (OUP 2011) 40, 41.

<sup>20</sup> Erdos (n 2) 4.

<sup>21</sup> Grant Huscroft ‘Rationalising Judicial Power: The Mischief of Dialogue Theory’ in James B. Kelly and Christopher P. Manfredi (eds) *Contested Constitutionalism: Reflections on the Canadian Charter of Rights and Freedoms* (University of British Columbia 2009) 50; Mark Tushnet (n 18)

<sup>22</sup> S3 Human Rights Act 1998; See *Ghaidan v Godin-Mendoza* [2004] UKHL 3; James Allan (n 14).

<sup>23</sup> Andrew Geddis suggested that a large part of why this is so is ‘lies in New Zealand’s strong, ongoing constitutional attachment to the theory of pure parliamentary sovereignty. The idea

even there, the same trend can be detected. The New Zealand Bill of Rights expressly precluded judicial decisions disapplying legislation due to inconsistency with the bill of rights.<sup>24</sup> However, not only has the Court of Appeal since expanded its remedial powers beyond those prescribed in the Act and held that its interpretation must be informed by international law,<sup>25</sup> the bench has also decided that it is empowered to make formal declarations of incompatibility of legislation with the Bill of Rights.<sup>26</sup> This power is not referred to in the Bill of Rights. Incidentally, this power was innovated in a case that also concerned the voting rights of prisoners and, in June 2020, the New Zealand Parliament passed an Act allowing prisoner voting, providing very recent proof that New Zealand is conforming to this broader trend.<sup>27</sup>

Even if the power to override judicial decisions in these jurisdictions remains formally with the legislature, and so even if it remains *plausible* to call parliament sovereign, as a matter of practical reality in these jurisdictions, the dominant force informing the entitlements which rights-bearers can claim is the judicial branch. This supports Tushnet's observation that:

[J]udicial decisions generally 'stick'. That is, legislatures have the *formal* power to respond to a judicial interpretation with which its members disagree through legislation rather than constitutional amendment, but they exercise that power so rarely that a natural inference is that the political-legal culture in nations with weak-form review have come to treat judicial interpretation as authoritative and final.<sup>28</sup>

The 'stickiness' of judicial decisions means that, in practical reality, whether the judiciary has the power to strike down legislative acts as unconstitutional,

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that anything, even judicial views on what individual rights require of society, should get in the way of an elected Parliament's law-making role simply does not get much traction in this nation's thinking about how its constitution ought to work.' Andrew Geddis, 'Inter-institutional 'Rights Dialogue' under the New Zealand Bill of Rights Act in Tom Campbell, KD Ewing, and Adam Tomkins (eds) *The Legal Protection of Human Rights: Sceptical Essays* (OUP 2011) 87, 105. See also Gardbaum (n 18).

<sup>24</sup> S4 New Zealand Bill of Rights Act, 1990.

<sup>25</sup> *Simpson v Attorney General [Baigent's Case]* [1994] 3 NZLR 667.

<sup>26</sup> *Taylor v Attorney General* [2017] NZCA 21; *Attorney General v Taylor* [2018] NZSC 104.

<sup>27</sup> The Electoral Registration (Registration of Sentenced Persons) Act 2020.

<sup>28</sup> Tushnet (n 18) 47 - 48.

or merely the power to declare an act incompatible with a bill of rights without the attendant power of nullification, in both scenarios the dominant understanding of the content of the right is provided by the judicial branch.

Not only are judicial determinations on rights generally accepted by the legislature,<sup>29</sup> Hiebert has observed that legislatures in Canada and the United Kingdom attempt to ‘proof’ legislation from the possibility of being declared incompatible with the Human Rights Act, or contrary to the Charter.<sup>30</sup> By this, the content of the rights claims are determined increasingly by interpretations of the judicial branch.<sup>31</sup>

This ‘stickiness’ is in part due to acquiescence by the elected branches to the judiciary possessing this power. Judicial interpretations can always be changed with sufficient political will, either through constitutional amendment in a strong-form regime or by persisting with legislation judicially declared rights-incompatible in weak-form systems. That this power is persistently *not* exercised leads to the development of a *status quo* of judicial authoritativeness on rights disputes which has been replicated across the common law world.

What the foregoing shows is that, in the last hundred years, common law judiciaries that formerly cleaved to deferential understandings of their role within the constitutional process have developed a new understanding of their function within the legal order. To varying extents, they have accepted a role as policing legislation for rights compatibility, and in this they have received the support, either through express encouragement or acquiescence, of the elected branches. The general nature of this trend across the common law world suggests that, while the two jurisdictions which will be analysed in depth in the next two Parts of this doctorate are ‘strong-form’ systems of judicial review, as the judiciary is usually the authoritative determinant of rights obligations, the lessons learned from studying the development of social rights

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<sup>29</sup> At least in Canada and the United Kingdom, as aforementioned it remains to be seen whether the New Zealand Court of Appeal decision in *Taylor* leads to the curing of the rights breach.

<sup>30</sup> Janet Hiebert, (n 19) 48. See also Alec Stone Street, *Governing with Judges: Constitutional Politics in Europe* (OUP, 2000) 204; Janet Hiebert and James B. Kelly, *Parliamentary Bills of Rights: The Experiences of New Zealand and the United Kingdom* (Cambridge University Press 2015) 17.

<sup>31</sup> This tracks with the instability of weak form systems which Tushnet predicted at (n 18).

adjudication in these jurisdictions may be instructive for studying common law rights regimes generally.<sup>32</sup>

## II: Rights and Judicial Culture

Having determined that the judiciary are the dominant force in defining the content of constitutional rights within common law legal systems, to identify why social rights develop in some common law legal systems and not others it follows that we have to examine how judiciaries reason about rights. Whilst it is the case that, at all times and in all jurisdictions there will be outlying judges who will disagree with the dominant communal understanding of the court's role as a rights adjudicator,<sup>33</sup> that jurisdictions can accurately be identified as either protecting constitutional social rights or not shows that there are pervasive cultural trends within judicial communities which either inveigh for or against such adjudication. It is by identifying *how* such consensus emerge that we can understand what influences judicial attitudes toward social rights adjudication and, by extension, how social rights protection develops within common law systems.

As McCarthy J perceptively noted, 'judges [...] are human beings with all the failings, prejudices and misconceptions that attend upon the condition.'<sup>34</sup> The reasoning of a community of judges is not then dissimilar to the reasoning of any other human community. As with any other group, 'interpretative principles are always at work [as] that is an inevitable part of the exercise of reason in human affairs.'<sup>35</sup>

From where does the commonality of interpretative practices amongst a judicial community develop? A persuasive theory posits that such cultural

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<sup>32</sup> Frank Michelman, 'Socioeconomic Rights in Constitutional Law: Explaining America Away' (2008) 6 *American Journal of Constitutional Law* 663.

<sup>33</sup> For instance, see my discussion of the counterculture of human rights lawyers under apartheid in Chapter Nine of this doctorate.

<sup>34</sup> Niall McCarthy, 'Observations on the Protection of Fundamental Rights in the Irish Context,' in Keith Ewing, Conor Gearty and Bob Hepple (eds) *Human Rights and Labour Law: Essays for Paul O'Higgins* (Mansell 1994) 179, 180.

<sup>35</sup> Gerry Whyte, 'The Role of the Supreme Court in our Democracy: A Response to Mr Justice Hardiman' (2006) 28(1) *DULJ* 1. See also Cass Sunstein, *The Partial Constitution* (HUP 1993) 103 - 104.

consensuses emerge through the filtering process by which people become members of the judicial community. As noted in *Kelly*:

Many legal interpretative practices and norms are formed by an interpretative community of lawyers and judges - a group of people who share understandings of the meaning and purpose of the legal enterprise, that are acquired in training and practice and which change gradually over time. These collective understandings form the basis of legal thought and have a huge role in shaping how judges perform interpretative tasks.<sup>36</sup>

Whilst selection processes vary, in common law systems, judges are generally selected from the professional legal class. In any event, members are chosen due to their having acquired a sufficient legal education, followed usually by either legal practice or, sometimes, on becoming a legal academic.<sup>37</sup> As McCarthy J continued, ‘when [judges] do become leading lawyers they become members of the middle class, with all the prejudices and traditions attached to them.’<sup>38</sup> They share common experiences of being taught what law *is*, how to *do* law, how to construct a persuasive *legal* argument.<sup>39</sup> Following on from the discussion in the previous Chapter, by the time people become judges, they are deeply familiar with what *kind* of arguments are considered legally

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<sup>36</sup> Gerard Hogan, Gerry Whyte, David Kenny, and Rachael Walsh *JM Kelly: The Irish Constitution* (5<sup>th</sup> edn, Bloomsbury, 2018) 54 - 55.

<sup>37</sup> Doyle described the Irish legal community:

The Irish legal world is a small one [...] Fewer than 50 people have authority at any one time to make constitutional determinations. This caste of judges is remarkably homogenous. By and large they are upper middle class in background. The majority were educated in fee paying schools before attending University. Following this, they would most likely have trained as barristers, membership of and success in that profession generally being a prerequisite for a senior judicial appointment. Whatever their social backgrounds, therefore, by the time they are serious candidates for judicial appointment, they must be exceptionally wealthy individuals working in a small professional caste. The small size, geographical concentration and homogeneity of the Irish judiciary allows for the informal communication and grasp of conventional norms.

Oran Doyle, ‘Conventional Constitutional Law’ (2015) 38(2) *DULJ* 311, 326.

<sup>38</sup> McCarthy (n 34) 180.

<sup>39</sup> As Fish observed of legal education: ‘as one learned [legal] ‘facts’ one learned too (not also) appropriate, and indeed obligatory, routes by which outcomes may be produced. The normative aspect of the law is not placed on top of its nuts and bolts (like icing on a cake); it comes along with them and someone who is able to rehearse the points of doctrine in a branch of law knows not only what a practitioner does but what he or she is obliged to do by virtue of his or her professional competence. Stanley Fish, *There’s No Such Thing and it’s a Good Thing Too* (Oxford University Press 1994) 226

compelling within their jurisdiction. Upon ascension to the bench, they are then expected to adjudicate in a *legal* fashion, so understood. That is, they are expected to be able to participate actively in the domestic adjudicative process, and construct arguments which would be persuasive to the legal community in which they have been immersed.<sup>40</sup>

The immersive nature of being *within* this legal community, and thereafter being filtered into an even smaller judicial community of elite lawyers, and then the judiciary, and then the *senior* judiciary, has a profound if often imperceptible conditioning effect on the reasoning of the members of the community. It informs their sense of what is appropriate and inappropriate, legally doable and legally impossible.<sup>41</sup> Members of the judicial community are thus so ‘deeply inside’ this community as to be already and always thinking within the norms, standards, definitions, routines, and understood goals that both define and are defined by that context.<sup>42</sup>

Agreement within the community then, ‘is not a function of particularly clear and perspicuous rules; it is a function of the fact that interpretative assumptions and procedures are so widely shared in a community that the rule appears to all in the same (interpreted) shape.’<sup>43</sup> Consensus within a judicial community’s conception of rights is explained in this way. It follows that our understanding of what inhibits some judicial communities and not others from understanding their role to include social rights protection is dependent on the legal environment in which adjudication occurs.

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<sup>40</sup> Per Cover, ‘the normative universe is held together by the force of interpretative commitments - some small and private, others immense and public. These commitments - of officials and of others - do determine what law means and what law shall be.’ Robert Cover, ‘Nomos and Narrative’ (1983) 97(4) *Harvard Law Review* 4, 7

<sup>41</sup> Additionally, note Ran Hirschl and Evan Rosevear’s observation that ‘Judges as individual decision-makers may be driven by their personal attitudes and ideologies, by cognitive psychological biases (social and/or physiological) by career-related considerations, or simply by their quest to cater to their epistemic communities.’ Ran Hirschl and Evan Rosevear, ‘Constitutional Law Meets Comparative Politics: Socio-economic Rights and Political Realities’ in Tom Campbell, KD Ewing, and Adam Tomkins (eds) *The Legal Protection of Human Rights: Sceptical Essays* (Oxford University Press 2011) 207, 223; See also Willem Gravett, ‘The Myth of Rationality: Cognitive Biases and Heuristics in Judicial Decision-Making’ (2017) 134 *SALJ* 53

<sup>42</sup> Stanley Fish *Doing What Comes Naturally: Change, Rhetoric, and the Practice of Theory in Literary and Legal Studies* (Clarendon 1989) 126 -127.

<sup>43</sup> *Ibid* 122.

This theory of how judges reason permits changes within judicial cultures. As the judicial community's understanding of its role within the legal system is informed to an immeasurable degree by the experience of being within this culture, shifts in the composition of the legal community or changes in hegemonic conventions can lead to shifts in adjudicative practices, and so by extension to the degree of rights protection within the jurisdiction.<sup>44</sup>

As an example, consider how, as Friedman noted in the American context, 'when the ideological valence of Supreme Court decisions shifts, constitutional theorising about judicial review tends to shift as well.'<sup>45</sup> In common law systems constitutional theorists are, almost entirely, legal academics who also function as university professors - educators of future legal professionals, including future judges. The education which these students will receive (whilst in many practical respects nearly-identical to adjacent generations of students) will in important ways be informed and inflected by such critical instruction, and the assigned literature chosen by such academics.<sup>46</sup> So, on ascension to the bench, it can be assumed that their attitude towards legal issues may be subtly distinguished from the dominant earlier attitude criticised by their professors, in some part due to the impact which this formative aspect of their legal education has had on their legal reasoning.<sup>47</sup>

As Part Two of the doctorate shows, shifts within judicial attitude towards rights do occur, and it is in correlation with their occurrence that the dimensions of rights protection available to rights-bearers expand or contract.

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<sup>44</sup> As Kenny wrote:

'There will always be cycles, as new events, new circumstances, and new people interact with the constitutional order and tests the limits - textual and doctrinal, conservative and innovative - of our constitutional law. Difference is the hallmark of the human condition, and constitutional law - as one of the core political tools through which we attempt to mediate and mitigate difference - will always be a site of contestation, dispute, and disagreement that will lead it always again to change.'

David Kenny 'Remedial Innovation, Constitutional Culture, and the Supreme Court at a Crossroads' (2017) 40(2) *DULJ* 85, 104 - 105; See also Oran Doyle 'Informal Constitutional Change' (2017) 65 *Buffalo Law Review* 1021.

<sup>45</sup> Barry Friedman, 'The Cycles of Constitutional Theory' 67 (2004) *Law and Contemporary Problems* 149, 149.

<sup>46</sup> (n 44).

<sup>47</sup> As Paul Freund put it, 'the Courts are the substations that transform the high-tension charge of the philosophers into the reduced voltage of serviceable current.' Paul Freund *The Supreme Court of the United States* (The World Publishing Company 1961) Quoted in Donal O'Donnell 'The Sleep of Reason' (2017) 40 *DULJ* 191, 192.



The fundamental rights provisions of the two Constitutions of Ireland were subject to relatively minimal interpretation during the first forty years of Irish independence. As a result, in the definition of rights advanced, it would be accurate to describe the rights enumerated in this period as essentially non-existent.<sup>48</sup> This illustrates Erdos' contention that:

The strength of a bill of rights or, in other words, the extent of its effect on the legal and political system, depends in part on factors that emerge after its enactment including the degree of 'activism' by the judiciary and the extent to which it is used by potential litigants.<sup>49</sup>

It took a shift in the composition of the judicial community in the 1960s for most of the rights protected by the Constitution (including some found to be unenumerated and latent within the Constitution) to become practically enforceable. In Part Two I explain these shifts in judicial attitude towards rights, and thereby explains why shifts in the degree of rights protection within society occurred.

The breadth to which judicial reasoning is informed by these immersive cultural factors is impossible to ever fully know.<sup>50</sup> That an understanding of the cultural factors impacting judicial reasoning will inevitably be 'radically incomplete' can either lead to concluding that the enterprise of critically analysing judicial culture is foolhardy, necessarily under-broad and should be abandoned; *or* that, admitting to the modesty of the enterprise, it remains worth endeavouring to discover how conventions impact constitutional adjudication, and by extension, rights protection in common law systems.

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<sup>48</sup>This is not to argue that the governments of this period *did* act in a manner contrary to the content which these rights would later be found to have, but that the entitlements were not protected *as of right*. See the preceding Chapter of this doctorate.

<sup>49</sup> Erdos, (n 2) 11. Erdos' latter point, it is suggested, is itself dependent on the former: potential litigants are likely to use a bill of rights when they have a reason to anticipate that the judiciary will act on their rights claim.

<sup>50</sup> As Kenny cautioned about speculating on the impact of such cultural factors, 'conventions [...] are built into the structure of the place where self-reflection happens and set the boundaries of what self-reflection can produce.' David Kenny, 'Conventions in Judicial Decision-Making: Epistemology and the Limits of Critical Self-Consciousness,' (2015) 38(2) *DULJ* 432, 435.

I adopt the latter approach. Aware that my evaluation of what are significant factors within Irish and South African judicial cultures will inevitably be underinclusive due to the presence of conventions which inhibit my own critical reflection; as pervasive cultural factors demonstrably do have *an important impact* on rights adjudication, I pursue how judicial rights interpretations are affected by discernible conventions, and what this means for developing social rights protection.

As Doyle has noted:

Judges share conventional understandings of what the Constitution requires, both of themselves and of other constitutional actors. These informal conventions lead to formal decisions, which are then centrally enforced by the State in the same manner as all other judicial decisions.’<sup>51</sup>

This section has defended the proposition that the degree of rights protection in a common law constitutional order can be traced back to the pervasiveness of cultural attitudes towards both rights and the judicial role that culturally predominate within the judicial community. This makes sense of the observable fact that the dominant attitudes towards rights within judicial communities is subject to change. Having explained the theory underlying this doctoral thesis, my approach to the case studies of South Africa and Ireland will be explained.

### III: Social Rights and Judicial Culture

In this doctorate I apply to the rights reasoning of the Irish and South African benches the theory that rights protection in common law jurisdictions is formatively contingent upon judicial culture. I assess whether the differences between the Irish and South African regimes of social rights protection are understandable with reference to the theory outlined above.

Young has discussed how, ‘a court’s adjudication of economic and social rights is linked to how the court perceives itself as an institution of governance and

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<sup>51</sup> Doyle (n 37) 311.

how this perception helps it to comprehend, and address, complaints.’<sup>52</sup> In the course of my research, I identified three cultural commitments which must predominate within a judicial community in order for the Court to understand its role as including the protection of social rights.

- 1) ‘The Civil Rights Commitment:’ the Court must internalise the propriety of engaging in civil rights review.
- 2) ‘The Positive Remedial Commitment:’ the judiciary must accept a capacity to issue orders of compulsion.
- 3) ‘The Social Rights Commitment:’ the judiciary must accept the justiciability of social rights claims.

Taken together, the presence of these commitments enables a regime of social rights protection to develop. All three require a committed move away from the Westminster orthodoxy which is the shared foundation for all common law constitutional systems. Further, without any one of these commitments, a regime of social rights protection will not develop in a common law system.<sup>53</sup>

The first prerequisite requires little explanation. As I have noted, rights protection in contemporary common law systems is provided by the judicial branch policing state activity for compliance with their understanding of the concept of rights. As civil rights protection constitutes the basic form of rights adjudication within common law systems, developing this - and thus normalising judicial rights review - is the first threshold. Similarly, for social rights protection to emerge, the third prerequisite is also self-evident - the judiciary must overcome the conventional objection within common law judiciaries noted in Chapter One to the adjudication of social rights and must see rights-bearers as due certain basic essentials *as of right*.

The second requirement is for the Court to develop orders of compulsion. Whilst it is possible to negatively protect social rights, however, the central case of social rights protection involves guaranteeing state provision of

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<sup>52</sup> Young (n 8) 172.

<sup>53</sup> See Chapter Thirteen of this doctorate. This is not to exclude further factors from hastening the emergence of such a role conception. Rather these three factors are the minimum commitments without which social rights protection is not able to develop.

necessities such as housing, education, or healthcare to rights-bearers.<sup>54</sup> An illustrative comparison can be drawn with the right to vote. It *can* be protected negatively - by preventing the franchise from being taken away. However, if this was the only protection available - and the ability of electors to actually vote was being actively frustrated - the extent to which the entitlement could be said to be protected would be limited.

Social rights concern ‘the substance of human life, the very basics necessary for human welfare’ such as provision of, or access to, housing, water, healthcare, and education.<sup>55</sup> To ensure provision or access to such rights requires the maintenance of a state apparatus that will protect these rights interests. Following from the discussion in the previous chapter, what differentiates civil rights from social rights *remedially* is, first, the frequency with which orders to cure the latter rights require state intervention beyond the existence of a justice system that can restrain rights-breaching behaviour; second, the generally larger financial implication of orders to cure social rights breaches compared to for civil-political rights; and third, the requirement for greater judicial supervision of rights compliance.

As Zackin has noted, ‘The term ‘positive rights’ reflects the intuition that although all rights imply obligations, some rights may imply different types of obligations than others.’<sup>56</sup> As state failure to positively provide *for* social rights is the primary cause of such rights falling into breach, to develop a rights regime which effectively protects the rights in question, it is necessary for the judiciary to internalise an understanding that issuing positive orders that direct, at cost, future state action to cure continuing rights breaches is legitimate.

Within the remedial element, there is a nuance. Whilst a Court may not feel empowered to issue hard mandatory orders that compel state action, a culture

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<sup>54</sup> Cass Sunstein, *Designing Democracy: What Constitutions Do* (OUP 2001) 223; *Jaftha v Schoeman* [2004] ZACC 25.

<sup>55</sup> Paul O’Connell, *Vindicating Socio-Economic Rights: International Standards and Comparative Perspectives* (Routledge 2012) 4.

<sup>56</sup> Emily Zackin, ‘Positive Rights’ in Mark Tushnet, Mark Graber and Sanford Levinson (eds) *The Oxford Handbook of the U.S. Constitution* (OUP 2015) 717, 717.

can develop whereby *weaker* declaratory orders of breaches of obligations the State positively owes to rights bearers will lead to a factual curing of the breach. Here, the necessary link between making a rights claim and the reasonable expectation of a curative remedial response exists, such that social rights protection *can* develop.<sup>57</sup>

The three cultural prerequisites are closely interrelated.<sup>58</sup> Whether a court considers an entitlement to be due as of right is determined in considerable part on whether the Court feels remedially empowered to cure the rights breach.<sup>59</sup> For instance, the study of a Court's remedial jurisprudence will inevitably provide an indication of the attitude of the judiciary towards rights review. As interrelated as they are, however, they will be considered separately, as a common law jurisdiction can allow orders of compulsion but not the adjudication of social rights claims,<sup>60</sup> or allow social rights claims but will not issue orders of compulsion.<sup>61</sup> In neither, will there be social rights protection. To this end, I study the Irish and South African Courts' attitudes to all three prerequisites separately.

Whilst the classification of these three commitments occurred *a posteriori*, I use them to structure my case studies in the next two Parts of this doctorate. As seminal cases engage all three commitments, I cover such cases in the chapter that is most pertinent to them. For instance, the Irish case of *TD v Minister for Education*,<sup>62</sup> or the South African case of *Treatment Action Campaign v Minister of Health (No 2)*,<sup>63</sup> engage with the breadth of the judicial review power, remedial power, and the justiciability of social rights; however these cases are considered discretely in regards the social rights commitment. From this, read together, a comprehensive understanding can be reached of how judicial cultures can foster social rights protection.

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<sup>57</sup> See the discussion in Part Four of this doctorate.

<sup>58</sup> Richard H. Fallon, 'The Linkage between Justiciability and Remedies and their Connection to Substantive Rights' (2006) 92(4) *Virginia Law Review* 633, 684.

<sup>59</sup> Paul Gerwitz, 'Remedies and Resistance' (1983) 92 *Yale Law Journal* 585, 678 - 679.

<sup>60</sup> See the discussion of Canadian jurisprudence in Chapter Fourteen of this doctorate.

<sup>61</sup> See the discussion of Irish social rights jurisprudence in Part Two of this doctorate.

<sup>62</sup> *TD v Minister for Education* [2000] 3 IR 62.

<sup>63</sup> *Minister of Health v Treatment Action Campaign (No 2)* [2002] ZACC 15.

## IV: Conclusion

In this Chapter, I have shown that the act of identifying rights in contemporary common law systems is performed, whether correctly or incorrectly, by the judicial branch. Having observed this, I considered what factors condition judicial rights reasoning and, importantly, why it is these factors have the conditioning effect that they do. It follows from this that to find out why some common law jurisdictions protect social rights and others do not, we must study closely the impact of cultural practices and beliefs dominant within the judicial community upon judicial reasoning.

As Hirschl has noted, ‘almost no attention has been paid by constitutional scholars to factors that may explain the variance in judicial interpretation of socio-economic rights provisions.’<sup>64</sup> Through identifying the factors which led one jurisdiction to practically enforce social rights, and comparing this process to that of a jurisdiction which, with a textual legitimation for socio-economic rights adjudication has failed to develop a robust social rights jurisprudence, I pay attention to this overlooked vital element in the study of social rights, and isolate the factors which condition judicial communities in common law jurisdictions to accommodate social rights adjudication within their constitutional order.

In this Part of the doctorate, I have explained why I research the cultural attitudes of common law judiciaries towards social rights. In the next two Parts, I compare the judicial role conceptions of two jurisdictions whose judicial communities have taken disparate approaches to the social rights provisions of their respective constitutions. In teasing out the conventional and cultural factors which distinguish the judicial communities in these two regimes from one another, what leads common law judicial communities to overcome apprehensions about the separation of powers and the nature of rights which conventionally inhibit the extension of protection to social rights will be explored. Where factors that induce greater judicial willingness to consider social rights adjudication are distilled, it follows that the presence of such

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<sup>64</sup> Hirschl, (n 9) 185.

factors within judicial communities that presently are resistant to social rights adjudication *may* help assure that effective, practically-realizable social rights protection develops within such common law systems.

PART TWO: SOCIAL RIGHTS IN THE IRISH  
CONSTITUTIONAL ORDER



## Chapter Three: Social Rights in the Irish Constitutional Order 1922 - 1965

In Part One of this doctorate, I explained how the study of the development of social rights protection in common law systems is a study of judicial culture. In common law systems, the primary determinant of whether social rights protection exists is what the dominant cultural attitude within the judiciary is towards social rights and remedies. This is even more important than formal textual inclusion of such rights within the constitutional text as, if textually included but not practicably enforced, the rights protection does not exist. By a close study of changes in judicial attitudes towards rights adjudication, the commitments that make judiciaries willing to engage or avoid social rights adjudication is explained. Judicial cultures, as with all human cultures, are not static, but responsive to changes in the context in which they operate.<sup>1</sup> By identifying why one common law jurisdiction develops effective social rights protection and another does not, in this thesis I discern what factors may induce judicial cultures *towards* developing social rights adjudication, creating legal systems which protect social rights.

In this chapter I apply the theoretical model described in Part One to the development of rights protection in Ireland. Social rights protection has not developed in Ireland. This is notwithstanding the development of a robust system of judicial rights review, textual inclusion of a social right in the constitutional text since the establishment of the constitutional order, and even judicial acceptance that social rights claims *are* justiciable. By studying what features of Irish judicial culture obstructed the development of a social rights protection role conception, the obstacles to the emergence of social rights protection are thereby illuminated.

In this chapter, I discuss Irish rights protection from 1922 to 1965. In this span, constitutional rights - indeed social rights - were recognised under two successive constitutions. Despite this, a culture of rights protection did not

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<sup>1</sup> See David Kenny, 'Remedial Innovation, Constitutional Culture, and the Supreme Court at a Crossroads' (2017) 40(2) *DULJ* 85.

emerge. I explore the factors which impeded the development of a rights protecting judicial role. By contrasting this period to the succeeding wave of rights adjudication, covered in the next Chapter, in which Irish judges substantively engaged with the constitutional rights provisions for the first time, a greater insight can be gleaned as to how judicial cultures change *towards* a rights protecting role conception.

First I discuss the Constitution of the Irish Free State and the rights jurisprudence under that Constitution. Then, I highlight the key rights provisions of the current Constitution of Ireland, officially known as ‘Bunreacht na hÉireann.’ Bunreacht na hÉireann was not designed simply to establish a State and confer power in a manner that negatively protected rights. Rather, the Constitution was intended to pursue a declared social objective: it was drafted with a purposive social objective of creating a constitutional order that promoted the common good. In this, the Constitution is not only compatible with social rights protection; a rights regime that effectively protects such rights *fits* this social dimension.<sup>2</sup>

By showing the compatibility of social rights protection with the Constitution, contrary arguments asserted by the judiciary which contend that social rights are incompatible with the Irish constitutional order become understandable as illustrations of the conceptual limits to the judicial community’s understanding of their own powers under the constitutional order. In the disparity between the judiciary’s assessment of the unviability of social rights protection under the current Constitution and the textual license documented in this chapter, I show how a judiciary’s perception of its rights-protecting role is the primary determinant of whether effective social rights protection will develop in a common law system.

After discussing the constitutional texts, I analyse the first wave of rights jurisprudence under Bunreacht na hÉireann. In this period - 1937 to 1965 - rights protection did not practicably exist, as the judiciary were routinely unwilling to find in favour of rights bearers when rights claims were raised. I

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<sup>2</sup> Colm Ó Cinnéide, ‘Zones of Constitutionalisation’ and the Regulation of State Power: The Missing Social Dimension to the Irish Constitutional Order’ (2014) 37 *DULJ* 173.

argue the highly deferential attitude of the Court in this period to the State in rights cases reflects the British-style judicial culture that predominated in the Irish legal community upon the promulgation of the present Constitution. In this, the Court's rights reasoning in this period (such as it was) provides an illustration of the contingency of rights protection on cultural understandings within the judiciary about rights.

A note on my case analysis. As I stated in my introduction, the cases I have chosen to critically examine were selected following an exhaustive overview of Irish constitutional rights precedent. For these chapters, I researched comprehensively Irish rights law: primary sources and secondary literature. I chose these cases for their significance within the Court's rights jurisprudence, whether because they advanced the case law or because they illustrate the dominant status quo in the periods covered. Whilst the cases I selected and omitted can be critiqued, I am confident that these cases provide both a compelling illustration of the contingency of rights protection upon cultural factors, and reflect the dominant rights controversies which have appeared before the Irish Courts since independence.

## I: The Constitution of the Irish Free State 1922

Ireland's leading legal historian, WN Osborough observed, 'no legal system exists in temporal isolation: in order to appreciate the significance of what comes after it is always a help to understand what has gone before.'<sup>3</sup> For the 122 years prior to the creation of the Irish Free State, 'the legal system in Ireland had been based upon an unwritten British Constitution in which Parliament was supreme.'<sup>4</sup> The British legal order lacked, as it still does, a written constitution. Acts passed in Westminster were the supreme source of law, and the concept of judicial rights review was not just foreign but

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<sup>3</sup> WN Osborough, *Studies in Irish Legal History* (Four Courts Press 1999) 239.

<sup>4</sup> Bláthna Ruane, 'The Challenges of Creating a New Judiciary 1922 - 1924' in Eoin Carolan (ed) *Judicial Power in Ireland* (IPA 2018) 1, 9. Oran Doyle *The Constitution of Ireland: A Contextual Analysis* (OUP 2018) 2 - 6. Alongside British law, the Dáil Courts existed from 1920 until dissolved in 1922 by the Free State Government on the ground that the 'former British Courts are now in Irish hands under the terms of the Treaty. They are now Irish Courts, and the necessity for duplication no longer exists.' Anon. 'The Judiciary' (1922) 56 *ILTR* 172.

disdained.<sup>5</sup> This doctrine was handily illustrated in an Irish context by Morgan in 1912, who noted:

An Act [of Westminster] setting up a new Constitution is no more irrevocable than an Act authorising the imposition of the income tax. If, therefore, the Imperial Parliament chooses to grant a Constitution to Ireland, there is nothing to prevent its revoking or amending that grant.<sup>6</sup>

The Constitution of the Irish Free State 1922 introduced the concept of constitutional rights (albeit, as I shall show, not the practice of constitutional rights protection) into the Irish legal system.<sup>7</sup> With the exception of the right of all citizens to free primary education,<sup>8</sup> the first enumerated social right in any common law jurisdiction in the world,<sup>9</sup> the rights provisions of the 1922 Constitution ‘enshrine the classic [negative] guarantees of individual liberty of the American and French Declarations [of rights]’.<sup>10</sup> These rights were accompanied by express provision for judicial review.<sup>11</sup> However this power

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<sup>5</sup> As Dicey in 1886 discussing the concept of a bill of rights in a written constitution, noted, ‘if it is to be of any value, [it] necessitates, in a way which not one English politician out of a thousand understand, the supremacy of the law courts, and with it the habit which the citizens of no state except the United States have as yet acquired, of rendering obedience to judicial decisions even when their logical correctness is open to question.’ Albert Venn Dicey, ‘Review: Notes on a Course of Lectures on American Constitutional Law’ (1886) 2 *LQR* 390, 390.

<sup>6</sup> JH Morgan, *The New Irish Constitution: An Exposition and Some Arguments* (Hodder and Stoughton 1912) 11 - 12. Donal O’Donnell, ‘“The Most Curious Forerunner” to the Fundamental Rights Provisions in the 1937 Constitution’ in Bláthna Ruane, Jim O’Callaghan, and David Barniville (eds) *Law and Government: A Tribute to Rory Brady* (Round Hall: 2014) 139.

<sup>7</sup> As the recent edition of *Kelly* noted, ‘the Constitution of the Irish Free State was a curious mixture of British parliamentary practice and constitutional thinking, together with the very un-British practice of entrenched constitutional rights and judicial review of legislation.’ Gerard Hogan, Gerry Whyte, David Kenny, and Rachael Walsh, *Kelly: The Irish Constitution* (5<sup>th</sup> edn, Bloomsbury 2018) 4.

<sup>8</sup> Article 10 of the Constitution of the Irish Free State, 1922.

<sup>9</sup> And only the third recognition of such a right in any democratic constitution after Mexico and Weimar Germany. Articles 3, 27, and 123 of the 1917 Mexican Constitution; and Articles 142 - 149 of the 1919 Weimar Constitution. See Thomas Murray ‘Socio-Economic Rights versus Social Revolution? Constitution Making in Germany, Mexico and Ireland, 1917 - 1923’ (2015) 24(4) *Social and Legal Studies* 487.

<sup>10</sup> Leo Kohn, *The Constitution of the Irish Free State* (Unwin Brothers 1932) 85. At 172, Kohn argued this was because ‘the outlook of the majority of the Assembly was too positivist to favour the enunciation of far-reaching principles.’ It could also be due to the perceived unpopularity of such provisions with wealthier, Unionist, elements of Irish society which the drafters sought to accommodate. Laura Cahillane *Drafting the Irish Free State Constitution* (Manchester 2017) 85 31ff.

<sup>11</sup> Article 65 of the Constitution of the Irish Free State 1922. Felix Frankfurter, later of the United States Supreme Court, found this ‘the most arresting provision in the Irish Free State Constitution.’ This was a note well taken given it is understood that ‘the idea came from the American doctrine of judicial review. *Ibid* 172.

was barely used, with only two judicial review cases brought in the fifteen years the Constitution was operative.<sup>12</sup>

Notwithstanding this unpromising start, it is arguable that ‘if judicial review had never been included in the 1922 Constitution it is highly likely that it would not have appeared in 1937.’<sup>13</sup> Between the provision of judicial review and the enumeration of constitutional rights, then, the institutional framework for a robust rights-enforcing judiciary existed, bar one key component: a willing judicial community.

Whilst the Free State governments also did not act as if the Constitution limited their power, nor was their behaviour was not censured by the Courts, as the judiciary were similarly uninterested in their new rights-reviewing responsibilities under the Constitution. This was particularly so after the Court in *The State (Ryan) v Lennon*, upheld the constitutionality of a constitutional amendment that enabled the passage of further amendments through ordinary legislation.<sup>14</sup> This in turn allowed the passage of a provision suspending most of the fundamental rights protections of the Constitution and establishing military tribunals with the power to issue the death penalty for civilian crimes.<sup>15</sup> In this, as Keane CJ noted extrajudicially, ‘the Bill of Rights provisions of the [1922] Constitution [...] were to be virtually swept away by the Supreme Court itself in *The State (Ryan) v Lennon*.’<sup>16</sup>

What emerged was a reversion to a model of unrestrained parliamentary supremacy, in a peculiar quasi-constitutionalised Free State form as, ‘since [the Constitution] could be amended at the whim of the Oireachtas, the judiciary had no real power of judicial review, *even if they had been inclined*

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<sup>12</sup> *R (O’Brien) v Governor of the North Dublin Military Barracks* [1924] 1 IR 32; *ITGWU v TGWU* [1936] IR 471. Perhaps indicatively, in both cases, the impugned Acts were upheld by the Court.

<sup>13</sup> Cahillane (n 10) 170. For a further discussion of the means by which Free State sought to constitutionally distinguish itself from the United Kingdom, see Laura Cahillane, ‘Anti-Party Politics in the Irish Free State Constitution,’ (2012) 35 *DULJ* 34.

<sup>14</sup> *The State (Ryan) v Lennon* [1935] IR 170. See Gerard Hogan, ‘A Desert Island Case Set in the Silver Sea: *The State (Ryan) v Lennon* (1934) in Eoin O’Dell (ed) *Leading Cases of the Twentieth Century* (Sweet and Maxwell 2000) 81.

<sup>15</sup> Article 2A(2) of the Constitution of the Irish Free State, 1922.

<sup>16</sup> Ronan Keane, ‘The Voice of the Gael: Chief Justice Kennedy and the Emergence of the New Irish Court System 1921 - 1936,’ (1996) 31(1) *Ir Jur* 205.

to use it.’<sup>17</sup> In total, 27 Acts would legislatively amend the Constitution during its fifteen-year history.<sup>18</sup> Further, the Court developed a doctrine of implied amendment, whereby Acts which were in conflict with the Constitution were understood not to be unconstitutional, but rather to be impliedly *amending* the Constitution to the extent of that conflict.<sup>19</sup> As Barrington J commented almost seventy years later, this doctrine, ‘assumed that the Oireachtas had so little respect for the Constitution that they would amend it without thinking of what they were doing.’<sup>20</sup> The coincidence of this unwillingness within the legal community to engage with the Constitution with the effectively unrestrained amendment power of the legislative branch conspired to make the 1922 Free State Constitution a failed attempt at rights protection.

What explains the judiciary’s attitude towards rights protection in this era? The deference shown in this period, typified by the doctrine of implied amendment, reflects the tendency of the judiciary when faced with an area of constitutional law with which they are unfamiliar to revert to legal and jurisprudential principles with which they are comfortable.<sup>21</sup> Implied amendment has been compellingly likened by Cahillane to the common law doctrine of implied repeal that prevailed under the colonial legal system.<sup>22</sup> The doctrinal similarities are suggestive of the discomfort which the judicial community felt towards the implications of engaging in the new and unfamiliar field of rights adjudication.<sup>23</sup>

The judiciary’s inexperience in constitutional adjudication and familiarity with the common law thus negated the intention behind including rights provisions within the Constitution. Through their inexperience and discomfort, the possibility of rights protection was removed. As Hogan noted, ‘Unfamiliarity

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<sup>17</sup> Cahillane (n 10) 168 (emphasis added).

<sup>18</sup> For comparison, 38 amendments have been made to the current Constitution in eighty-three years, none of which come close to the sweeping change Article 2A brought about.

<sup>19</sup> See *R (Cooney) v Clinton* [1935] IR 245; *Attorney General v McBride* [1928] IR 451.

<sup>20</sup> *Laurentiu v Minister for Justice* [1999] 4 IR 26, 69.

<sup>21</sup> This will also be seen in the following chapter’s discussion of the Court’s treatment of the Catholic elements of the Constitution of Ireland 1937.

<sup>22</sup> Cahillane (n 10) 160. See *Dean of Ely v Bliss* (1842) 5 Beau 574, 582; *Ellen Street Estates v Minister for Health* [1934] 1 KB 590, 597.

<sup>23</sup> Illustrative of judicial attitudes is O’Byrne J’s observation that the Constitution ‘intended to set up the new State with the least possible change to previously existing law.’ *The State (Kennedy) v Lyttle* [1931] IR 39, 58.

with the concept of judicial review led the judiciary to give the personal rights guarantees of the new Constitution of the Irish Free State a highly restricted ambit.<sup>24</sup> One can speculate that, in the wider legal culture, the bar was similarly unenthusiastic about the new powers of rights review which had been pronounced, and were thus similarly hesitant to sue on foot of them.<sup>25</sup> Two judicial reviews brought in fifteen years suggests as much.

The jurisprudence of this period illustrates how the judiciary determine the presence or absence of rights for all practical purposes within common law jurisdictions. To ensure the benefit of rights protection, the judicial community must be willing to adjudicate rights claims. As the judiciary were uninterested in rights adjudication, the rights provisions of the Free State Constitution remained inert.<sup>26</sup> The Supreme Court of the Irish Free State thus provide an instructive illustration of the contingency of rights protection on a facilitative judicial culture.

The transition from the pre-independence legal order to the Free State constitutional order, and from it to the present constitutional order occasioned little immediate change in the composition of the legal community.<sup>27</sup> Additionally, while the law-making process was changed, all previous

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<sup>24</sup> Gerard Hogan, *The Origins of the Irish Constitution 1928 - 1941* (RIA 2012), 4. See also Donal K Coffey, 'Comparative and Institutional Perspectives on the Exercise of Judicial Power in the Irish Free State' in Eoin Carolan (ed) *Judicial Power in Ireland* (IPA 2018) 26.

<sup>25</sup>As Hugh Geoghegan, whose father James was a member of the Irish bar during this period commented, 'I rather doubt that, whether rightly or wrongly, there was any appetite among the bar - despite political religious and cultural differences - for radical changes in procedures and still less for radical changes in the law. Hugh Geoghegan, 'The Three Judges of the Supreme Court of the Irish Free State 1925 - 1936: their backgrounds, personalities and mindsets' in Felix M Larkin and NM Dawson (eds) *Lawyers, the Law, and History: Irish Legal History Society Discourses and Other Papers 2005 - 2011* (Four Courts Press 2013) 29,32.

<sup>26</sup> This is not to assume the Government would necessarily have acquiesced to a judicial finding of a rights breach. However, this response would only come to pass had the prerequisite willingness of a judiciary to take rights seriously existed.

<sup>27</sup> With regard to the transition from the British to Free State judiciaries, in January 1922 the Government proclaimed 'all Law Courts, corporations, councils, departments of state, boards, judges, civil servants, officers of the peace, and all public servants and functionaries hitherto acting under the authority of the British Government shall continue to carry out their functions unless and until otherwise ordered by us.' Anon. 'New Government's Proclamation' (1922) 56 *ILTR* 15. The result of this, 'no less than [by] the specific reference in the Anglo-Irish Treaty of December 1921 to judicial pensions, [was] that many of the judges would in fact retire, and this, indeed, occurred in 1924, when, of the judges of High Court standing or above, only two, the Master of the Rolls, Charles O'Connor, and the Land Judge, Mr Justice Wylie, transferred to the new judiciary. Osborough (n 3) 278.

legislation, both from the British administration and from the Free State administration, was kept on unless and until repealed or declared unconstitutional. The attitudes of the legal community which first encountered the rights protected by the present Constitution would thus be informed by their prior experiences with constitutional rights and their greater familiarity and acceptance of the pre-constitutional order.

## II: The Constitution of Ireland 1937

The rights provisions of the Constitution of Ireland affirm a constitutional commitment to protect many of the same rights protected under the Free State Constitution, alongside including further family and property rights. As with the Free State Constitution, judicial rights review is expressly provided by the Constitution.<sup>28</sup> This chapter will not engage in depth with why a new Constitution was brought into

force.<sup>29</sup> Briefly stated, Bunreacht na hÉireann was drafted as the President of the Executive Council of the Irish Free State Éamon de Valera wanted to sever any connection between the Irish constitutional order and the British Crown.<sup>30</sup> As well as this primary aim, de Valera appears to have sought to produce a legal system founded on rights which, ‘should be regarded as fundamental on the ground that they safeguard democratic rights,’ and ‘should not be capable of being altered by the ordinary processes of legislation.’<sup>31</sup>

The drafting of the rights provisions was informed by three major influences: Anglo-American Enlightenment rights theory, post-war continental constitutionalism (both of which also informed the drafting of the Free State

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<sup>28</sup> Article 34.3.2° of the Constitution of Ireland states: The jurisdiction of the High Court shall extend to the question of the validity of any law having regard to the provisions of this Constitution.’ See also Article 34.5.5° concerning ‘the decision of the Supreme Court on a question as to the validity of a law having regard to the provisions of this Constitution.’

<sup>29</sup> For the authoritative overview of the drafting of the Constitution of Ireland, see Hogan (n 24).

<sup>30</sup> Arising from the fact that the Free State Constitution was directly subject to the Anglo-Irish Treaty, ‘De Valera’s fundamental objection remained that, however independent in practice, the new state was still for him subject in character.’ Dermot Keogh and Andrew McCarthy, *The Making of the Irish Constitution 1937* (Mercier 2007) 41.

<sup>31</sup> National Archives SPO 2979. See also Gerard Hogan, ‘The Historical Origins of Article 40.6.1°’ in Eoin Carolan and Oran Doyle (eds) *The Irish Constitution: Governance and Values* (Thomson Round Hall 2008) 77.



Constitution)<sup>32</sup> and Catholic social teaching.<sup>33</sup> It is under the latter two influences that the constitutional text advanced beyond a bare charter of negative rights towards a purposive document where the State is ascribed a role in alleviating the suffering of the disadvantaged.

The incorporation of aspects of Catholic social teaching inflected the rights protection under the Constitution in two main ways. First, rights protected in a positivist manner by the Constitution of the Irish Free State such as education rights were became founded upon a conception of the natural law ‘antecedent to positive law’.<sup>34</sup> This constitutional recognition of a higher natural law would ultimately lead to the Courts’ acknowledgment of further rights unenumerated in the Constitution but also flowing from the natural law, which also merit constitutional protection.<sup>35</sup>

The second main way Catholic social teaching influenced the drafting of the rights provisions was by informing the establishment of a social dimension to the Irish constitutional order. The Catholic social teaching which predominantly informs the Constitution is the Catholic communitarianism of the encyclicals *Rerum Novarum* and *Quadragesimo Anno*. These encyclicals advocate ordering society in a manner that both recognises and protects individual natural rights, whilst also promoting the common good of all its members. As Pope Pius XI pronounced:

Accordingly, twin rocks of shipwreck must be carefully avoided. For, as one is wrecked upon, or comes close to, what is known as "individualism" by denying or minimizing the social and public character of the right of

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<sup>32</sup> As Coffey has noted, from early on ‘the drafting process was transnational, one influenced by contemporary theories of constitutionalism in Europe and the wider world.’ Donal K Coffey, *Constitutionalism in Ireland 1932 - 1938: National, Commonwealth, and International Perspectives* (Palgrave Modern Legal History 2018) 119. See Chapters Two and Four of Coffey for a discussion of the influence of comparative constitutionalism on the Constitution of the Irish Free State.

<sup>33</sup> Coffey: ‘The basic structure, as we shall see, is that the institutions were formed on the basis of liberal democratic constitutions on the model of the 1919 Constitution of Germany, while the rights provisions were inspired by the Catholic constitutions of Portugal (1933) and Poland (1931).’ Donal K Coffey, *Drafting the Irish Constitution 1935 - 1937: Transnational Influences in Interwar Europe* (2018 Palgrave Modern Legal History) 29 -30.

<sup>34</sup> Per Article 43.1.1° of the Constitution of Ireland, 1937.

<sup>35</sup> See the next Chapter of this doctorate.

property, so by rejecting or minimizing the private and individual character of this same right, one inevitably runs into "collectivism" or at least closely approaches its tenets. [...] The riches that economical-social developments constantly increase ought to be so distributed among individual persons and classes that the common advantage of all which Leo XIII had praised [in *Rerum Novarum*] will be safeguarded; in other words, that the common good of all society will be kept inviolate.<sup>36</sup>

It is under the influence of these texts that the current Constitution develops a Catholicised understanding of the purpose of the state and a natural law basis for rights protection.

Unlike earlier drafts, or the prior Constitution, rights were now limited with reference to the 'exigencies of the common good.' Such references to the common good recur eight times within the text of the Constitution, as well as in the Preamble. These citations follow clearly from the influence of the Encyclicals, given the correlation between their inclusion within drafts of the Constitution and the contributions of the religious orders.<sup>37</sup>

Under these influences, an objective has been assigned to the State - to pursue the common good - of such importance that the state's obligation to avoid interfering with rights may be waived where required in pursuit of this objective.<sup>38</sup> Until as late as 16<sup>th</sup> March 1937, four months before the

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<sup>36</sup> Pope Pius XI, '*Quadragesimo Anno*' (15 May 1931) <[http://www.vatican.va/content/pius-xi/en/encyclicals/documents/hf\\_p-xi\\_enc\\_19310515\\_quadragesimo-anno.html](http://www.vatican.va/content/pius-xi/en/encyclicals/documents/hf_p-xi_enc_19310515_quadragesimo-anno.html)> (accessed 25 August 2020). Per Leo XIII: The foremost duty, therefore, of the rulers of the State should be to make sure that the laws and institutions, the general character and administration of the commonwealth, shall be such as of themselves to realize public well-being and private prosperity.' Pope Leo XIII '*Rerum Novarum*' (15 May 1891) <[http://www.vatican.va/content/leo-xiii/en/encyclicals/documents/hf\\_l-xiii\\_enc\\_15051891\\_rerum-novarum.html](http://www.vatican.va/content/leo-xiii/en/encyclicals/documents/hf_l-xiii_enc_15051891_rerum-novarum.html)> (accessed 25 August 2020).

<sup>37</sup> See Article 6, Article 40.6.1° (i), Article 41.2.1°, Article 42.3.2°, Article 42A.2.1°, Article 42A.4.1° (i), Article 43.2.2°, Article 45.2(ii) of the Constitution of Ireland, 1937. For a discussion of the contribution of clerics to the drafting of the Constitution see Chapter Six of Hogan (n 29).

<sup>38</sup> One of the two property rights provisions of the Constitution is particularly illustrative. Article 43.2 of the Constitution of Ireland, 1937 states both that, 'the exercise of the [property] rights mentioned in the foregoing provisions of this Article ought, in civil society, to be regulated by the principles of social justice;' and, '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.'

referendum on the enactment of the current Constitution, property rights were rendered even more conditional to the basket of social policy objectives that sought to ensure the state pursued the common good.<sup>39</sup> These policy objectives are now contained in Directive Principles of Social Policy in Article 45 and are prefaced by a clause declaring the principles ‘non-cognisable by any Court under any of the provisions of the Constitution.’<sup>40</sup> These Directive Principles which as Keane CJ extrajudicially noted, ‘might not unfairly be described as mildly progressive with a leaning towards benign capitalism rather than socialism,’ were directly inspired by Catholic communitarianism: seeking to qualify capitalism to promote the interests of the socio-economically disadvantaged.<sup>41</sup>

The property rights and directive principles provisions were to be combined to ensure that the liberal individualism of the guarantee of private property was qualified by a communitarian focus on the creation of a society motivated to promote the common good.<sup>42</sup> Ultimately however, upon opposition from the Department of Finance as to the cost implications of leaving such pledges within the justiciable constitution, the compromise stance of leaving what then became the Directive Principles within the Constitution in a putatively non-

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<sup>39</sup> Rachael Walsh, ‘Private Property Rights in the Drafting of the Irish Constitution: A Communitarian Compromise,’ (2011) 33(1) *DULJ* 86.

<sup>40</sup> Kelly provides an interesting commentary on this provision, that:

The Irish language version of Article 45 is interesting in this context as the use of the words ‘*i dtaobh an fheidhmithe sin*’ in the second part of the second sentence of Article 45 makes explicit what is only implicit in the English language version of the same sentence, namely, that it is the application of the directive principles in the making of laws that is put beyond the function of the courts. This arguably supports the conclusion that the courts are not precluded from relying on these principles when identifying implied rights or applying the common law.

Hogan et al (n 7) [7.10.20]. See also O’Keefe P in *McGee v Attorney General* [1974] IR 284, 290 - 291.

<sup>41</sup> Ronan Keane ‘Judges as Law-Makers: The Irish Experience’ (2004) *JSIJ* 4(2) 1, 16. See also John MacMenamin, ‘Constitutional Principles and the Charter of Fundamental Rights’ in Kieran Bradley, Noel Travers and Anthony Whelan (eds) *Of Courts and Constitutions: Liber Amicorum in Honour of Nial Fennelly* (Hart 2014) 285, 288. Per: Coffey ‘The most important influence on the drafting of Article 45 was *Quadragesimo Anno*, a papal encyclical written in 1931.’ Coffey (n 23) 241. At 242, Coffey noted another key influence: ‘comparing the legislative agenda of the Fianna Fáil government from 1932 to 1937, it is clear that there were legislative provisions which corresponded to the constitutional protections of Article 45.’

<sup>42</sup> Per Rachael Walsh ‘while Article 43 protects private ownership as a natural right, it does so against the backdrop of a constitutionalised vision of social justice for the Irish State, thereby reflecting the individual and social aspects of property that were central to Catholic teaching on property at the time it was adopted.’ Walsh (n 39) 114.

justiciable form was adopted.<sup>43</sup> As Walsh has argued, this severance does not reflect ‘a desire to de-couple private property rights from their social context, but rather [a means] to avoid the flood of legal claims under the social principles predicted by the Department of Finance.’<sup>44</sup> It should not then be deduced from the express exclusion of the Directive Principles from judicial cognisance, that the judiciary was intended to be non-cognisant of the broader social objective of promoting the common good.

The drafting of the only express social right in the Constitution - the right in Article 42.4 to provision for free primary education - also reflects the tension between a social commitment and financial practicality.<sup>45</sup> Initially, the right was *to* free primary education. However again, after pressure from the Department of Finance that this may create an unduly burdensome obligation on the State, this commitment was lessened to a commitment to provide *for* such education. Notwithstanding this, this right remains the oldest extant social right in any constitution in the common law world.

Amongst the innovations of Bunreacht na hÉireann, one of the most significant, if at first unnoticed, was the inclusion of Article 40.3. This Article has been described by Hogan as ‘perhaps the single most important provision in the entire Constitution,’ due to the unenumerated rights jurisprudence which it inspired, and which will be analysed in the next chapter.<sup>46</sup> This Article is also significant in the breadth of obligations it places upon the State to ensure rights protection. As Casey and McCormack-George noted, ‘the text of Article 40.3 is not couched in solely negative terms.’<sup>47</sup> Here, the State ‘guarantees; in its laws to protect, and as far as practicable, by its laws to defend and *vindicate* the personal rights of the citizen.’<sup>48</sup> Whilst defence and protection of personal

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<sup>43</sup> Hogan (n 24) 327.

<sup>44</sup> Walsh (n 39) 108.

<sup>45</sup> As Casey noted, ‘With the exception of Article 42 of the Constitution, under the heading ‘Education’, there are no express provisions therein cognisable by the courts which impose an express obligation on the State to provide accommodation, medical treatment, welfare or any other form of socio economic benefit for any of its citizens however needy or deserving.’ Conor Casey, ‘Courts, Public Interest Litigation and Homelessness: A Commentary on Recent Case Law’ (2020) 42 *DULJ* (forthcoming).

<sup>46</sup> Hogan (n 24) 277.

<sup>47</sup> Conor Casey and Dáire McCormack-George, ‘An Analysis of the Right to Shelter in Irish Law for Children and Adults’ (2015) 54 *Ir Jur* 131, 139.

<sup>48</sup> Article 40.3.1° of the Constitution of Ireland 1937 (emphasis added).

rights may be synonymous with restraining State action which may breach the rights of persons, the reference to vindication suggests a broader duty to positively act on foot of personal rights claims. Supporting this claim, a February 1937 transcription from the Oxford English Dictionary found among the drafting materials includes the definition that ‘‘vindicate’ means ‘to assert, make good, *by means of action*, esp. [*sic*] in one’s own interest; to defend against encroachment or interference.’<sup>49</sup>

Whilst *Kelly* is correct then that, ‘neither the Constitution itself nor any other law prescribes a particular procedure as appropriate for remedying a breach of constitutional rights,’<sup>50</sup> thus, an understanding of ‘vindicate’ which presupposed positive action to ensure rights protection was not foreign to the drafters. Conscious of it, a duty to vindicate was included in the Article.<sup>51</sup> This supports the view that, following the influences upon its drafting, the Constitution was intended to bring about a legal order where the State would be a positive actor in the promotion of rights, on whom obligations could be imposed. Under this influence, Ó Cinnéide noted, ‘the text certainly resembles many contemporary European constitutions in how it sets out to direct the exercise of state power in a manner that goes well beyond the much more limited remits of Anglo-American Constitutions of a similar vintage.’<sup>52</sup> However, notwithstanding the expansive interpretation given to this Article, this vindicatory aspect of Article 40.3 has conspicuously not been expanded upon by the Courts, and as will be seen, mandatory injunctions ordering the State to vindicate rights have not been permitted.

By this, the conception of the State contained in the Constitution shifted from a quasi-American enlightenment-liberal view of the State as a necessary evil that can impose order but is limited in its protection of rights (similar to the rights regime enumerated in the text of the Constitution of the Irish Free

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<sup>49</sup> Hogan (n 24) 312 (emphasis added).

<sup>50</sup> Hogan et al (n 7) 1532.

<sup>51</sup> As Hogan J has noted, extrajudicially, ‘After all, why, for example, did the drafters deliberate at length over the choice of the word ‘vindicate’ in Article 40.3, even to the point of arranging for the definition of that word in the OED to be specially transcribed in an enlarged print font for Mr de Valera to consider?’ Gerard Hogan, ‘Harkening to the Tristan Chords’ (2017) 40 *DULJ* 71, 76.

<sup>52</sup> Ó Cinnéide (n 2) 181.

State), to a conception of the State with the potential to positively pursue stated rights objectives. This latter understanding is consistent with a State against which injunctions can be granted to positively vindicate rights. Further, this is consistent with the positive vindication of social rights such as the right to provision for free primary education enumerated in Article 42.4. It is consistent with a conception that views the State as a positive means of achieving the common good, and the common good is understood as requiring the conscious protection of rights; where the State is no longer understood to be a force in antagonism against rights protection, but rather as a vehicle by which the content of rights can be protected and vindicated. As Ó Cinnéide noted, this reflects:

the idea that constitutions should seek to steer the exercise of state policy towards the attainment of greater social justice - unlike the Anglo-American systems, the socio-economic sphere is not viewed as a constitutional no-go area.<sup>53</sup>

Notwithstanding this demonstrable focus within the text on creating a Constitution with a purposive social dimension, Ó Tuama was ultimately accurate that ‘Bunreacht na hÉireann made a fundamental move away from the British constitutional model to one where strong judicial review, similar to the *American Constitution*, could ultimately emerge.’<sup>54</sup> This is true because the social dimension highlighted here has not been engaged with by the judiciary and it is to the treatment of the Irish judiciary in the first wave that this chapter now turns.

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<sup>53</sup> Ibid 180.

<sup>54</sup> Séamus Ó Tuama, ‘Prospects for Constitutional Democracy in Ireland’, in Eoin Carolan (ed) *The Constitution of Ireland: Perspectives and Prospects* (Bloomsbury 2012) 453, 458. As Ó Cinnéide has written:

In general, the Irish courts have been allergic to the idea that the 1937 Constitution should be interpreted as having a social dimension. The ideology of liberal individualism has proved to be very potent in Irish constitutional interpretation, notwithstanding the gestures towards a more communitarian/’caregiving’ ethos set out in the text of provisions such as Articles 41 and 45.

Colm Ó Cinnéide, ‘Commentary on *MhicMhatúna v Attorney General*’ in Máiréad Enright, Julie McCandless, and Aoife O’Donoghue (eds) *Northern/Irish Feminist Judgments: Judges’ Troubles and the Gendered Politics of Identity* (Bloomsbury 2017) 137, 141 - 142.

### III: Judicial Rights Review 1937 - 1965: A Rights-Resistant Judicial Culture

Ireland's rights jurisprudence is divisible into four distinct periods or 'waves.'<sup>55</sup> The first wave was a period of general rights avoidance. The second and third waves, meanwhile were periods of intense engagement, and later considerable disengagement, with rights adjudication. They are the main focus of this Part of the doctorate and will be analysed in the next chapters before, in Chapter Eight, the fourth wave - corresponding to the period from 2013 to the present - is considered.

The first wave is considered here. Like under the Free State Constitution, a largely deferential (bordering on disinterested) attitude towards rights protection predominated within the judiciary for the first thirty years, punctuated by outlier cases which engaged with the implications of adjudicating under a master text with a bill of rights. As the composition of both bench and the bar were largely unchanged by the transition to a new constitutional order, prejudices arising from a legal practice which developed largely under the British legal system, unfamiliar with judicial rights review persisted into the first decades of the present Constitution.<sup>56</sup>

*Pigs Marketing Board v Donnelly*,<sup>57</sup> 'the first case in which a statute was challenged under the new Constitution,' illustrates the attitude of the early Court.<sup>58</sup> Asked to consider the meaning of the 'social justice' clause within the private property provisions of Article 43, Hanna J deferred, holding:

In a court of law it seems to me to be a nebulous phrase, involving no question of law for the Courts, but questions of ethics, morals,

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<sup>55</sup> As noted in the previous chapter, the concept of 'waves' of rights reasoning is imported from the analysis of the South African Constitutional Court by Stuart Wilson and Jackie Dugard. 'Constitutional Jurisprudence: The First and Second Waves' in Malcolm Langford, Ben Cousins, Jackie Dugard, Tshepo Madlingozi, (eds) *Socio-Economic Rights in South Africa: Symbols of Substance* (Cambridge University Press 2014) 35.

<sup>56</sup> MacCormaic noted of this era that: "the judges in the Four Courts in the 1950s [and the preceding decades] had been educated in that British tradition where Parliament was supreme and the judge's job was to ascertain the will of the politicians through their laws." Ruadhán MacCormaic, *The Supreme Court* (Penguin 2016) 71.

<sup>57</sup> *Pigs Marketing Board v Donnelly* [1939] IR 413.

<sup>58</sup> Hogan et al (n 7) 982.

economics and sociology, which are, in my opinion, beyond the determination of a Court of law, but which may [be], in their various aspects, within the consideration of the Oireachtas, as representing the people, when framing the law.<sup>59</sup>

This opinion was general amongst the courts in this period.<sup>60</sup> Incrementally however, the constitutional text would be engaged with by select senior judges, gradually introducing the judicial community to the potential of rights-based judicial review. These early significant cases related to disputes which likely would have offended the judiciary's understanding of their function within the legal system even under the British model. That said, the considerable development of Ireland's rights jurisprudence, and the position which the judiciary has fashioned for itself, within its self-defined conception of the separation of powers can be traced back to the impact of these early references to the rights provisions of the constitutional text.

My survey of the early years of rights-based adjudication under the Constitution will focus on the cases which advanced judicial engagement with rights. These cases did not of themselves create a culture of rights protection, whereby persons could authoritatively say what rights interests they could reasonably expect *as of right* to have secured against breach. Rather, they stand out because they deviated from the norm of judicial deference to the Oireachtas' understanding of the rights provisions reflected in the above quote from *Pigs Marketing Board*. Studying this period both illustrates how judicial familiarisation with the concept of rights informs the degree to rights protection that exists within common law systems; and reflects how the degree of rights protection shifts incrementally but perceptibly over time.

Amidst the generally disengaged rights jurisprudence of the period, several early cases stand out. The two most significant cases from the first thirty years

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<sup>59</sup> [1939] IR 413, 418.

<sup>60</sup> As Ó Drisceoil noted, 'the climate in which Irish lawyers and judges had been educated was heavily influenced by the 19<sup>th</sup> century British liberal tradition which viewed with derision the idea that rights could exist without law.' Macdara Ó Drisceoil, 'Catholicism and the Judiciary in Ireland, 1922 - 1960' (2019) 4(1) *JSIJ* 1, 13.



in regards rights protection are *The State (Burke) v Lennon*,<sup>61</sup> and *Buckley v Attorney General*, otherwise known as '*The Sinn Fein Funds Case*.'<sup>62</sup> Both cases were heard by Gavan Duffy J, a judge to whom, as Kelly remarked 'almost all the assertive interpretation of the Constitution in the first fifteen years after its enactment can be attributed.'<sup>63</sup>

### III(A): *The State (Burke) v Lennon*

*The State (Burke) v Lennon* was a challenge to the Offences Against the State Act 1939, which permitted internment without trial for any citizen whom the Minister for Justice was satisfied ought to be interned. In the High Court, Gavan Duffy J held that, in the absence of a requirement for the Minister to show *why* he was satisfied internment was necessary, his actions unconstitutionally breached the right to liberty contained in Article 40 of the Constitution.

This was the first ever declaration of unconstitutionality, an engagement with the judicial power to review rights breaches that had been absent before under both the 1937 and 1922 constitutions. As significant as this step into uncharted constitutional territory was in one sense, the right engaged in *Burke* - the right to *habeas corpus* relief - would be one of the few enumerated rights in the new Constitution with which the bench of the 1930s would have been familiar. It is among the most established rights under the common law.<sup>64</sup> Whilst groundbreaking, then, it did not then require radical ingenuity for Gavan Duffy J to apply the new *habeas corpus* provision contained in Article 40 of the Constitution.

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<sup>61</sup> *The State (Burke) v Lennon* [1940] IR 136.

<sup>62</sup> *Buckley v Attorney General* [1950] IR 67.

<sup>63</sup> JM Kelly *The Irish Constitution* (Jurist 1980) Preface. Along with Kennedy CJ, Gavan Duffy J proved an exception to the general lack of judicial engagement with the potential of Constitutional law during the early years of the State. John Kelly described Gavan Duffy P's judgments related to Article 44 as displaying 'unique adventurousness.' Ó Drisceoil (n 60) 18; see also Thomas Connolly, 'A Supplementary Assessment of the Late Mr Justice George Gavan Duffy as Advocate and Judge' (1976) 70(8) *GILSI* 177.

<sup>64</sup> As Hanna J noted in the Free State case of *Attorney General v McBride*, the Free State's *habeas corpus* protection was 'inherited as the heirs of the ages of the common law. *Attorney General v McBride* [1928] IR 451 454. See also Michael Forde and David Leonard, *Constitutional Law of Ireland* (3<sup>rd</sup> edn. Bloomsbury Professional 2013) 15.25, quoting David Clark and Gerard McCoy *The Most Fundamental Legal Right: Habeas Corpus in the Commonwealth* (OUP 2000) 38; AV Dicey, *An Introduction to the Study of the Law of the Constitution* (Macmillan 1959) 220.

Of most significance is that Gavan Duffy J grounded the habeas corpus entitlement in the text of the Constitution, affirming:

In my opinion, the right to personal liberty and the other principles which we are accustomed to summarise as the rule of law were most deliberately enshrined in a national Constitution, drawn up with the utmost care for a free people, and the power to intern on suspicion or without trial is fundamentally inconsistent with the rule of law *and with the rule of law as expressed in the terms of the Constitution.*<sup>65</sup>

The same finding could have feasibly been made solely on common law principles, yet Gavan Duffy J elected to ground his finding in an expansive statement of the judicial power to protect constitutional rights, continuing “The Constitution [...] is the Charter of the Irish People and I will not whittle it away.”<sup>66</sup> With this, for the first time in Ireland judicial review protected the rights of a citizen against legislative incursion, paving a way for a culture of judicial rights review to ultimately develop.<sup>67</sup>

### III(B): *Buckley v Attorney General*

*Buckley* is the most significant constitutional law case of the first wave.<sup>68</sup> Hogan has argued, ‘in many ways, contemporary constitutional law may be said to have begun with this judgment.’<sup>69</sup> In a reflection of the general rights-avoidant

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<sup>65</sup> [1940] IR 136, 155 - 157 (emphasis added).

<sup>66</sup> [1940] IR 136, 155.

<sup>67</sup> To pre-empt a second finding of unconstitutionality, the following year a redrafted form of the impugned Act was submitted by President Hyde for pre-enactment judicial review to the Supreme Court per Article 26 of the Constitution. Affirming the constitutionality of this Bill, the Supreme Court in *their* first case of rights adjudication expressed a deference to the legislature in regards rights protection which is more reflective of the general disposition of the senior bench to the fundamental rights provisions. The Court held:

[t]he duty of determining the extent to which the rights of any particular citizen, or any class of citizens, can properly be harmonised with the rights of citizens as a whole seems to us to be a matter which is peculiarly within the province of the Oireachtas, and any attempt by this Court to control the Oireachtas in the exercise of its function would, in our opinion, be a usurpation of its authority.’

*Re Article 26 and the Offences Against the State (Amendment) Bill 1940* [1940] IR 470, 481.

<sup>68</sup> [1950] IR 67.

<sup>69</sup> Gerard Hogan, “The *Sinn Féin Funds* Judgment Fifty Years On,” (1997) 92(8) *Bar Review* 375.

attitude of the courts in this era, this judgment came a whole seven years after *Burke*.<sup>70</sup>

*Buckley* arose from a dispute over a fund set up by Sinn Féin prior to the Fianna Fáil split. Margaret Buckley, President of Sinn Féin, was litigating to secure control of the funds for Sinn Féin. This alarmed the Fianna Fáil government. Consequently, Fianna Fáil introduced the Sinn Féin Funds Act 1947, which expropriated the funds to the State, thereby removing Buckley's cause of action and throwing the case out of court.

Gavan Duffy J in the High Court roundly rejected the power of the Oireachtas to interfere in the administration of justice by negating an ongoing cause of action. The responsibility for ensuring the administration of justice was, he held, assigned to the judiciary under Article 34.1. As with *Burke*, whilst the Court asserting a power to strike down an Act of the Oireachtas may seem a radical move for a bench steeped in the British legal tradition, the judgment becomes more explicable, but no less significant, when contextualised. Even under the pre-independence regime of parliamentary supremacy, this Act would have been suspect. If anything is a necessary element of the function of the judiciary, or the administration of justice, it is the ability to hear cases brought before the Court in accordance with law.<sup>71</sup>

It was due predominantly to this incursion by the elected branch into the judicial realm, and less so the property rights issue, that the State lost at the High Court.

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<sup>70</sup> The year prior to *Buckley*, in *National Union of Railwaymen v Sullivan NUR* an Act of the Oireachtas was declared unconstitutional for the first time, and for the second time, after the *School Attendance Bill* reference discussed later, that an Irish Court grounded a declaration of unconstitutionality in a right not protected prior to independence, in this case the right to associate protected by Article 40.6.1 (iii) of the Constitution. This judgment however would be eclipsed in significance by *Buckley* and so is not considered in depth here. For a discussion of the case and the political backdrop of favouring Irish over British based unions which may explain the atypical reasoning of the Court in this case, see Donal K Coffey, 'The union makes us strong,' *National Union of Railwayman v Sullivan* and the demise of vocationalism in Ireland,' in Laura Cahillane, James Gallen, and Tom Hickey (eds) *Judges, Politics, and the Irish Constitution* (Manchester 2017) 182.

<sup>71</sup> Per Gavan Duffy J 'this application [...] raises a constitutional issue of transcendent importance, because the applicant challenges directly the primacy of the law in the legal domain.' [1950] IR 67, 69.

On appeal, the Supreme Court strongly endorsed the power of the judiciary to assess the legislature's limitation of property rights to ensure it was in accordance with the principles of social justice and with regard to the exigencies of the common good per Article 43. The Court held:

If it were intended to remove this matter entirely from the cognisance of the Courts, we are of the opinion that it would have been done in the express terms as it was done in Article 45 [the Directive Principles].<sup>72</sup>

The bench here thus expressed an expanded conception of their role from its prior deferential approach in regards constitutional rights protection. As noteworthy as these aspects of the decision were, however, the case remained rooted in its resolution in the foundational attack on the power of the judicial branch to hear cases. To have upheld the constitutionality of the Sinn Féin Funds Act would have been to accept a limitation of the judicial power to a degree arguably greater than the limited power the Courts possessed under the British legal system. While noting its significance, then, it thus seems hard to imagine an alternative finding to the declaration of unconstitutionality. Nevertheless, as Keane CJ noted of *Buckley* extrajudicially, 'given that all of the judgments came from the same conservative generation, the decision must undoubtedly have come as a severe jolt to politicians who were not accustomed to taking the Constitution seriously into account.'<sup>73</sup>

These cases are mentioned as exceptions, not the norms. The attitude towards the rights provisions remained that of O'Sullivan, who in 1940 wrote:

Large sections of the new Constitution consist of declarations of a homiletic character, concerning personal rights, the family, education, private property, religion, and Directive Principles of Social Policy. Many

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<sup>72</sup> [1950] IR 67, 83. This endorsement is made without reference to the aforementioned Article 26 application concerning the Offences Against the State (Amendment) Bill 1940. Indeed, as Keane notices "there is not a reference to a single authority in either of the High Court or the Supreme Court judgments," Ronan Keane, 'Across the Cherokee Frontier of Irish Constitutional Jurisprudence: *The Sinn Fein Funds Case: Buckley v Attorney General*.' In Eoin O'Dell (ed) *Leading Cases of the Twentieth Century* (Round Hall 2000) 185.

<sup>73</sup> *Ibid* 195.

of these are so vague that they could not possibly be pleaded in court, and it is difficult to see what purpose they serve in such a document.<sup>74</sup>

Unfamiliar with rights, and suspicious of them, the court generally did not concern itself with rights adjudication. As a consequence, for practical purposes the guarantee of rights protection under the Constitution was not realised, as litigants with rights claims could not reasonably anticipate the Courts would act to cure their rights breach. Whilst *Buckley* showed the possibilities latent within the new constitutional order for judicial experimentation in rights protection, after *Buckley*, as MacCormaic observed, ‘between 1947 and 1958 there was little novel constitutional law to enliven the Supreme Court, and no major decision striking down legislation.’<sup>75</sup>

Given the dominance of a rights-avoidant judicial culture, that outlier judges such as Gavan Duffy J utilised the text of the Constitution itself merits explanation. Gavan Duffy J had an early and (for the time) idiosyncratic interest in judicial review.<sup>76</sup> As his son noted, ‘from the beginning of 1937, despite the fact he was a judge, de Valera consulted him at every stage of the preparation of the Constitution [...] As the judge was one of the draftsmen of the Constitution of 1937, he naturally took a special interest in cases where the Constitution had to be construed.’<sup>77</sup> Indeed, in *Burke*, Gavan Duffy J was specifically chosen by counsel for *Burke* to hear the case alone *because* of his (evidently earned) reputation for being tolerant of rights claims.<sup>78</sup>

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<sup>74</sup> Donal O’Sullivan *The Irish Free State and its Senate: A Study in Contemporary Politics* (Faber and Faber 1940) 495.

<sup>75</sup> MacCormaic (n 56) 68. Indeed, only two declarations of unconstitutionality were issued in this period, in *Re Tilson* [1951] IR 1, and *State (Doyle) v Minister for Education* [1989] ILRM 276. For a study of declarations of unconstitutionality over time, see Gerard Hogan, David Kenny, and Rachael Walsh ‘An Anthology of Declarations of Unconstitutionality,’ (2015) 54 *Irish Jurist* 1.

<sup>76</sup> Hogan noted how ‘he was one of the first members of the bar to recognise the possibility of judicial review offered by the 1922 Constitution.’ Gerard Hogan, ‘George Gavan Duffy’ in *The Cambridge Dictionary of Irish Biography* (RIA 2009). As John Kelly would remark after his death, ‘Judge Gavan Duffy was one of the greatest judges the State has seen. I believe that, were it not for him, the whole system of judicial review of the legislation might never have got off the ground.’ 311 *Dáil Debates* 1109 - 1111.

<sup>77</sup> Colum Gavan Duffy, ‘George Gavan Duffy’ (2002) 2(2) *JSIJ* 1, 16 - 18. As Thomas Connolly S.C. wrote of Gavan Duffy J. ‘The widespread recognition of human rights [was] always a first priority in his mind [...] As a lawyer he was ahead of his time and was always inspired by paramount legal principles.’ Connolly (n 9).

<sup>78</sup> As Hogan wrote

Where judges such as Gavan Duffy J found unconstitutionality in this era, it usually arose either from breaches of orthodox judicial functions, such as hearing cases brought before the Court, or declaring upon the legality of a detention. Understood in the context, these decisions - whilst integral to the development of rights protection - appear more consonant with a judicial community still inexperienced in adjudication under a written Constitution with entrenched rights.

#### IV: The Remedial Power 1937 - 1965: First Uses of the Remedial Power

Alongside the internalisation of an understanding that the Court rightfully has a role in rights adjudication, for social rights protection to develop it is also required that the judicial community accepts the propriety of issuing orders with resource implications against the State. As noted in *Kelly*:

Neither the Constitution itself nor any other law prescribes a particular procedure as appropriate for remedying a breach of constitutional rights, just as no special procedure is laid down for challenging the constitutionality of statutes.<sup>79</sup>

The limits of the Court's remedial powers are thus defined, to a considerable degree, by the Court themselves. Developing a recognition within a common law judicial culture that orders of compulsion, or positive remedies, can be issued to fulfil rights commitments involves a further step away from the judicial deference of orthodox common law constitutionalism. Whilst the Court's attitude to rights adjudication has changed considerably since the coming into force of the Constitution, the judiciary's remedial innovations have not matched their conceptual innovations. Orders of compulsion have not developed in Irish law. For this reason, social rights protection has not either.

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It is worth pausing to inquire why Burke's legal team took the stance which they did: it can only be because they believed that Gavan Duffy was likely to be outvoted by both Maguire and O'Byrne, and that the best prospect of securing the release of their client was to make the application before Gavan Duffy sitting alone.

Hogan (n 24) 673.

<sup>79</sup> Hogan et al (n 7) 1532.

As aforementioned, the rights provisions were scarcely engaged with in the first decades of the constitutional order. Consistent with this, the Court's conception of its remedial function in rights cases was also relatively under-developed. However, the first wave did see the first uses of a declaration of unconstitutionality: against first a ministerial decision,<sup>80</sup> then British legislation still on the statute books,<sup>81</sup> then a Bill,<sup>82</sup> and ultimately against an Act passed by the Oireachtas.<sup>83</sup> With *Burke*, the declaration of unconstitutionality led to fifty-four internees being released, because 'as a result of the decision the government felt obliged to release all IRA prisoners currently in detention.'<sup>84</sup> Here, for the first time in Ireland, a rights-bearer was able to bring a claim - to an entitlement *as of right* to be detained only in accordance with law - which brought about a curing of the rights breach. While this decision, in its context, was less of an unprecedented judicial advance than may initially appear, this still demonstrated the capacity for rights to be remedied by the Courts. The impact of this case on all later rights jurisprudence therefore is considerable.

As significant as this pioneering of the power to strike down laws as unconstitutional was, the Government's response was equally important. 'Justice Gavan Duffy's judgment in the High Court in *Burke* [...] provoked a major constitutional crisis.'<sup>85</sup> De Valera stated, 'the Government, and all those interested in the passing of the Constitution were taken by surprise when they found that an Act which was passed by the Oireachtas last year was held to be unconstitutional.'<sup>86</sup> Nevertheless, the finding was accepted, and the prisoners were freed.<sup>87</sup> Notwithstanding that this case was tried during the three-year transitional period in which the Oireachtas could pass constitutional

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<sup>80</sup> *The State (Burke) v Lennon* [1940] IR 136.

<sup>81</sup> *Re Loftus Bryan's Estate; Bryan v Irish Land Commission* [1942] IR 185.

<sup>82</sup> *Re Article 26 and the School Attendance Bill 1942* [1943] IR 334.

<sup>83</sup> *National Union of Railwaymen v Sullivan* [1947] IR 77; *Buckley v Attorney General* [1950] IR 67.

<sup>84</sup> 'Some time later, on Christmas Eve, an attempt was made [by the released prisoners] to seize ammunition from the Magazine Fort Phoenix Park.' Gavan Duffy (n 78) 16.

<sup>85</sup> Hogan (n 24) 670.

<sup>86</sup> Quoted in MacCormaic (n 56) 55.

<sup>87</sup> However, the Offences Against the State Act 1940 essentially reversed the decision, albeit did not cause the automatic reinternment of the released men. See Gerard Hogan, 'The Supreme Court and the Reference of the Offences Against the State (Amendment) Bill 1940 (2000) 35 *Ir Jur* 238.

amendments through ordinary legislation, the Government avoided this impulse it had so frequently given into under the prior Constitution.<sup>88</sup>

The noteworthiness of these engagements derives from the fact they were against a backdrop of conservatism amongst the judiciary. It would be during the second wave that judicial enthusiasm for rights adjudication would become mainstream. However, whilst the basket of rights protected by the Irish constitutional order would expand during the second wave, the remedial breadth of the Court's powers to protect rights would remain largely unchanged from the formatting in *Burke* of negatively constraining State action.

## V: Social Rights Protection 1937 - 1965: No Social Rights Protection

Given the previous discussions of the judicial avoidance of rights adjudication during the first decades of the current constitutional order, it is unsurprising that social rights were not considered by the Court in this time. An engagement with the canon of civil rights, such as to free expression or religious freedom, could naturally be expected to precede any substantive consideration of rights such as to provision for free primary education which had less premium within common law constitutionalism at the time.

One fringe exception in this period was the unusual case of *Re Article 26 and the School Attendance Bill 1942*.<sup>89</sup> This case considered the constitutionality of legislation that would create an offence where parents failed or neglected to cause their children to attend school without prescribed excuse.<sup>90</sup> Whilst home schooling was a prescribed excuse, the *content* of the home education would have to be certified by the Ministry as suitable. This, the Court held, was an overbroad Ministerial power, encroaching on the rights of the family to determine the educational programme of their children.

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<sup>88</sup> The Second Amendment to the Constitution, passed during the transitional period, did respond to the finding in *Burke* that applicants could select their judges in *habeas corpus* applications, however it did not reverse the finding that the Court could declare legislation unconstitutional. See *ibid*.

<sup>89</sup> *Re Article 26 and the School Attendance Bill 1942* [1943] IR 334.

<sup>90</sup> [1943] IR 334, 339.



Article 42.3.2° stipulates the State shall, ‘as guardian of the common good, require in view of actual conditions that the children receive a certain minimum education, moral, intellectual, and social.’ In the absence of clarity as to what ‘a certain minimum education’ may entail, the Court advocated deference to the Oireachtas’ interpretation of this clause.<sup>91</sup> Here again, the Court left to the Oireachtas the determination of what the rights provisions of the Constitution entailed.

However, the Court then proceeded to declare the School Attendance Bill unconstitutional. ‘The State is free to act,’ the Court held, ‘so long as it does not require more than a ‘certain minimum education,’<sup>92</sup> This indicates a ‘minimum standard of elementary education of general application.’<sup>93</sup> As a Minister ‘*might* require a higher standard of education than could properly be described as a minimum standard under Article 42.3.2° of the Constitution’, and:

as the standard contemplated by the section might vary from child to child and, accordingly, that is not a standard of general application as the Constitution contemplates [...] the proposed legislation exceeds the limits permitted by the Constitution and thus is repugnant to it.<sup>94</sup>

In this case then, the Court found that, as the State was seeking to ensure *too much* primary education to children, it had breached the right of parents to play the primary role in determining the education of their children.

This is the only engagement with a social right in this period, and the peculiarity of the judgment may be partially due to the historical context in which it arose. As Arthur O’Rahilly reported, ‘one of the purposes of the School Attendance Bill was to enable the Minister to prevent parents from sending their children to schools in England.’<sup>95</sup> Nevertheless, in a rare exercise of the power to

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<sup>91</sup> ‘What is referred to as a ‘certain minimum education’ has not been defined by the Constitution. Accordingly, we are of the opinion that the State, acting in its legislative capacity through the Oireachtas has the power to define it.’ [1943] IR 334, 345.

<sup>92</sup> [1943] IR 334, 345.

<sup>93</sup> [1943] IR 334, 345.

<sup>94</sup> [1943] IR 334, 345. (emphasis added).

<sup>95</sup> Arthur O’Rahilly, *The Constitutional Position of Education in Ireland* (Cork University Press 1952) 9.

declare legislation unconstitutional in this period, the Court struck the Bill down due to it having an outsized expectation of the education of children.

As well as the *School Education Bill* reference, during the first wave, a subtle but pervasive convention developed within constitutional adjudication which would have downstream implications for the viability of social rights protection in Ireland. In this period, the Preamble was recognised as a resource that could be used to interpret the Constitution, and coincidentally the ability of the more communitarian Directive Principles of Social Policy to be similarly used was rejected. This trend has persisted ever since. Most evocatively, Murphy J has noted ‘the innumerable occasions in which the Preamble to the Constitution has been invoked [...] to ‘fill the gaps’ in the Constitution.’<sup>96</sup>

From the very first rights case, the values evoked in the Preamble were cited to support the judicial power to declare an unconstitutionality.<sup>97</sup> In *Buckley v Attorney General*, the Court’s reliance upon the Preamble developed from viewing it as authorising constitutional adjudication, to viewing it as an interpretative device for clarifying the content of the fundamental rights provisions, with the Supreme Court holding that: ‘[The Preamble’s] most laudable objects seem to us to inform the various Articles of the Constitution, and we are of the opinion that, so far as possible, the Constitution should be so construed as to give them life and reality.’<sup>98</sup>

This, the Court held, required it to both make an authoritative assessment as to what the common good requires, and ultimately also to strike down the Act as offending the guarantee of private property in Article 43. By this, the Court successfully arrogated to themselves the authoritative role as guardian and interpreter of the fundamental rights provisions of the Constitution.

Whereas the Preamble is *impliedly* non-justiciable (that is, there is no indication it was drafted with any expectation it would be judicially cognisable) the Directive Principles of Social Policy are preceded by a clause *explicitly*

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<sup>96</sup> *Lawlor v Minister for Agriculture* 1 IR 356, 375 - 376. (emphasis added)

<sup>97</sup> ‘The Constitution, with its most impressive Preamble, is the Charter of the Irish People and I will not whittle it away.’ [1940] IR 136, 155. The Preamble was also invoked in the follow-up judgment in *Re Article 26 and the Offences Against the State Bill 1940* [1940] IR 470.

<sup>98</sup> [1950] IR 67, 80.

precluding their cognisance by the courts in any case concerning the application of those principles in the making of laws by the Oireachtas. In the beginning, citing this clause, the courts totally excluded Article 45 from its consideration. Indeed, in *Buckley v Attorney General*, where the Preamble was relied upon to inform the Court's decision, Article 45 was referred to as an example of a provision which the Court can have no cognisance of it all.<sup>99</sup> That same year, in *Comyn v Attorney General*, Kingsmill Moore J held that the non-cognisance clause meant Article 45's duties 'cannot be enforced *or regarded* by any court of law.'<sup>100</sup>

From these cases, a conventional understanding emerged, which is traced throughout the Court's jurisprudence, that the Preamble informs rights adjudication, but the Directive Principles does not. This is so notwithstanding that the Directive Principles provide a more expansive indication of what indeterminate terms such as 'the common good' meant to convey than does the Preamble. As the Directive Principles contains the most extensive discussion within the Constitution of its social dimension, this reading out of the Directive Principles of Social Policy from the cognisable constitution significantly diminished the potential for the social dimension of the Constitution to inform rights protection.

Why was the Preamble elevated and the Directive Principles relegated in this period? An unavoidable factor is that the Directive Principles are preceded by a clause that the application of the principles 'shall not be cognisable by any Court under any of the provisions of this Constitution.'<sup>101</sup> While there is nothing to suggest the Preamble was meant to be cognisable by the Courts, it was not thereby precluded. This likely informed the Court's reading of the Constitution, and what aspects of it, it could consider when adjudicating.

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<sup>99</sup> 'If it were intended to remove this matter entirely from the cognisance of the Courts, we are of opinion that it would have been done in express terms as it was done in Art. 45 with reference to the directive principles of social policy, which are inserted for the guidance of the Oireachtas, and are expressly removed from the cognisance of the Courts.' [1950] IR 67, 83.

<sup>100</sup> *Comyn v Attorney General* [1950] 1 IR 142, 160.

<sup>101</sup> Article 45 of the Constitution of Ireland 1937.

However, I argue this is only part of the explanation. The reason this distinction became relevant is because, in the judgments mentioned - *Burke*, *Buckley*, and the cases considered later - the Court wished to expand their judicial power and reached for a rhetorical legitimator for this action, and found, in the indeterminate text of the Preamble, a useful resource. To the judiciary, the indeterminacies of the Preamble's text allowed greater license for them to interpret it in a fashion that suited their interests, which in this period was to enable them to innovate judicial review of (some) enumerated rights. The more prescriptive text of the Directive Principles could also have been relied upon to justify judicial innovation.<sup>102</sup> If this had been the case, the nature of the judicial innovation would have been different. In particular, greater remedial interventionism to protect the interests of the vulnerable would potentially have been conceivable: a prospect which did not conform with the judiciary's understanding of their function, then or indeed now.

## VI: Conclusion

Cahillane was correct that, in the Free State, 'the judiciary needed the security of an entrenched constitution before more use could be made of the judicial review provision' and thereby also of the rights provisions.<sup>103</sup> However, when the variable of an unentrenched Constitution is removed, while a judiciary undisposed to rights adjudication is maintained, rights protection will remain ineffective, if not virtually non-existent. In this, under the rights regime established under the present Constitution, drafted to be less susceptible to

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<sup>102</sup> The social rights jurisprudence of India is informative in this regard, as Thiruvengadam noted:

The Indian Supreme Court initially adopted the approach that the words in Article 37 that rendered the Directive Principles unenforceable were to be interpreted to mean that they were inferior in constitutional status to Fundamental Rights. [...] it was not until the decision in *Minerva Mills v Union of India* the Supreme Court acknowledged that both Directive Principles and Fundamental Rights were of equal status in the Indian constitutional scheme, and are to be harmoniously construed. Until this issue was resolved, Indian courts could not actively seek to implement the Directive Principles. After the pronouncement in the *Minerva Mills* case, the Indian judiciary felt more confident in addressing social rights issues and tackled a raft of such cases across the 1980s.

Arun K Thiruvengadam, *The Constitution of India: A Contextual Analysis* (Bloomsbury 2017) 128 - 129; Gautam Bhatia, 'Directive Principles of State Policy' in Sujit Choudhry, Madhav Khosla and Pratap Bhanu Mehta (eds) *The Oxford Handbook of the Indian Constitution* (OUP 2017).

<sup>103</sup> Cahillane (n 10) 168.

legislative overreach, judicial unwillingness to engage with the fundamental rights provisions, at least in the first thirty years, led to the continuation of a negligible rights jurisprudence.

In this chapter, I described Ireland's two constitutions, and showed the general reticence of the Irish judiciary during the first half of the 20<sup>th</sup> Century rights adjudication. As Hamilton CJ wrote extrajudicially:

The first generation of Irish judges had spent their working lives in a pure common law environment, where Parliament reigned supreme. Old habits die hard, and it is not surprising if a certain wariness and timidity coloured judgments in the first few decades of the constitutional era.<sup>104</sup>

This continued timidity and disengagement reinforces the thesis that it is the attitudes of the judicial branch towards rights which mostly delimit the content of rights and their practical enforceability within common law jurisdictions.

The noteworthy rights adjudication discussed in this Chapter did not consider the constitutional order, or interrogate what values underpinned it, in any substantive way. They did not consider the social dimension to the Constitution. What the adjudication *did* do however was enable the judiciary to pronounce authoritatively on rights. This authority is demonstrated by the Oireachtas' respect for the orders given by the Courts in these initial cases. As the next chapters show, in the succeeding half century, the Court would transform their role as rights protectors in considerable part due to the significant early judgments discussed here. Thus, tentatively, against a general culture of disinterest in the rights provisions of the Constitution, a body of case law was being developed during the first wave which considered rights seriously as legal claims. As will be seen next, from this foundation grew a robust regime of rights can protection.

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<sup>104</sup> Liam Hamilton, 'Matters of Life and Death' (1996) 65 *Fordham Law Review* 543, 544.

## Chapter Four: The Development of Judicial Rights

### Review in Ireland 1965 - 1995

The last chapter discussed the text of the Constitution and the first wave of judicial rights engagement. I argued the largely deferential attitude towards rights protection resulted from the predominance of judges immersed within the preceding British model of parliamentary sovereignty and rights scepticism, interspersed with idiosyncratic judges such as Gavan Duffy J, who were willing to engage with the new Constitution.

In this chapter, I discuss the development of judicial rights review during the second-wave. In the mid-1960s, a profound shift in judicial attitude towards rights occurred, with judicial willingness to engage in rights reasoning expanding to the point that the judiciary felt able to assert that hitherto-unknown rights were also latent within the Constitution and capable of discernment. In this period, a regime of effective rights protection developed for the first time in Ireland as discrete rights interests became claimable, in an expectation that they would have the breaches cured or be compensated for the breach.

By tracking the waves of judicial attitudes towards rights review in Ireland, two crucial observations can be made. First, by plotting the shifts within the Court's rights reasoning alongside changes in cultural influences upon the Court, the contingency of rights protection upon judicial culture is shown. *How* judicial rights review emerged, as well as how the scale of protection afforded by such rights review changes over time is shown as conditional upon cultural factors. This observation supports my thesis that, while effective social rights protection has not yet developed in Ireland, judicial cultural attitudes towards social rights adjudication are the predominant impediment to this. Thus, as culture is dynamic, through changing influences upon that culture, this unwillingness to engage with social rights may change too.

Second, as a willingness to engage in judicial rights review is a prerequisite to creating a regime of effective social rights protection, by studying the waves of judicial attitudes in this area, those cultural commitments that induce this

prerequisite emergence to come about will be clarified. By understanding how this happened in Ireland, lessons can be learned about how social rights protection may develop in other common law systems.

## I: The Second Wave 1965 - 1995: A Rights-Engaged Judicial Culture

In 1965, the Canadian academic Edward McWhinney commented of the Irish Courts:

The Supreme Court's work to date [1965] has been rather less daring and innovatory than might have been expected, granted the break with the past represented by the Constitution of 1937 and especially the novel character and comprehensive provisions of the Bill of Rights.<sup>1</sup>

In that year alone, however, three cases from the Supreme Court would signal the beginning of a new and innovatory outlook from the bench. In the thirty-years covered in this section, the role of the judiciary within the separation of powers was transformed. This was a largely judicially-driven exercise, albeit with vital encouragement from the Government. In this period, rights enumerated within the text and rights the Court asserted were latent within the constitutional order, were substantively considered by the Court for the first time.

Also in this period, the judiciary effectively read out the social constitutionalist aspects of the text and construed the Catholic elements in a manner compatible with a rights regime which only imposes negative rights obligations on the State. In so doing, notwithstanding the social objectives which the constitutional order was drafted to pursue, the viability of issuing positive obligations, and as a result, developing social rights protection, was foreclosed.

After reviewing the key cases from this period, factors relating to judicial culture, the composition of the bench and the prior experiences of its members, will be presented as an explanation for why the judiciary in this

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<sup>1</sup> Edward McWhinney *Judicial Review in the English-Speaking World* (3<sup>rd</sup> edn. Toronto University Press 1965) 158.

period became such a confident and rights-conscious entity, despite its past ambivalence towards rights. The direction in which the Courts developed Ireland's rights adjudication - that is, towards a negative rights-based approach - will also be contextualised. By this, the thesis that rights protection is directly contingent upon judicial culture and preferences latent within the members of the judiciary will be furthered.

### I(A): *The State (Quinn) v Ryan*

*The State (Quinn) v Ryan* provided the first indicator of a new interest amongst the bench for rights adjudication.<sup>2</sup> *Quinn* was a habeas corpus challenge to the Gardaí spiriting Quinn from Ireland to Northern Ireland 'where on no view of the law he was authorised to be sent.'<sup>3</sup> This action was taken with such haste that Quinn's lawyers had no opportunity to question its legality and, as Quinn was outside the jurisdiction, the Court was unable to vindicate his Article 40.4.1° right to personal liberty. The Court found the Gardaí in contempt of Court for this intentional violation of the rights of the prosecutor; and declared unconstitutional the colonial statute on which the Gardaí had relied.<sup>4</sup>

Removing a prisoner from the jurisdiction before they were able to challenge their extradition was an act in such clear disregard for due process that likely a less activist bench would have found it unconstitutional. However, what makes *Quinn* significant is Ó Dálaigh CJ's commentary on the nature of the Constitution's rights guarantees:

[I]t was not the intention of the Constitution in guaranteeing fundamental rights of the citizen that these rights should be set at naught or circumvented. The intention was that rights of substance were to be assured to the individual and that the Courts were custodians of these rights. As a necessary corollary, it follows that no one can with impunity set these rights at naught or circumvent them, and that the Court's powers in this regard *are as ample as the Constitution requires*.<sup>5</sup>

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<sup>2</sup> *The State (Quinn) v Ryan* [1965] IR 70 [hereinafter '*Quinn*'].

<sup>3</sup> [1965] IR 70, 117.

<sup>4</sup> Petty Sessions (Ireland) Act 1851.

<sup>5</sup> [1965] IR 70, 122. (emphasis added).



Whilst the Court had already asserted its role as adjudicator of fundamental rights disputes in *Buckley*,<sup>6</sup> in *Quinn*, and without reference to *Buckley*, Ó Dálaigh CJ asserted the role of the Courts not just as ‘custodians’ of the rights, but as empowered to do whatever is necessary in custodianship of those rights. If at the time of its pronouncement, this statement appeared an overstatement of how the judiciary saw its constitutional role, it became clear later that year how willing the Court was to arrogate to itself a new role as defender of fundamental rights, enumerated or unenumerated.

### I(B): *The People (Attorney General) v O’Brien*

Akin to *Quinn*, *The People (Attorney General) v O’Brien* showed the changing attitude of the bench towards rights in this hinge period of the middle 1960s.<sup>7</sup> *O’Brien* concerns the admissibility of evidence in criminal proceedings, and the inviolability of the dwelling per Article 40.5 of the Constitution. In the concurring judgment of Walsh J, with whom Ó Dálaigh CJ agreed, held that, ‘the vindication and the protection of constitutional rights is a fundamental matter for all Courts established under the Constitution. That duty cannot yield place to any other competing interest.’<sup>8</sup> Continuing, Walsh J held, ‘the defence and vindication of the constitutional rights of the citizen is a duty superior to that of trying such citizen for a criminal offence. The Courts in exercising the judicial powers of government of the State must recognise the paramount position of constitutional rights.’<sup>9</sup>

This reasoning, with which Kingsmill Moore J for the majority stated his concurrence in principle,<sup>10</sup> similar to *Quinn* elevates the importance of fundamental rights protection to a position of paramountcy. Even an area which heretofore was the preserve of the Executive - the prosecution of crimes - must, per Walsh J, be conducted in a manner compliant with fundamental

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<sup>6</sup> *Buckley v Attorney General* [1950] IR 67, 83.

<sup>7</sup> *The People (Attorney General) v O’Brien* [1965] IR 142 [hereinafter ‘*O’Brien*’] Indeed, the dictum of the majority in *O’Brien* would later be subject to two substantive revisions by the Court in interceding years. *The People (DPP) v Kenny* [1990] 2 IR 110; *The People (DPP) v JC* [2015] IESC 31.

<sup>8</sup> [1965] IR 170.

<sup>9</sup> [1965] IR 170.

<sup>10</sup> [1965] IR 142, 162.

rights *as they were understood by the Courts*. Notwithstanding that Walsh J's dictum was not the ratio of the case, his concurring judgment would prove to have a greater impact upon rights adjudication than that of Kingsmill Moore J and, by 1990, would become the dominant position of the Court.<sup>11</sup>

*O'Brien* is significant as, during the thirty year period under review, the judgment of Walsh J signalling a strong protection for the rights of the accused went from being a minority view to one assented to by the Court.<sup>12</sup> Second, it provides an early example of a form of rights-consciousness which would later reach dominance in constitutional law generally, not just in regards the rights of the accused. Indeed, the paramountcy of rights protection held by Walsh J would be found, later that year, to extend to rights hitherto not known to be protected by the Constitution.

### I(C): *Ryan v Attorney General*

*Quinn* and *O'Brien* provided signs of a new resolve among the bench to adjudicate rights disputes, but *Ryan v Attorney General* was the inflection point after which the Court became emphatically engaged in rights adjudication.<sup>13</sup> In their reasoning, the Court laid the groundwork for a body of rights jurisprudence which relied more upon judicial interpretations of the values latent within the Constitution than the text of the Constitution itself.

*Ryan* concerned a challenge to the Health (Fluoridation of Water Supplies) Act 1960, on the ground it infringed the personal rights under Article 40.3; family rights under Article 41; and the right of parents to educate their children under Article 42. *Ryan* lost her case on all counts. It is the Article 40.3 claim which merits further discussion. Article 40.3.1<sup>o</sup> states that: 'the State guarantees in its laws to respect, and, as far as practicable, by its laws to defend and

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<sup>11</sup> [1990] 2 IR 110; see however [2015] IESC 31.

<sup>12</sup> While ultimately, the firmness of this resolution to place fundamental rights protection necessarily ahead of preserving public safety and crime prevention would eventually give way, twenty-five years after *Kenny*, in *DPP v JC* [2015] IESC 31 the fact that such a strict rule against unconstitutionally obtained evidence - described by O'Donnell J as, 'a near absolute exclusion which is the most extreme position adopted in the common law world' - could become settled law is indicative itself of the extent to which the Court became willing to protect fundamental rights. [2015] IESC 31 [95]

<sup>13</sup> *Ryan v Attorney General* [1965] IR 294 [hereinafter '*Ryan*'].

vindicate the personal rights of the citizen. Article 40.3.2° continues that, ‘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.’

In the High Court, Kenny J contended that the ‘general guarantee’ of Article 40.3.1° ‘relates not only to the personal rights specified in Article 40 but to those specified personal rights *and* other personal rights of the citizen which have to be formulated and defined by the High Court.’<sup>14</sup> The textual legitimation for this contention was the clause in Article 40.3.2° that the rights therein stated were ‘in particular’ protected. To Kenny J, given that these ‘in particular’ personal rights were not specified in 40.3.1°, conceivably there must be other unexpressed personal rights which the Constitution also protects.<sup>15</sup>

These other personal rights, Kenny J held, ‘include all those rights which result from the Christian and democratic nature of the State.’<sup>16</sup> This, he held, included the right to bodily integrity. He reached this conclusion with reference to the 1963 Papal encyclical *Pacem in Terris*, declaring ‘every man has the right to life, to bodily integrity and to the means which are necessary and suitable for the proper development of life; there are primarily, food, clothing, shelter, rest, medical care, and finally the necessary social services’.<sup>17</sup>

To Kenny J, the judiciary have the power to find new rights because, while ‘in modern times [it] would seem to be a function of the legislature rather than the judicial power,’ this power was nevertheless ‘one used by the Courts in the formative period of the common law and there is no reason why they should not do it now.’<sup>18</sup> This claim that the Court could pronounce that unenumerated

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<sup>14</sup> [1965] IR 294, 311.

<sup>15</sup> [1965] IR 294, 313.

<sup>16</sup> [1965] IR 294, 312.

<sup>17</sup> [1965] IR 294, 314. Save the right to life, already protected by Article 40.3.2° of the Constitution of Ireland 1937, and the right to bodily integrity, none of the additional rights Kenny J cited from *Pacem in Terris* have been held to be protected by the Constitution. Pope JohnXXIII, ‘*Pacem in Terris*’ <[http://www.vatican.va/content/john-xxiii/en/encyclicals/documents/hf\\_j-xxiii\\_enc\\_11041963\\_pacem.html](http://www.vatican.va/content/john-xxiii/en/encyclicals/documents/hf_j-xxiii_enc_11041963_pacem.html)> (accessed 25 August 2020)

<sup>18</sup> [1965] IR 294, 313.

rights existed within the Constitution and were equally subject to judicial protection as enumerated rights was upheld on appeal by the Supreme Court. However the Supreme Court notably avoided considering whether the Christian and democratic nature of the State was the source of such rights.<sup>19</sup>

Even considering *Quinn* and *O'Brien*, there is no precedent that suggested such a radical assertion of the judicial function by the Court was coming.<sup>20</sup> In *Ryan*, the Court decided to read a new right into the Constitution, founded upon a bald assertion that the state has a Christian and democratic nature, which, as Hogan noted, 'Kenny J merely announced, without explanation, [...] was the case.'<sup>21</sup>

Moreover, this judicial power was legitimated by a common law power notwithstanding that the Court were in the process of privileging the Constitution - and its rights, implicit and explicit - over all competing claims to precedence (including from the common law) and that there is no provision of such a power to the judiciary within the text of the Constitution. Rather, the only means of adding rights to the Constitution provided for by the text of the Constitution is by amendment, following legislative approval and a referendum of the people.<sup>22</sup>

As noteworthy as *Ryan* was, that it became not an outlier case of judicial activism but the foundation for a new branch of constitutional law is even more remarkable. The next year, two more rights were recognised as implied within the Constitution. First, the right to have recourse to the High Court was found to be implicit within Article 40.3 in *McCauley v Minister for Posts and*

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<sup>19</sup> Due to the one-judgment rule at the time, found in Article 34.4.5 of the Constitution, the finding of the Supreme Court appears unanimous, however it is not possible to know whether there was in fact consensus upon Kenny J's reasoning from the senior bench.

<sup>20</sup> Perhaps the only earlier judgment which can be argued to pre-empt the reasoning of *Ryan* is that of Kennedy CJ dissenting in *The State (Ryan) v Lennon*, in which he argued that the natural law exists as a source of constitutional interpretation beyond the text. *The State (Ryan) v Lennon* [1935] IR 170, 204 - 205; See Gerard Hogan, 'A Desert Island Case Set in the Silver Sea: *The State (Ryan) v Lennon* (1934) in Eoin O'Dell (ed) *Leading Cases of the Twentieth Century* (Sweet and Maxwell 2000) 81.

<sup>21</sup> Gerard Hogan, 'Unenumerated Personal Rights: *Ryan's Case* Re-Evaluated,' (1990) 25(1) *Irish Jurist* 95, 104.

<sup>22</sup> Article 46 of the Constitution of Ireland 1937.

*Telegraphs*.<sup>23</sup> Then, even more strikingly, in *The State (Nicolau) v An Bord Uchtála*, the Court held that ‘an illegitimate child has the same natural rights as a legitimate child though not necessarily the same legal rights’.<sup>24</sup> Similar to Kenny J’s assertion that the State has a Christian and democratic nature, Walsh J stated in the Supreme Court, as if self-evident, that it is ‘abundantly clear that the rights referred to in section 3 of Article 40 are those which may be called natural personal rights.’<sup>25</sup> Having thus established the existence of unenumerated natural rights, the Court, per Walsh J, proceeded to determine that ‘while the law cannot under the Constitution seek to deprive the illegitimate child of those natural rights guaranteed by the Constitution it can [...] secure for the illegitimate child legal rights similar to those possessed by legitimate children.’<sup>26</sup>

The father’s appeal for custody was rejected because ‘it has not been shown to the satisfaction of this Court that the father of an illegitimate child has any natural right as distinct from legal right [...] and the Court has not been satisfied that any such right has ever been recognised as part of the natural law.’<sup>27</sup> This determination by the Supreme Court of who is or is not in receipt of natural personal rights was undertaken without an elaboration by the Court of what was the ultimate source of natural law, from which Nicolau should have attempted to demonstrate his natural law custody right.

As Bryan McMahon noted, ‘once lawyers began to appreciate the legal significance of the [Constitutional] document in relation to fundamental rights, once they discovered the potential of the document, as it were, a veritable

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<sup>23</sup> *McCauley v Minister for Posts and Telegraphs* [1966] IR 345. This right was not derived from the Christian and democratic nature of the State, however, but from ‘necessary inference’ from Article 34.4.1° of the Constitution of Ireland 1937. [1966] IR 345, 358.

<sup>24</sup> *The State (Nicolau) v An Bord Uchtála* [1966] IR 567 [hereinafter ‘*Nicolau*’].

<sup>25</sup> [1966] IR 567, 642. Walsh J continues that the very words of [Article 40.3.1°] by the reference therein to ‘laws’ exclude such rights as are dependent only upon law.’ This construction of Article 40.3.1°, and the use of ‘laws’ therein is hard to understand; as 40.3.1° states that by its laws the personal rights of the citizen will be protected and respected, thereby directly relating the personal rights to laws, with no mention of any superior natural law from which these personal rights derive.

<sup>26</sup> [1966] IR 567, 642

<sup>27</sup> [1966] IR 567, 643

revolution occurred in the legal system.<sup>28</sup> As shortly as a year after *Ryan*, then, natural rights were recognised as a distinct source of rights, on a par with enumerated constitutional rights. These rights were also, presumably, distinct from non-natural unenumerated rights derived from the Christian and democratic nature of the State. Upon recognising a right for the first time in a case, in the same case this hitherto unknown right could be held as requiring Acts of the Oireachtas, passed without knowledge this right was latent within the Constitution, to be declared invalid. Moreover, unenumerated rights were being recognised and applied by the Court whilst enumerated rights (such as the guarantee of non-discrimination in Article 40.1, or the right to free primary education in Article 42.4) were being left largely untouched.<sup>29</sup>

This case law from 1965 and 1966 represents an unprecedented outbreak of judicial activism from the Irish bench, at great variance with the conservatism McWhinney had commented upon a year prior. Already, it is clear that a paradigmatic shift had occurred between the earlier, deferential approach to rights review in the early years of the State and the new assertive role for the Judiciary in rights review. And the Court were only getting started.

### I(D): *McGee v Attorney General*

*McGee v Attorney General* was not the next case after *Nicolau* to recognise an unenumerated right,<sup>30</sup> but it was the next case of major significance.<sup>31</sup> *McGee* is the Supreme Court judgment most wilfully at variance with contemporary public opinion. It merits consideration both for the evident boldness it took to intervene in such a contentious area and for the rights reasoning employed by the Court.

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<sup>28</sup> Bryan McMahon, 'A Sense of Identity in the Irish Legal System' in Joseph Lee (ed) *Ireland: Towards a Sense of Place: The UCC- RTÉ Lectures* (Cork University Press 1985) 34, 34 - 35.

<sup>29</sup> As Doyle noted of the guarantee of non-discrimination in Article 40.1: 'At a time when the courts enthusiastically adopted an expansionist reading of many constitutional provisions, most notably in their enumeration of rights under Article 40.3.2, Article 40.1 remained a constitutional backwater. Oran Doyle *Constitutional Equality Law* (Thomson Round Hall 2004) viii.

<sup>30</sup> *Murphy v Stewart* [1973] IR 97.

<sup>31</sup> *McGee v Attorney General* [1974] IR 284 [hereinafter 'McGee'].

*McGee* concerned the constitutionality of the prohibition on importing contraceptives. This, Mrs McGee claimed, violated her personal rights under Article 40.3, as well as her family rights under Articles 41 and 42. She won her case on the Article 40.3 grounds, with the Supreme Court recognising an unenumerated right to marital privacy. As the impugned legislation violated that right, it was declared unconstitutional. Two explanations for why this right exists latent within the Constitution were provided. Henchy J wrote the majority opinion. In finding the right to privacy, Henchy J held that, to identify an unenumerated right ‘it must be shown that it is a right that inheres in the citizen in question by virtue of his human personality.’<sup>32</sup> Notwithstanding matter-of-factly pronouncing this the test for determining unenumerated rights, this human personality test had not been previously applied by the Court.

Conceding that the proposed test was somewhat unclear, Henchy J clarified that

[T]he lack of precision in this test is reduced when [Article 40.3.1°] is read (as it must be) in light of the Constitution as a whole and, in particular, in light of what the Constitution, expressly or by necessary implication, deems to be fundamental to the personal standing of the individual in question in the context of the social order envisaged by the Constitution.<sup>33</sup>

To determine what rights are guaranteed by this test was, Henchy J noted, ‘difficult, if not impossible.’<sup>34</sup> However, in light of the Preamble’s proclamation of the aim of the constitutional order as the promotion of the dignity and freedom of the individual; read alongside the State’s duty to protect and vindicate the life and person of the citizen in 40.3.2°, and in conjunction with the protections for the family within Article 41, Henchy J

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<sup>32</sup> [1974] IR 284, 325.

<sup>33</sup> [1974] IR 284, 325.

<sup>34</sup> [1974] IR 284, 325.

argued that a personal right to marital privacy was thereby latent within the Constitution.

Walsh J agreed that the right to marital privacy of Mrs McGee was infringed by the prohibition on importing contraceptives. However, his reasoning was based on the natural law, a source of rights he had already relied upon in *Nicolau*. Citing the references in Articles 41.1, 42.1, and 43.1 to the natural law, Walsh J suggested that these rights ‘emphatically reject that there are no rights without laws, no rights contrary to the law and no rights anterior to the law.’<sup>35</sup> To Walsh J, these provisions:

indicate that justice is placed above the law and acknowledge that natural rights, or human rights, are not created by law but that the Constitution confirms their existence and gives them protection. The individual has natural and human rights over which the State has no authority.<sup>36</sup>

Natural rights, thus, exist superior to the law, and it is from the natural law that the Constitution’s rights get their ultimate authority. This leaves open what these natural rights protect, how they are found, and whose determination of the natural law is supreme. Walsh J did not ‘feel it necessary to enter upon an inquiry as to their extent, or indeed as to their nature’ as ‘it is sufficient for the court to examine and to search for the rights which may be discoverable in the particular case before the court in which these rights are invoked.’<sup>37</sup> Concerning who is authorised to determine the natural law Walsh J averred (without citation) that ‘in this country it falls finally upon the judges to interpret the Constitution and in doing so to determine, where necessary, the rights which are superior or antecedent to positive law, or which are imprescriptible or inalienable.’<sup>38</sup>

The ultimate source of natural law rights for Walsh J is God. Per Walsh J, given the references to Christianity and to God in the Preamble and Article 6 of the

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<sup>35</sup> [1974] IR 284, 310.

<sup>36</sup> [1974] IR 284, 310.

<sup>37</sup> [1974] IR 284, 318.

<sup>38</sup> [1974] IR 284, 318.



Constitution, ‘the natural law as a theological concept is the law of God promulgated by reason and is the ultimate governor of all the laws of men.’<sup>39</sup> Notwithstanding that Walsh J cited ‘the acknowledgment of Christianity in the Preamble,’<sup>40</sup> the God which the Constitution, per Walsh J’s dictum, produces the natural law, must be understood ‘in a pluralist society such as ours’ as not determined by the beliefs of any religious denomination, but rather by the Courts.<sup>41</sup>

The judicial power to recognise and render constitutionally-binding God’s natural laws must be exercised in compliance with the values advanced by the Constitution. Walsh J reads Article 40.3.2° as expressly subordinating the law to justice and so the need for natural law to comply with justice frames what natural rights the Court can recognise.<sup>42</sup>

Having interpreted the Constitution as subordinate to the natural law, Walsh J held that among the family rights contained in Article 41 is the right to marital privacy with which the law must comply. As there was no sufficient common good justification for proscribing the importation of contraceptives, the impugned law was unconstitutional and invalid. Thereby, notwithstanding relating the natural law to the Christian (that is, Catholic) references within the Constitution, Walsh J held that the natural law justified permitting the importation of contraceptives which ‘may offend against the moral code [read: religious objections] of the [overwhelmingly Catholic] majority of the citizens of the State.’<sup>43</sup>

The judgments of Henchy and Walsh JJ rely in considerable measure on their own conceptual understandings of what values the Constitution seeks to promote. Given the deeply politically controversial nature of their finding in favour of Mrs McGee, *McGee* reflects an unprecedented degree of judicial self-confidence.<sup>44</sup> The Court displayed a willingness to engage in controversial

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<sup>39</sup> [1974] IR 284, 317.

<sup>40</sup> [1974] IR 284, 317.

<sup>41</sup> [1974] IR 284, 318.

<sup>42</sup> [1974] IR 284, 318.

<sup>43</sup> [1974] IR 284, 312.

<sup>44</sup> As Hogan has noted, ‘The *McGee* judgment had a remarkable impact. The Supreme Court had sanctioned a radical change in the law which could not then have been brought through

disputes usually left to the elected branches based upon a right not previously known to exist under the Constitution, found on the basis of an interpretation of the rights provisions of the Constitution not previously developed.

Reflecting this confidence, during this second wave, Kelly noted the reasoning of the Courts:

evoked from a Taoiseach (Mr Jack Lynch) the comment that ‘it would be a brave man who would predict these days what was or was not so contrary to the Constitution, so adventurous have the Courts become.’<sup>45</sup>

Both Henchy and Walsh JJ’s judgments would prove highly influential. As will be seen, the natural law reasoning of Walsh J brought the Court to the brink of constitutional crisis in the *Abortion Information Bill* case that brought the second wave to a dramatic stop. Further, Henchy J’s human personality-based reasoning would have an enduring influence on the Court’s rights reasoning to this day. Given this, beyond simply being an exemplar of judicial activism in its own right, *McGee* merits such extensive analysis.

### I(E): *Norris v Attorney General*

If *McGee* is one of the most forward-thinking rights judgments of the Irish Courts, *Norris v Attorney General* is frequently criticised as among their most, if not *their most*, regrettable.<sup>46</sup> The criticisms mounted against *Norris* pertain not exclusively to the outcome of the case - the finding that the unenumerated

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the ordinary legislative process.’ Gerard Hogan, ‘Law and Religion: Church-State Relations in Ireland to the Present Day’ (1987) 35(1) *American Journal of Comparative Law* 47, 69. This is so notwithstanding that, as Cloatre and Enright noted, ‘The basic services that the McGees required remained essentially illegal for decades after the judgment.’ It would be over a decade after the judgment before the Health (Family Planning) Amendment Act 1985 regulating the importation of contraceptives would be passed by the Oireachtas. Emilie Cloatre and Máiréad Enright, ‘Commentary on *McGee v Attorney General*’ in Máiréad Enright, Julie McCandless, and Aoife O’Donoghue (eds) *Northern/Irish Feminist Judgments: Judges’ Troubles and the Gendered Politics of Identity* (Bloomsbury 2017) 95, 106.

<sup>45</sup> JM Kelly, *The Irish Constitution* (2<sup>nd</sup> edn. Jurist 1984) xxviii - xxix.

<sup>46</sup> *Norris v Attorney General* [1984] IR 36 [hereinafter ‘*Norris*’] To MacCormaic, ‘O’Higgins’ judgment has a strong claim to be one of the worst the Supreme Court has produced.’ Ruadhán MacCormaic (Penguin 2016) 207; See also Diarmuid Ferriter, *Occasions of Sin: Sex and Society in Modern Ireland* (Profile 2012); 487 - 508; and David Norris, *A Kick Against the Pricks: An Autobiography* (Transworld 2013).

right to privacy does not extend to protecting homosexual conduct - but also the reasoning by which this decision was reached.

Notwithstanding that *Norris*, like *McGee* pertained to the right of privacy, in this case the natural law reasoning which vindicated *McGee*'s rights is neglected in favour of a dependence upon the 'Christian and democratic nature of the State' reasoning. Avoiding some of the more spurious reasons given for upholding the constitutionality of the criminalisation of gross indecency between men, such as the threat which homosexual conduct can have on marriage;<sup>47</sup> or the health risks associated with homosexuality;<sup>48</sup> the primary rationale for the rejection of *Norris*' claim was, 'on the ground of the Christian nature of our State and on the grounds that the deliberate practice of homosexuality is morally.<sup>49</sup>

As the Preamble asserts the existence of God, and references both the Most Holy Trinity and our Divine Lord, Jesus Christ; and as 'the conduct in question has been condemned consistently in the name of Christ for almost two thousand years', it followed that it was condemned under the Constitution as well.<sup>50</sup> Thus, the Christian nature of the State militated against decriminalising homosexual conduct.

The substance of this judgment is given by O'Higgins CJ without reference to the Court's finding in *McGee*. Whereas in *McGee* the Court, conscious that their judgment 'may offend against the moral code of the majority of the citizens of the State', held that the right to privacy obtained notwithstanding the question of morality;<sup>51</sup> in *Norris*, O'Higgins regarded the State as 'having an interest in the general moral wellbeing of the community and as being entitled, where it

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<sup>47</sup> Per O'Higgins CJ 'homosexual conduct can be inimical to marriage and is *per se* harmful to it as an institution.' [1984] IR 36, 63.

<sup>48</sup> It bears noting in this regard that the *Norris* judgment was handed down without any reference to HIV/AIDS. The references in the judgment to the spread of venereal disease pertained to 'syphilis, gonorrhoea, urethritis and intestinal infection.' [1984] IR 36, 62

<sup>49</sup> [1984] IR 36, 65.

<sup>50</sup> [1984] IR 36, 64.

<sup>51</sup> [1974] IR 284, 312.

is practicable to do so, to discourage conduct which is morally wrong and harmful to a way of life and to values which the State wishes to protect.’<sup>52</sup>

Henchy J dissented in *Norris*, basing his dissent upon the same human personality reasoning with which he had relied in his majority judgment in *McGee*. As a right to privacy had already been found to ‘inhere in the individual personality of the citizen in his capacity as a vital human component of the social, political, and moral order posited by the Constitution’ the only question was whether homosexual conduct was so inherent to the individual personality of Mr Norris.<sup>53</sup> As the plaintiff was ‘exclusively and obligatorily homosexual’ the effect of the criminalisation was to:

[c]ondemn such persons, who are destined by nature to be incapable of giving interpersonal outlet to their sexuality otherwise than by means of homosexual acts, to make the stark and (for them) inhumane choice between opting for total unequivocal sexual continence (because guilt for gross indecency may result from equivocal acts) and yielding to their primal sexual urges and thereby [...] committing a serious crime.<sup>54</sup>

This, to Henchy J, was an attack upon the human personality of the plaintiff which Article 40.3 requires the State to protect against unjust attack.

The justification for relying upon the Christian nature of the State as a determinant of what actions the Constitution’s rights provisions protect was further cast into doubt by the dissent of McCarthy J. Also relying upon the Christian and democratic nature of the State,<sup>55</sup> McCarthy J suggested the majority’s source for deriving rights from the Christian nature of the State was ‘Christian theology [...] rather than Christianity itself, the example of Christ

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<sup>52</sup> [1984] IR 36, 64.

<sup>53</sup> [1984] IR 36, 71. The textual justifications given by Henchy J in *Norris* for finding that a conception of the human personality provides the foundation for the fundamental rights provisions are the same as those in *McGee*: the fourth paragraph of the Preamble, Article 5 and Article 40.3 of the Constitution of Ireland, 1937. [1984] IR 36, 71.

<sup>54</sup> [1984] IR 36, 78

<sup>55</sup> McCarthy J however mis-cites this reasoning as deriving from ‘the judgment of Kenny J in *McGee*’, whereas, as noted above, it was in *Ryan* wherein Kenny J provided the Christian and democratic nature of the State test. Kenny J was not a judge on the *McGee* case. [1984] IR 36, 99.

and the great doctrine of charity which He preached.’<sup>56</sup> Given Christ preached that the highest virtue was charity, the Christian nature of the State ought to inform the Court’s jurisprudence to be charitable of those who are gay, and should not, then, criminalise their behaviour.

O’Higgins CJ, Henchy and McCarthy JJ all relied upon their interpretations of the foundational values of the Constitution to determine the case, and all came to differing judgments. In the case of McCarthy J and O’Higgins CJ, the opposite conclusion was reached while relying upon the same test for determining the provenance of rights.

*Norris* stands then as a stark signal of the difference between the disputes which the Court in this period were engaging in, as opposed to the Court prior to *Ryan*. It requires a judiciary relatively undisturbed by considerations of deference and the limits of their power within the constitutional order to reach a judgment such as *Norris*, in which a right not express within the Constitution is accepted, and then delimited to the exclusion of the plaintiff, due to a construction of the underlying values of the constitutional order devised by members of that same Judiciary, and moreover upon which the Judiciary are divided. For what the adjudication in *Norris* reflects, then the case is highly informative of the culture of judicial activism which prevailed amongst the judicial community at the time.

### I(F): *The Abortion Information Bill Case*

The final case of the second wave was *the Abortion Information Bill* case, which to all intents and purposes spelled the end of the culture of expansive constitutional interpretation.<sup>57</sup> Whilst some cases redolent of the thirty years covered in this review postdate this case,<sup>58</sup> it was the conundrum which presented itself to the Court by this case which made clear to the judicial community the extent of the powers which had been arrogated to the Courts.

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<sup>56</sup> [1984] IR 36, 99.

<sup>57</sup> *Re Article 26 and the Regulation of Information (Services Outside the State for the Termination of Pregnancies) Bill 1995* [1995] 1 IR 1.

<sup>58</sup> See *McKenna v An Taoiseach (No 2)* [1995] 2 IR 11; *Re a Ward of Court (withholding medical treatment) (No 2)* [1995] 2 IR 79; *I O’T v B* [1998] 2 IR 321.

Faced with this, a transition towards a culture of more cautious constitutional adjudication took hold.<sup>59</sup>

*The Abortion Information Bill* case arose out of the passage of the Fourteenth Amendment to the Constitution. This amended Article 40.3.3° of the Constitution, the provision acknowledging the right to life of the unborn, to specify that Article 40.3.3° ‘shall not limit freedom to obtain or make available, in the State, subject to such conditions as may be laid down by law, information relating to services lawfully available in another state.’ The need for including this amendment to the Constitution was due to the Court’s holding in *Attorney General (SPUC) v Open Door Counselling Ltd* that the dissemination of information relating to abortion services overseas was unconstitutional with regard to Article 40.3.3°.<sup>60</sup>

The source of controversy leading to the case was due to the Court’s repeated assertions in previous case law of the natural rights of the unborn. In *McGee*, Walsh J had held termination of pregnancies to be an offence against the guaranteed personal rights of the unborn human life in question.<sup>61</sup> He had elaborated further in *G v An Bord Uchtála* that ‘the [natural] right to life necessarily implies the right to be born.’<sup>62</sup> Given this, the Court in the *Abortion Information Case* concluded that ‘the right to life of the unborn was clearly recognised by the Courts as one of the unenumerated personal rights which the State guaranteed in its laws to respect, and, as far as practicable by its laws to defend and vindicate.’<sup>63</sup>

The existence of natural law rights anterior and superior to the posited law was the foundation for the Court’s unenumerated rights adjudication in these cases. Following this logic, natural rights of the unborn *should* supersede the posited right to access information approved by the People by passage of the

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<sup>59</sup> See most notably in this regard the dissenting judgment of Keane CJ in *I O’T v B* [1998] 2 IR 321; *Sinnott v Minister for Education* [2001] 2 IR 545; *TD v Minister for Education* [2001] 4 IR 259.

<sup>60</sup> *Attorney General (Society for the Protection of the Unborn Child) v Open Door Counselling Ltd* [1988] IR 593.

<sup>61</sup> [1974] IR 284.

<sup>62</sup> *G v An Bord Uchtála* [1980] IR 32, 69.

<sup>63</sup> [1995] 1 IR 1, 28.

Fourteenth Amendment. To be consistent with the natural law reasoning which had fuelled the Court's rights adjudication since *McGee*, the Court would have to declare a referendum to amend the Constitution - the paradigm expression of popular sovereignty - unconstitutional and void.

Faced with this proposition, the Court in the *Abortion Information case* reinterpreted their past natural law jurisprudence, emphasising how where a natural law right was pronounced, 'the Court in each such case had satisfied itself that such personal right was one which could be reasonably implied from and was guaranteed by the provisions of the Constitution, interpreted in accordance with its ideas of prudence, justice and charity.'<sup>64</sup> That is, the natural law language which was employed in the recognition of these rights is beside the point: these rights ultimately flowed from the values underlying the Constitution.

To this end, the Court declared that it 'at no stage recognised the provisions of the natural law as superior to the Constitution' which, as Doyle noted 'flatly contradicts Walsh J's statement in *McGee* to the effect that the State has no authority over natural rights.'<sup>65</sup> Nevertheless, having disowned its precedent espousing the supremacy of the natural law, the Court was then able to recognise the People as the supreme source of constitutional authority, and thus to uphold the passage of the Act, and implementation of the referendum result.

Daly and Hickey have commented on 'a notable abruptness and lack of theoretical sophistication in the reasoning in the *Abortion Information* judgment.'<sup>66</sup> This case saw the Court's reliance upon an argument that a source of law existed superior to the Constitution and which only they were able to

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<sup>64</sup> [1995] 1 IR 1, 43.

<sup>65</sup> [1995] 1 IR 1, 43. Oran Doyle *Constitutional Law: Texts, Cases and Materials* (Clarus 2009) 103. That the supremacy of natural rights over posited rights was intended by Walsh J is further supported by his extra-judicial commentary that 'rights are not conferred by the Constitution. They are acknowledged as pre-existing natural rights, inherent in man because he is man. What the Constitution does is guarantee their protection and vindication.' Brian Walsh, 'The Constitution: A View from the Bench' in Brian Farrell (ed) *De Valera's Constitution and Ours* (Gill and Macmillan 1988) 195, 195.

<sup>66</sup> Eoin Daly and Tom Hickey, 'The Constitution and Judicial Power: Theoretical Perspectives' in Eoin Carolan (ed) *Judicial Power in Ireland* (IPA 2018) 220, 226.

authoritatively determine, come into conflict with the other - textually prescribed - means of amending the Constitution's rights provisions. The thrust of the Court's case law to this point had provided the Court with a consistent argument in favour of preferring its own interpretation of what rights the Constitution grants over that expressed by the Irish people in a referendum. Whilst the Court not only relented from, but disowned, the substance of its past natural rights reasoning, that they had by this point summoned to themselves the authority necessary to mount a credible case based on its precedent against favouring the vote of the people is the critical point. Considering this, even with the outcome upholding the constitutionality of the amendment, the *Abortion Information Bill* case is the high watermark of the judicial power.

After this case, the Court became much more cautious to assume powers beyond those expressly prescribed by the Constitution. Murphy observed that this case 'has been widely understood as bringing about the 'dramatic fall' of 'religiously motivated natural law in the Irish legal system.'<sup>67</sup> In this way, the *Abortion Information Bill* case is the opposite number to *Ryan*: whereas the latter signalled the arrival of a new era of judicial action, particularly in regards rights; the former would effect a turn away from such substantive rights reasoning by the bench.

## II: What Factors Conditioned the Court's Expansion of Rights Protection in the Second Wave

This period saw a transition from a standoffish judiciary to an activist judiciary. In the second wave, the Irish judiciary developed a familiarity with rights review and thereby the conceptual foundation of rights protection in Ireland. The Court adjudged that 'the natural law [from which unenumerated rights were derived] is of universal application and applies to all human beings, be they citizens of the State or not.'<sup>68</sup> Indeed, the Court's commitment to rights

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<sup>67</sup> Tim Murphy, 'The Cat Amongst the Pigeons: Garrett Barden and the Irish Natural Law Constitution' in Eoin Carolan and Oran Doyle (eds) *The Irish Constitution: Governance and Values* (Round Hall 2008) 121, 127.

<sup>68</sup> *Northants Co Council v ABF* [1982] ILRM 164, 166.



protection even led to holding rights breaches by private parties actionable, a considerable conceptual expansion,<sup>69</sup> if not in reality a considerable practical expansion, on the remit of rights adjudication.<sup>70</sup> What developed during this period was a Court with a strong and regularly-applied power to render legislation null and void due to an unconstitutional encroachment upon the protected zone of an individual's rights. From this, the conceptual breadth of constitutional rights protected expanded profoundly.

## II(A): A Generational Change on the Bench

How did this shift come about? How was it that a regime of effective rights protection emerged within a common law order that had proved so resistant to such a development a generation before? The most significant factor explaining the shift by the bench towards a more robust rights jurisprudence from the 1960s onwards was demographic. For the first time, the senior bar and bench was composed of lawyers whose legal experience was after independence from Britain. Whereas the adjudication of the earlier bench was heavily influenced by their educational and professional experience within a system of judicial deference to the sovereign parliament,<sup>71</sup> this incoming generation had only practiced under the independent Irish legal system. And so, as Chubb noted 'concepts of fundamental law were no longer foreign to their training or tradition.'<sup>72</sup>

The appointments of Cearbhall Ó Dálaigh to Chief Justice at the relatively young age of 51 and Brian Walsh to Supreme Court Justice aged 43 on the same

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<sup>69</sup> *Meskeil v Córas Iompair Éireann* [1973] IR 121; *Glover v BLN* [1973] IR 188; *PH v Murphy (John) & Sons* [1987] IR 621. As Hogan noted extrajudicially, these cases marked the last of Ó Dálaigh's CJ on the bench. Gerard Hogan 'The Farthest - December 1972' (2019) 62 *Ir Jur* 1.

<sup>70</sup> Colm Ó Cinnéide, 'Irish Constitutional Law and Direct Horizontal Effect - A Successful Experiment?' in Dawn Oliver and Jörg Fedtke (eds) *Human Rights and the Private Sphere: A Comparative Study* (Routledge 2007) 213. As McMahon and Binchy have noted: No judge has gone so far as to declare that the *Meskeil* experiment is over. Yet the product of 40 years of judicial development of *Meskeil* has been surprisingly modest. Brian McMahon and William Binchy, *Law of Torts* (4<sup>th</sup> edn, Bloomsbury 2017) 49. See *Hanrahan v Merck, Sharpe & Dohme* [1988] ILRM 629.

<sup>71</sup> As Donal Barrington remembers of the Irish legal system prior to the Ó Dálaigh Court: 'There are many instances in the law reports of barristers being congratulated by judges for making concessions based on British constitutional practice, concessions which no barrister would make today.' Donal Barrington, 'The Constitution in the Courts' in Frank Litton (ed) *The Constitution of Ireland 1937 - 1987* (IPA 1988) 110, 114.

<sup>72</sup> Basil Chubb, *The Constitution and Constitutional Change in Ireland* (IPA 1978) 76.

day in 1961 would have far-reaching consequences for the development of constitutional rights in Ireland.<sup>73</sup> That same year John Kenny was appointed as High Court judge, as was, the following year, Seamus Henchy, aged 44. These young judges were among the first of the generation brought up almost entirely after independence to be appointed to the senior bench, and, as the previous section in this Chapter already illustrated, the judicial opinions of these four judges drove the development of Irish rights jurisprudence during the second wave. The dominant accounts of the values which the Constitution seeks to promote, the rights which it protects; and the role of the judiciary within the constitutional order, were provided by these judges.

A generational shift on its own explains the shift in emphasis amongst the bench towards the Constitution, given the greater cleavage of the younger generation to the only constitutional order which they have known. Resulting from this exclusive comprehension of a constitutional legal system, it is probable that these judges, who would demonstrate such an interest in rights adjudication, felt frustrated at the disuse of the Constitution by the legal community in which they were institutionalised. Due to this, upon appointment to the bench, they were seized of the opportunity to assert their dormant understanding of the primacy of the Constitution within the Irish legal order.<sup>74</sup>

Judges with known interests in constitutional interpretation induce a rights-consciousness within the bar. As Barrington J noted extrajudicially of barristers of the 1950s, ‘they were unlikely to press original arguments based on the Constitution until they felt judges were prepared to receive them.’<sup>75</sup> The practical efficacy of adopting a rights-based approach in Court necessarily increases when you know the judiciary are interested in rights adjudication. So, the trend towards what O’Donnell J recently described as a ‘find a right, win the case’ approach in this period followed from an awareness that cases

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<sup>73</sup> As Hogan noted extrajudicially of Ó Dálaigh CJ and Walsh J, ‘they together spearheaded the constitutional revolution of the 1960s and the early 1970s.’ Hogan (n 69) 2.

<sup>74</sup> Donal Barrington offers an interesting anecdote suggesting the dormancy of this form of constitutional interpretation prior to 1965. It concerns when ‘Cearbhall Ó Dálaigh was an ordinary member of the court at the time so that it must have been 1953 or later. Suddenly Cearbhall looked up from his papers and, so far as I can recall his words, said ‘Gentlemen, we have a Constitution. Yet, no one seems to know what it means.’’ Barrington (n 71) 114.

<sup>75</sup> *Ibid.*

could be won by persuading the court that the stated right was latent within the order established by the Constitution.<sup>76</sup> This would have incentivised the bar to develop their own interest in rights litigation for the first time.<sup>77</sup>

This signal that rights arguments were persuasive to the senior bench would extend the effects of this generational change in the composition of the judicial community in the early to middle 1960s beyond the years that these judges were on the bench. Again, Barrington J's extrajudicial writings illustrate this. 'Judges', Barrington J noted, 'like everyone else, are influenced by their own generation. Moreover, the judge is particularly influenced by the debate in his own court.'<sup>78</sup> The jurists which replaced them in the 1970s and 1980s were conditioned towards rights adjudication by their experiences litigating before a Court composed of judges such as Ó Dálaigh CJ and Walsh, Henchy, and Kenny JJ. If basing one's litigation strategy upon a claim of an unenumerated right latent within the Constitution would have been absurd in the 1950s, by two decades later it was not only credible but expectable.

In this period, the Court also expressly stated a greater willingness to distinguish itself from the British system.<sup>79</sup> Note the contrast between O'Byrne J observing that the Free State Constitution was 'intended to set up the new State with the least possible change to previously existing law,'<sup>80</sup> and Ó Dálaigh J, in *Melling v Ó Mathghamhna* 'rejecting pre-1922 standards as a guide in interpreting the 1937 Constitution.'<sup>81</sup>

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<sup>76</sup> Donal O'Donnell, 'The Sleep of Reason' (2017) 40(2) *DULJ* 191.

<sup>77</sup> Perhaps the most extraordinary example of the successful adoption of a rights-based strategy to win a case in this period was that found in *Lennon v Ganly* [1981] ILRM 84. In this case, the Irish Rugby Football Union sought to travel to apartheid South Africa for a friendly match; but an injunction sought to prevent this due to the sporting boycott against South Africa. It was held by O'Hanlon J that 'the defendants have a constitutional right to travel and play rugby abroad.' [1981] ILRM 84, 86.

<sup>78</sup> Gerard Hogan, Donal Barrington, and Patrick McEntee, 'The Constitution, Law, and Ideology' (1985) 9(2) *The Crane Bag* 104, 105.

<sup>79</sup> Note however the early extrajudicial commentary of Kennedy CJ that, 'insofar as the existing systems of judicature is based upon the English history we hope to cut it out and start afresh.' Thomas Towey, 'Hugh Kennedy and the Constitutional Development of the Irish Free State (1977) *Irish Jurist* 355, 365. See also the judgments of Gavan Duffy J in *Re Howley* [1940] IR 109; and *Cook v Carroll* [1945] IR 515;

<sup>80</sup> *The State (Kennedy) v Lyttle* [1931] IR 39, 58.

<sup>81</sup> Macdara Ó Drisceoil, 'Catholicism and the Judiciary in Ireland 1922 - 1960' (2020) 4(1) *Judicial Studies Institute Journal* 1, 2.

The framers of the Constitution of Saorstát Éireann had no particular reason to look with reverence or respect to the British statute roll in Ireland as affording them an example of standards which they would wish to enshrine in their new Constitution.<sup>82</sup>

Of importance, in this period, there was limited academic or judicial criticism of the Court's rights adjudication. Save for Kelly's analysis of the reasoning of Kenny J in *Ryan v Attorney General*,<sup>83</sup> Clarke's critique of natural law reasoning,<sup>84</sup> McCarthy J's extrajudicial comment on Article 40.3,<sup>85</sup> and Hogan's recasting of Kelly's criticism in 1990,<sup>86</sup> the correctness of the reasoning in *Ryan*, and the corpus of rights adjudication which emerged from it was largely unchallenged. It was not until the *Abortion Information Bill* case that the possible conceptual difficulties in the Courts approach became fully apparent. Until then, the propriety of maintaining this form of rights-based adjudication was unchallenged, likely facilitating further the emergence of a culture inured to such rights reasoning.

To have demonstrated that the change in the composition of the senior bench brought about 'nothing less than a revolution in constitutional interpretation, most particularly in the area of fundamental rights' is not however sufficient by itself to explain the impact of judicial culture on rights protection in this period.<sup>87</sup> What cultural influences *directed* the reasoning of the Court in this period to develop this system of strong-form negative rights protection?

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<sup>82</sup> *Melling v Ó Mathghamhna* [1962] IR 1 Similarly, Lavery J in *O'Byrne v Minister for Finance* [1959] IR 1, 43 referred to the Irish courts as representing a 'new departure constituted under different ideas' and that 'far from being founded on British precedents or recognising British forms the Constitution of 1922 repudiated deliberately and consciously these institutions.' See also *McMahon v Attorney General* [1972] IR 69, 111.

<sup>83</sup> JM Kelly, *Fundamental Rights in the Irish Law and Constitution* (2<sup>nd</sup> edn, Allen Figgis 1967) 121 - 123.

<sup>84</sup> Desmond Clarke, 'The Role of Natural Law in Irish Constitutional Law' (1982) 15(2) *Irish Jurist* 187; Desmond Clarke, 'The Constitution and Natural Law: A Reply to Mr Justice O'Hanlon' (1993) 11 *Irish Law Times* 177.

<sup>85</sup> Niall McCarthy, 'Observations on the Protection of Fundamental Rights in the Irish Constitution' in Deirdre Curtin and David O'Keefe (eds) *Constitutional Adjudication in European Community and National Law: Essays for the Hon. Mr. Justice T.F. O'Higgins* (Lexis, 1992), 181.

<sup>86</sup> Hogan (n 21).

<sup>87</sup> JM Kelly 'Fundamental Rights and the Constitution' in Brian Farrell in Brian Farrell (ed) *De Valera's Constitution and Ours* (Gill and Macmillan 1988) 163, 167.

## II(B): The Influence of American Constitutional Jurisprudence

Why did a generational shift precipitate this change in judicial attitude towards rights? The earlier generation of the bench, given their general disinterest in constitutional law, had no need to develop an articulated conception of the primacy of a written Constitution with a bill of rights within a common law legal system. It fell to the ‘arrival of a new generation of Irish judges who did not share their predecessors lack of enthusiasm for crafting a new Irish constitutional jurisprudence’ to develop this understanding of what the Constitution does.<sup>88</sup> To guide this exercise of ostensibly founding the separate legal discipline of Irish constitutional law, the influence of comparative constitutionalism was relied upon.

As the previous chapter noted, the Constitution includes a social dimension common to contemporary European constitutional orders which was supplanted on top of the original, more classically liberal-democratic, and quasi-American structure. However, as also discussed, the preference of the bench for American constitutional law led the rights provisions to develop a jurisprudence much more in consonance with this source than with others. This is ascribable in no small part to factors unrelated to any substantive similarity between the American and Irish Constitutions. The intelligibility of American cases without the need for translation, and press coverage of significant American cases from this period would have made this jurisdiction more accessible than continental regimes such as West Germany, which also contain express social constitutionalist elements.

The import of US constitutional jurisprudence can be seen in the citations of American constitutional law in several of the key cases covered in the prior section such as *O’Brien*,<sup>89</sup> *Nicolau*,<sup>90</sup> *McGee*,<sup>91</sup> and *Norris*.<sup>92</sup> Illustrating the

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<sup>88</sup> Ronan Keane, ‘Judges as Law-makers: The Irish Experience’ (2004) 4(2) *Judicial Studies Institute Journal* 1, 9.

<sup>89</sup> [1965] IR 142.

<sup>90</sup> [1966] IR 567.

<sup>91</sup> [1974] IR 284.

<sup>92</sup> [1984] IR 36. As Kenny J wrote extrajudicially: ‘If you ask where do the High and Supreme Courts find these rights, what materials do they use in formulating them, the answer is that international declarations of rights, decisions of the courts in the United States of America,

point, Barrington J in 1988 commented that, ‘nowadays a barrister arguing a point of constitutional law in the High or Supreme Courts will, as a matter of course, refer to the decisions of the American Federal Supreme Court as persuasive authority. If, by chance, he does not, the trial judge will, as likely as not, ask him if the American Federal Supreme Court ever had to consider this point.’<sup>93</sup>

Walsh J avowed the impact American jurisprudence had on his own adjudication, assisted by a close personal and intellectual friendship with Justice William Brennan of the United States Supreme Court.<sup>94</sup> After leaving the bench, Walsh J remarked that, ‘I was certainly very much influenced by the American experience. I had studied it to a very considerable extent and kept myself familiar with it all through my career.’<sup>95</sup> Speaking of his and Ó Dálaigh CJ’s partnership throughout the 1960s and early 1970s, Walsh J noted, ‘We had sufficient knowledge of the subject, in particular the American jurisprudence, to see the significance of it all, and to provide the remedies which we thought the particular occasion, and even the decade, required.’<sup>96</sup>

For Ó Dálaigh CJ and Walsh J to be adjudicating with cognisance of the American constitutional jurisprudence could, of itself, have the indirect effect of making Irish rights jurisprudence substantively similar to the American approach. However, it is reported that two Taoisigh of the middle 20<sup>th</sup> Century expressed an interest in developing an American rights model too. As Coffey reported, De Valera ‘in the early 1960s privately expressed the view that the

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the natural law and the dictates of justice are the principal sources used.’ John Kenny, ‘The Advantages of a Written Constitution Incorporating a Bill of Rights’ (1979) *NILQ* 197.

<sup>93</sup> Barrington (n 71) 115. JM Kelly expressed similar sentiments in 1978: ‘The Irish practitioner would at least have heard in general terms of the US Supreme Court and of the judicial review which it practised in the heart of a system of pure common law descent.’ JM Kelly, ‘Grafting Judicial Review on a System Founded on Parliamentary Supremacy: The Irish Experience’ in Papers of JM Kelly P147/4, UCD Archives. Quoted in Laura Cahillane, *Drafting the Irish Free State Constitution* (MUP 2016) 173ff.

<sup>94</sup> MacCormaic (n 46) 138 - 139.

<sup>95</sup> *Ibid*, 79.

<sup>96</sup> *Ibid*, 80.

courts should use the constitution in the same way as United States courts did the constitution of 1789.’<sup>97</sup> And, as reported by Morgan:

[Taoiseach] Seán Lemass consciously initiated the era of judicial activism as part of his project of modernising Ireland, by his selection of Ó Dálaigh CJ and Walsh J and by his private admonition to each of them on appointment [...] that he ‘would like to see the Supreme Court behave more like the United States Supreme Court.’<sup>98</sup>

Given the scale of reliance on American case law in Irish rights adjudication in this period it appears uncoincidental that the rights provisions in this formative period took on an aspect akin to the strong negative form of constitutional rights protection of the US Bill of Rights jurisprudence. Thereby, Walsh J and Ó Dálaigh CJ, among others developed a role for the judicial branch which was absent before, in a likeness to the bench whose jurisprudence they are known to have consulted.

Whilst American constitutional jurisprudence provided a much broader rights protecting function for the Court than the previously hegemonic British model, the approval which the Court received for expanding Ireland’s fundamental rights protections in accordance with American constitutional practice also imported into Irish constitutional law an Americanised rejection of state obligations to vindicate rights.<sup>99</sup> The effect of this would be that, whilst the American experience inspired judicial activism in Ireland, commitment to the American model of rights protection precluded the social constitutionalist aspects of the Constitution from receiving judicial consideration. This will be discussed further in the next chapter. In this way, the attention paid to

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<sup>97</sup> Donal K Coffey, *Constitutionalism in Ireland 1932 - 1938: National, Commonwealth, and International Perspectives* (Palgrave Modern Legal History 2018) 157 (quoting *The Irish Press* 14 October 1982).

<sup>98</sup> David Gwynn Morgan, *A Judgment Too Far: Judicial Activism and the Constitution* (Cork University Press 2001) 12.

<sup>99</sup> *San Antonio v Rodriguez* (1973) 411 U.S. 1; *Maher v Roe* (1977) 432 US 464; *Winnebago County v DeShaney* (1989) 389 US 189. See also Emily Zackin, ‘Positive Rights’ in Mark Tushnet, Mark Graber and Sanford Levinson (eds) *The Oxford Handbook of the U.S. Constitution* (OUP 2015) 717.

American constitutional jurisprudence both permitted and circumscribed the scope of judicial activism and rights protection in Ireland.

### II(C): The Influence of a Catholic Education

Finally, a general trend in the education of the bench also appeared to have informed the emergence of this second wave. For the first time, the bench was predominantly composed of Catholics, that attended (mostly private) all-boys Catholic secondary schools.<sup>100</sup> The emergence of Catholic natural law theory (and the citing of a Papal encyclical) reflects the influence of this newly-ubiquitous educational background amongst the members of the bench.<sup>101</sup> As O'Donnell J has recently put it, 'there may be a sense in which what can be described as the collective Irish legal mind had some inbuilt receptors upon which natural law language was particularly effective.'<sup>102</sup>

The uniformity of educational experience among the members of the senior bench did not stop at eighteen. Until 1970, Catholics could only attend Trinity College, Dublin upon receipt of special dispensation from the Bishop. This led Catholics with an interest in studying law in Dublin with one local option at the time: University College Dublin. Not coincidentally, then, UCD provided at least seventeen members of the senior bench between 1961 and 1995, including all of those who previously attended (usually private) Catholic secondary schools.<sup>103</sup>

The legal education at UCD was significant to the rights revolution as constitutional law from 1934 to 1959, was taught by Professor Patrick McGilligan, a lecturer who, as attested by Kelly, peculiarly for that period

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<sup>100</sup> As McCandless, Enright, and O'Donoghue noted, 'The vast majority of Irish judges appointed since independence have been middle-class Catholics though many publicly associated with positions that would not be approved by the Church hierarchy.' Julie McCandless, Máiréad Enright and Aoife O'Donoghue, 'Introduction: Troubling Judgment' in Máiréad Enright, Julie McCandless, and Aoife O'Donoghue (eds) *Northern/Irish Feminist Judgments: Judges' Troubles and the Gendered Politics of Identity* (2017 Bloomsbury) 1, 31 - 32; Paul Bartholomew *The Irish Judiciary* (IPA 1971) 31 - 45.

<sup>101</sup> 'The acceptance of natural law is more in line with Catholic thought than its outright rejection.' Ó Drisceoil (n 81) 13.

<sup>102</sup> O'Donnell (n 76) 195.

<sup>103</sup> See Brice Dickson *The Irish Supreme Court: Historical and Comparative Perspectives* (OUP 2019) Appendix 3: 'Biographies of the Judges of the Supreme Court 1924 - 2018'.



‘believed strongly in rigorous judicial review.’<sup>104</sup>. Among the positions proposed by McGilligan, he ‘believed the natural law should be ‘the sheet anchor of the Constitution:’ a means of constitutional interpretation which can be relied upon when necessity requires.<sup>105</sup>

Even prior to the emergence of the natural law as a relevant aspect of Irish law, a relationship between natural law and the Constitution was being drawn. As O’Donnell J would note ‘almost all of the judges in the High Court and the Supreme Court during the 1970s and 1980s were taught constitutional law by McGilligan,’<sup>106</sup> Thereby, for the judicial community which emerged in the 1960s, and which existed thereafter, a comprehension of certain aspects of Catholic theology - natural law theory and an understanding of Catholic morality if not Catholic communitarianism - was common. This is in distinction with the judicial community dominant before the 1960s. Not only was the bench of the first wave composed of more judges who had not attended Catholic schools than those who had - as many went to either Queens University Belfast or Trinity College Dublin as went to UCD - those who did attend UCD in this period predated the professorship of Patrick McGilligan and so would not have had their legal education conditioned by the - then esoteric - natural law theory he promoted.

### III: Conclusion

What is particularly distinct about this period was the recognition by the Court of unenumerated rights latent within the constitutional order which were equally enforceable as those expressly provided by the constitutional text. Whilst in 1966 the Irish judiciary could be characterised by an American academic as ‘pay[ing] a perhaps extreme deference to the Legislature’;<sup>107</sup> fourteen years later a member of the Supreme Court could publicly declare that ‘Judges have become legislators and have the advantage they do not have

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<sup>104</sup> JM Kelly (n 45) xxviii.

<sup>105</sup> JM Kelly (n 83) 65.

<sup>106</sup> Donal O’Donnell, ‘Review: Irish Legal History of the Twentieth Century’ (2014) 105(417) *Studies* 98, 112.

<sup>107</sup> Loren P Beth, *The Development of Judicial Review in Ireland 1937 - 1966* (IPA 1967) 7.

to face an opposition.<sup>108</sup> By engaging with the content of these rights, the Court gave them a practicable existence, as legal claims which rights holders could sue on foot of, in the expectation of some curative response to their rights breach.

The Court's jurisprudence in this period is the result of a generational shift in the judicial community in the 1960s, whereby a new group of jurists versed in natural law, educated about American constitutionalism, and eager to broaden Ireland's legal horizons reshaped the role of the judiciary and the content of rights protection in Ireland. In this section, I have shown how the judgments of this period reflect the influence of these factors. The willingness of the judiciary to adjudicate a rights claim is contingent upon factors not germane to the adjudication at hand - such as the education of the judge, their pre-judicial professional experience, their proclivity towards a certain understanding of the constitutional order or separation of powers. The ability to successfully assert a rights claim is thus itself dependent upon these factors.

A judicial consensus of its own interpretative competence developed essentially without interruption or criticism for thirty years. It was not until the authority of the judiciary was challenged in court by the authority of the people that this enthusiasm for expansive rights adjudication came to an abrupt end. In this transition, insight can be gained on the influence of judicial cultural attitudes upon regimes of rights protection afforded by common law legal systems.

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<sup>108</sup> Kenny (n 92) 196.

## Chapter Five: The Development of Judicial Rights

### Review in Ireland 1995 - 2013

In the middle 1990s the Court, for the first time since *Ryan v Attorney General*, began to consciously limit the exercise of its rights-protecting function, giving a greater regard to the ability of the other branches to engage in rights deliberation.<sup>1</sup> The third wave saw a retrenchment away from the expansive judicial rights review power developed in the preceding period. The separation of powers and the appropriate limits of the judicial power became an abiding interest of the Court to a greater degree than before. Critical self-reflection within the judiciary about their role as rights adjudicators developed particularly due to the *Abortion Information Bill* case. This can be seen in two trends of this period: the emergence of (notionally) general standards of review, and the decline of unenumerated rights recognition.<sup>2</sup> As these trends became dominant, the scope for rights adjudication contracted. From this contraction, however, a more articulated conception of the judicial role within the constitutional order developed, providing a more coherent basis for rights adjudication going forward.

#### I: The Emergence of General Standards of Review

Any shift in judicial attitude towards rights adjudication has knock-on effects on the practical enforceability of rights. While the substantive content that a right protects may be - and often is - satisfied by a different branch, the ability to receive an individuated response to one's own rights breach is contingent upon judicial reception of the content of the right and their willingness to adjudicate upon it.

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<sup>1</sup> *Ryan v Attorney General* [1965] IR 294.

<sup>2</sup> Alongside the disappearance of unenumerated rights and the emergence of standards of review, an articulation of the separation of powers rose to dominance within the judicial community which, as the key cases of this jurisprudence involved social rights, will be discussed in particular depth in Chapter Seven of this doctorate.

In the early 1990s, the Courts, driven by the desire to introduce greater consistency to the process of rights adjudication, as well as, it appears, the desire to withdraw from having to resolve *all* rights disputes, developed for the first time two different tests for reviewing rights breaches by the State. In the decades prior, the Court had never fashioned a general test for determining when legislation was in breach of the rights provisions. As a visiting academic remarked: ‘Irish standards of review is - as many Americans say colloquially - all over the ballpark. Many judges do not even bother to announce a standard.’<sup>3</sup> During the third wave, an ultimately largely unsuccessful attempt to tackle this criticism was made. By this, the degree of judicial scrutiny of legislation became both more standardised and more limited, as considerable discretion was ceded to the Oireachtas to resolve rights disputes.

*Heaney v Ireland*,<sup>4</sup> and *Tuohy v Courtney*,<sup>5</sup> both decided in 1994, provide tests by which the Court ought to determine when it should interfere in a legislative limitation of a constitutionally recognised right. The former concerned the right to silence. In *Heaney*, the High Court imported wholesale from Canadian jurisprudence without textual link the proportionality test for rights breaches. To be constitutional, the objective of a constitutionally impugned provision must

- a) Be rationally connected to the objective, and not be arbitrary, unfair, or based on irrational considerations;
- b) Impair the right as little as possible;
- c) Be such that their effects on rights are proportional to the objective.<sup>6</sup>

Notwithstanding being the foundational case for the three-pronged proportionality test in Ireland, Costello J did not proceed to evaluate the impugned legislation with reference to these three elements, and appeared to have assumed the legitimacy of the State’s submission as to the Act’s objective. *Heaney* would provide significant both as it established a test which would be

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<sup>3</sup> Martin Marguiles, ‘Standards of Review and State Action Under the Irish Constitution’ (2002) 37(1) *Irish Jurist* 23.

<sup>4</sup> *Heaney v Ireland* [1994] 3 IR 593 (High Court) [1996] 1 IR 580 (Supreme Court) [hereinafter ‘*Heaney*’].

<sup>5</sup> *Tuohy v Courtney* [1994] 3 IR 1 [hereinafter ‘*Tuohy*’].

<sup>6</sup> [1994] 3 IR 593, 607.

relied upon consistently during the period under review; and began a trend of paying little consideration to the actual limbs of the test making decisions as to proportionality.

Weeks after *Heaney*, in *Tuohy v Courtney* the Supreme Court proposed an alternative test without reference to *Heaney*.<sup>7</sup> *Tuohy* was a challenge to the Statute of Limitations 1957. Particularly the plaintiff challenged how the Statute restricted their unenumerated right of access to the Court,<sup>8</sup> as balanced against the defendant's right 'in his property to be protected against unjust and burdensome claims.'<sup>9</sup>

Confronted with having to balance these two unenumerated rights, Finlay CJ reasoned that in

[a] challenge to the constitutional validity of any statute in the enactment of which the Oireachtas has been engaged in such a balancing function, the role of the Courts is not to impose their view of the correct or desirable balance in substitution for the view of the legislature as displayed in their legislation but rather to determine from an objective stance whether the balance contained in the impugned legislation *is so contrary to reason and fairness as to constitute an unjust attack on some individual's constitutional rights*.<sup>10</sup>

By this, the Court admitted that, where the Oireachtas balances two rights, the Court will not second-guess the resolution unless contrary to reason and fairness. As most resolutions pass this low standard, in application, this test provides a considerable self-imposed limitation on the Court's ability to develop, and in enforce, its interpretation of the appropriate balance between two or more rights.

Unlike the *Tuohy* test, the *Heaney* test had the potential to enable a searching inquiry into the propriety of restricting rights, if the legitimacy of the objective, rationality of the connection between objective and action, the

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<sup>7</sup> [1994] 3 IR 1.

<sup>8</sup> As established in *McCauley v Minister for Posts and Telegraphs* [1966] IR 345.

<sup>9</sup> [1994] 3 IR 1, 47.

<sup>10</sup> [1994] 3 IR 1, 47 (emphasis added).

minimality of the restriction, and, most unclearly, the proportionality of the limitation are strictly scrutinised.<sup>11</sup> However, in *Heaney* it was not even applied in this way by the High Court. Then, two years after Costello J's High Court judgment, the Supreme Court in the *Heaney* appeal approved Costello J's proportionality test.<sup>12</sup>

Throughout the following decades, both the *Heaney* and *Tuohy* tests were relied upon by the Court when confronted with rights disputes involving legislation. Whilst in their abstract formulations, these tests could have become a means of introducing regularity to the process of Irish rights adjudication, in practice the case law in this area became confused, due to the absence of an overarching rule explaining in what circumstances either tests ought to be employed. *Tuohy* is expressly deferential to the Oireachtas, whereas the proportionality test is neutral on its face as to the standard of judicial deference that should be proffered. As Foley has noted, 'choosing between the *Tuohy* and *Heaney* standards or cross-applying *Tuohy* into *Heaney* says something about how the Court thinks about deference.'<sup>13</sup> What the Court thinks of deference is what the Court thinks of when it should protect rights.

Briefly, some of the confusion can be highlighted. The reference to 'unjust attack' in *Tuohy* appeared to relate that test to cases of rights arising from Article 40.3.2°. <sup>14</sup> However, both Costello J in *Daly v Revenue Commissioners*<sup>15</sup> and Keane J in *Iarnród Éireann v Ireland* used the proportionality to determine the justice of an attack on a property right as protected by that Article.<sup>16</sup> Meanwhile, in *re Article 26 and the Employment Equality Bill, 1996*, the Supreme Court relied on the *Tuohy* test to determine the constitutionality of

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<sup>11</sup> As O'Donnell J noted, 'the mere statement that something is proportionate is almost as Delphic as the statement that it is reasonable.' *Nottinghamshire County Council v B* [2011] IESC 48, [87].

<sup>12</sup> [1996] 1 IR 580.

<sup>13</sup> Brian Foley, 'The Proportionality Test: Present Problems,' (2008) 1 *Judicial Studies Institute Journal* 67, 76.

<sup>14</sup> Article 40.3.2° of the Constitution of Ireland 1937 states: '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.' (emphasis added)

<sup>15</sup> *Daly v Revenue Commissioners* [1995] 3 IR 1.

<sup>16</sup> *Iarnród Éireann v Ireland* [1995] 3 IR 321 [hereinafter '*Iarnród Éireann*']. In the latter case, upon appeal, O'Flaherty J would outline the elements of the proportionality test, and then proceed to apply the *Tuohy* test. [1995] 3 IR 321, 371-376.

one form of discrimination (age discrimination) and on *Heaney* to determine the unconstitutionality of another form (disability discrimination).<sup>17</sup>

Most representative of the merging of the two tests, and so of the willingness of the Courts to grant elected bodies the high *Tuohy* degree of deference where rights were breached was *Rock v Ireland*.<sup>18</sup> Like *Heaney*, *Rock* concerned the right to silence. In this case the impugned Act allowed inferences to be drawn from silence. However, in this case, the Court held that the *Tuohy* test applied as ‘the legislature was seeking to balance the individual’s right to avoid self-incrimination with the right and duty of the State to protect the life, person, and property of all citizens.’<sup>19</sup>

*Heaney* is cited, and then *Tuohy* is used. Not only is the fact that two different tests were used for the same rights dispute noteworthy; also that the right to silence was here considered as balanced against a right of *the State*, not another individual, in the application of *Tuohy* is interesting. Whereas initially *Tuohy* appears to have been introduced to resolve conflicts between rights, it was not applied exclusively in this manner. Reinforcing this confusion, McKechnie J later held in *BUPA Ireland v Health Insurance Authority*, *Tuohy* is ‘of general application in dealing with a constitutional challenge.’<sup>20</sup> Thus, as *Kelly* has noted, ‘if *Tuohy* was intended to be of limited scope, this intention has not always been realised.’<sup>21</sup>

Thereby, the *Tuohy* test was read by the Courts to be sufficiently expansive as to cover limiting rights to the public good in the manner heretofore understood to be the preserve of *Heaney*. However, in those cases where *Heaney* was applied, the standard of review provided was not uniform, if in general weak.<sup>22</sup> Legitimate objectives are presumed, consonant with a presumption of constitutionality. From this, a *rational* connection between an action and an

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<sup>17</sup> *Re Article 26 and the Employment Equality Bill, 1996* [1997] 2 IR 321.

<sup>18</sup> *Rock v Ireland* [1997] 3 IR 484 [hereinafter ‘*Rock*’].

<sup>19</sup> [1997] 3 IR 484, 501.

<sup>20</sup> *BUPA Insurance v Health Insurance Authority* [2006] IEHC 431, 238 (emphasis added).

<sup>21</sup> Gerard Hogan, Gerry Whyte, David Kenny, and Rachael Walsh *Kelly: The Irish Constitution* (5<sup>th</sup> edn. Bloomsbury Professional 2018) 1502.

<sup>22</sup> See *Re Article 26 and Part V of the Planning and Development Bill 1999* [2000] 2 IR 321. For an exception consider *Daly v Revenue Commissioners* [1995] 3 IR 1.

objective has been considered by the Court to be relatively straightforward as well: if the Oireachtas *could have* relied upon a reasoning that was reasonable, then it satisfies this test.<sup>23</sup>

If the purpose of introducing standards of review applicable to rights disputes generally was to establish uniformity in the process of adjudicating rights cases, the project was a noble failure. Whilst in principle these tests certainly provide a better means of resolving rights disputes than leaving it to the hierarchy of rights preferred by an individual judge, in practice these tests failed to achieve the consistency in application necessary for them to operate as intended.

Whilst there was an inconsistency in application, there was consistency in the outcome: a finding that the resolution of the rights dispute achieved by the Oireachtas was constitutional. By this, rights as legal claims became less practically enforceable, as the limitation of a right by the Oireachtas was usually upheld without much scrutiny. The ability of rights-bearers to ensure vindication of compensation when their rights were compromised thus was reduced, as the Court backed away from wanting to engage in balancing rights, preferring to leave this to the legislature. This development was mirrored by other trends within constitutional adjudication in this time, including the concurrent disappearance of the unenumerated rights doctrine by which the Court had for the previous thirty years exercised the most influence.

## II: The Disappearance of Unenumerated Rights Reasoning

The *Abortion Information Bill* case precipitated a crisis of confidence within the judicial community as to the legitimacy of its rights reasoning.<sup>24</sup> Whilst this case was the beginning of the end of the unenumerated rights period, a small number of further rights were recognised in the years following the *Abortion*

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<sup>23</sup> See for instance *Murphy v IRTC* in which the Court held that ‘the Oireachtas *may well have thought* that in relation to matters of [religious] sensitivity, rich men should not be able to buy access to the airwaves to the detriment of their poorer rivals’ sufficed as an objective pursued by legislation limiting the right to freedom of expression protected under Article 40.6.1° of the Constitution of Ireland 1937. [1999] 1 IR 12, 22.

<sup>24</sup> *Re Article 26 and the Regulation of Information (Services Outside the State for the Termination of Pregnancies) Bill 1995* [1995] 1 IR 1.



*Information Bill* case, before ‘it simply petered out.’<sup>25</sup> By ending this exercise in judicial engagement with unenumerated rights the judiciary further retreated from their rights activism during the third wave.

There are two Supreme Court dicta based upon unenumerated rights in the period under review. First, in *Re a Ward of Court (refusing medical treatment) (No 2)*, the Supreme Court was tasked with determining whether a ward of court could have her life-supporting treatment removed.<sup>26</sup> The key constitutional issue was whether it was possible to remove treatment, given the constitutional recognition of the State’s duty to vindicate the right to life,<sup>27</sup> and the Court’s precedent recognising that the right was first in the hierarchy of rights.<sup>28</sup>

Relying on the fact that removing treatment would not be the causative factor ending her life, rather the critical injuries received over twenty years before would be, the Court reasoned that removal was not an active negation by the State of the life of the ward. Nevertheless, the State still had a duty to vindicate ‘as far as practicable’ the ward’s right to life. As no rights claim could be levelled to trump the right to life, the resolution reached by the Court was to recognise, per Hamilton CJ, that ‘the right to life necessarily implies the right to have nature take its course and to die a natural death.’<sup>29</sup>

This right is a corollary right, rather than one derived from a substantive conception of the values underpinning the constitutional order like conceptions of the natural law, human personality, or the Christian and democratic nature of the State. Whilst a novel reading of the right to life, this required less ingenuity, and was less tangential to the constitutional text, than many of the rights discovered during the second wave. By finding the right to die a natural death as a component of the right to life, it was consistent for the Court to

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<sup>25</sup> ‘The development of unenumerated rights, which had after all been the distinctive engine which had driven activism in the 60s and early 70s has in recent decades simply petered out.’ Donal O’Donnell, ‘The Sleep of Reason’ (2017) 40 *DULJ* 192, 200.

<sup>26</sup> *Re a Ward of Court (Withholding Medical Treatment) (No 2)* [1996] 2 IR 79 [hereinafter ‘*Re a Ward of Court*’].

<sup>27</sup> Article 40.3.2° of the Constitution of Ireland 1937.

<sup>28</sup> *Attorney General v X* [1992] 1 IR 1, 57. As there was no legislation regulating the withdrawing of treatment in such cases, standards of review were not usable.

<sup>29</sup> [1996] 2 IR 79, 127.

note that ‘Where it is not possible to harmonise conflicting rights there is a necessity to apply a priority of rights and [...] the hierarchy of rights, under the Constitution, the right to life is superior to the right of privacy and the right of bodily integrity;’ and so to withdraw the tube in furtherance of the primary right to life.<sup>30</sup>

Denham J in her concurring opinion held that, ‘an unspecified right under the Constitution to all persons as human persons is dignity - to be treated with dignity.’<sup>31</sup> This is asserted without indication given as to where in the Constitution this is found or supported.<sup>32</sup> Given the case was decided on the right to life, and no other member of the court supported Denham J’s dignitarian analysis, this must be assumed to be *obiter dictum*.

However, this *dictum* bears noting for two reasons. First, this standalone dignity right was not considered persuasive by the majority of the bench; and is only a component of Denham J’s reasoning in favour of removing medical treatment. What was opted for instead was an admittedly expansive reading of the content of the right to life. This also was a notably less inventive interpretation of the constitutional text, suggesting a cautious disinclination to derive rights from substantive conceptions of the values underpinning the constitutional order in the manner which had occurred in the previous period. Second, Denham J’s recognition of an individual right to dignity will prove significant in the analysis of the current ‘fourth wave,’ as a quasi-dignitarian conception of rights has been employed.

The other consequential unenumerated rights case from this period was *O’T v B*.<sup>33</sup> The case concerned an adoption arranged by a religious order outside the terms of the Adoption Act 1952. The biological mother wanted to remain anonymous and the child wanted to know the identity of her mother. It was held by the Supreme Court that both parties had discrete unenumerated rights which were in conflict. Hamilton CJ held first that, ‘the basic right to know the

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<sup>30</sup> [1996] 2 IR 79, 151.

<sup>31</sup> [1996] 2 IR 79, 163.

<sup>32</sup> The only citation of ‘dignity’ is in the Preamble, and it is not clear whether the Preamble is technically considered part of the justiciable Constitution. See Hogan et al. (n 21) 78.

<sup>33</sup> *O’T v B* [1998] 2 IR 321.

identity of one's natural mother is a basic right flowing from the natural and special relationship which exists between a mother and her child.<sup>34</sup> However, this was to be balanced against 'the constitutional right to privacy of the natural mothers' in their dealings with the society which arranged the adoption.<sup>35</sup>

The right to privacy had already been affirmed by the Court before,<sup>36</sup> however the natural law reasoning that the right to know the identity of one's mother organically flows from the relationship of mother and child, whilst supported by similar precedent in the past was novel.<sup>37</sup> This is one of the more esoteric and specific of the rights held to be latent within the Irish constitutional order. Unlike with *Re a Ward of Court*, this case rested on a claim that the constitutional order recognised unenumerated rights as deriving from a certain extra-constitutional source - the natural law.

Having held that both mother and child had discrete, oppositional, unenumerated rights, the Court then permitted of its own limitation in resolving whose rights claim should prevail and remitted the case back to the lower courts to resolve the dispute. This is also suggestive of a disengagement amongst the senior bench towards resolving rights disputes, preferring to allow other bodies, here the Circuit Court, to resolve such rights conflicts on a case-by-case basis.

The main significance of this decision however lay not in its outcome (or lack thereof) but in Keane J's dissent. Keane J used this case to question the salience of the Court's exercise of a self-derived power to recognise such unenumerated rights. Keane J noted that: 'the 'unenumerated rights' doctrine did not emerge until nearly 30 years after the enactment of the Constitution. It may not have been within the contemplation of the framers that such a doctrine would emerge.'<sup>38</sup> He continued:

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<sup>34</sup> [1998] 2 IR 321, 348.

<sup>35</sup> [1998] 2 IR 321, 349.

<sup>36</sup> *Kennedy v Ireland* [1987] IR 587.

<sup>37</sup> *G v An Bord Uchtála* [1980] IR 32, 55.

<sup>38</sup> [1998] 2 IR 321, 366.

It would unduly prolong this judgment to consider in detail the problems that have subsequently been encountered in developing a coherent, principled jurisprudence in this area. It is sufficient to say that, save where such an unenumerated right has been unequivocally established by precedent, as, for example, in the case of the right to travel and the right of privacy, some degree of judicial restraint is called for in identifying new rights of this nature.<sup>39</sup>

The Supreme Court has not since identified a new unenumerated right. In this, it is evident that Keane J's call for judicial restraint here was favourably received by the contemporary judicial community. Keane J would restate this stance in his later and more significant judgment in *TD v Minister for Education*, covered in Chapter Seven.<sup>40</sup>

Since *O'T v B*, as Doyle noted, 'there has been no case that squarely addresses the issue of the unenumerated rights doctrine, either to confirm its vitality or to rule its constitutionality improper.'<sup>41</sup> Rather, it would appear, particularly with the ascension of Keane J to the Chief Justiceship shortly thereafter, that his comment in this case was taken as indication that a willingness to engage in substantive unenumerated rights reasoning was disappearing within the judicial community.

The *Abortion Information Bill* resulted in an expressive retreat to the constitutional text by the judicial community for the legitimation of their decision-making. Whilst the text had, of course, never been totally disregarded, in the *Abortion Information Bill* by judicial identification of the values of the Constitution, read through two words in Article 40.3.2° the Court arrogated the potential power to invalidate a referendum of the People. Among the consequences of this, it appears, was a renewed desire to ground constitutional arguments to a greater degree within the text of the Constitution. This, unavoidably, caused a retraction in judicial rights adjudication as the judiciary were, not unjustifiably, further limiting their

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<sup>39</sup> [1998] 2 IR 321, 370.

<sup>40</sup> *TD v Minister for Education* [2001] 4 IR 259, 281. See also Hogan et al (n 21) [7.3.86]

<sup>41</sup> Oran Doyle, 'Conventional Constitutional Law,' (2015) 38(2) *DULJ* 311, 320.

scope for rights interpretation.<sup>42</sup> This can be seen in the grounding of the hitherto unrecognised right to end one's life within the enumerated right to life rather than in a conception of human dignity, as proposed by Denham J<sup>43</sup> and in the drying-up of rights recognition throughout this period generally.

The movement away from judicial engagement with the substance of rights, simultaneous with a movement towards judicial deference to legislative resolution of rights breaches, reflected a general judicial detachment from the breadth of their understanding of their rights protecting function during the second wave. By this, the willingness of the Court to substantively evaluate the values they considered to underlay the Irish rights regime lessened. With this, the Court's willingness to adjudicate rights claims similarly reduced.

### III: What Factors Conditioned the Court's Contraction of Rights Protection in the Third Wave

What these trends in the Court's constitutional jurisprudence point towards in this period is a turn away from a judicial self-perception in which the Court's role as protector of the rights regime was internalised and affirmed by members of the bench. In this period, a greater credence was given for the rights reasoning of other branches of government, at the expense of judicial engagement with their rights review function.<sup>44</sup>

Just as the second wave was in part a reaction against the deference of the first, this period is constructively understood in light of its predecessor. The third wave may be seen as in part a correcting of the overextension of the judicial power in the previous thirty years. The commentary of Keane J in *O'T v B* suggests that reorienting constitutional adjudication to a more consistent, textually-grounded basis was a commanding concern of the bench in this period. The judiciary's expanded deference towards the other branches of

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<sup>42</sup> It bears noting that in *Heaney v Ireland*, the proportionality test, whilst limiting the scope of judicial review, was itself a significant exercise in judicial activism, as it imported wholesale a Canadian test into the Constitution of Ireland notwithstanding the absence of textual link. [1994] 3 IR 593

<sup>43</sup> [1996] 2 IR 79.

<sup>44</sup> David Gwynn Morgan, "Judicial-o-centric' Separation of Powers on the Wane?" (2004) 39(1) *Irish Jurist* 142.

government is also indicative of this tendency, as areas of rights breaches within both the legislative and executive spheres which may before have been considered within the competence of the judiciary to review were revised to the limitation of the judiciary's power.<sup>45</sup>

This is mostly understood in negative, regressive terms for rights protection. However, even if this restraint was partially due to judicial unwillingness to adjudicate on rights, it was also partially due to a desire to construct a more comprehensive and coherent jurisprudence about the boundaries of the judicial power, and the procedures by which rights could be claimed. This is a positive insofar as it sought to provide coherence to the Court's rights adjudication, and so provided clarity to citizens about when the court would be willing to enforce their rights. As predictability of enforcement of rights claims is essential to rights protection, this aspect of attempting to standardise rights protection should be seen, in principle if not always in practice, as a positive step by the Courts.

What explains the third wave? I suggest the most important explanatory factor for the jurisprudence in this period is the rise of judicial self-reflection, brought about by the ostensible collapse in the legitimacy of unenumerated rights reasoning in the aftermath of the *Abortion Information Bill* case. Evaluating what led to the jurisprudence of this period is thus in considerable part evaluating the excesses of the jurisprudence which preceded it.

### III(A): Explaining the Judicial Acceptance of Standards of Rights Review

There were three internal and complementing factors, which influenced the judicial community to develop the stance it adopted in this period. First, the rise of articulated standards of review reflect, per Ó Cinnéide: 'the gradual and cautious retrenchment of the Irish constitutional jurisprudence since the activism of the Ó Dálaigh Court and a concern to avoid judicial overstretch and

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<sup>45</sup> Ibid. See also *O'Malley v An Ceann Comhairle* [1997] 1 IR 427; *Horgan v An Taoiseach* [2003] 2 IR 468.

excessive annexation of state power.<sup>46</sup> Considering standards of review, criticisms of the prior, somewhat ad hoc means of resolving disputes between recognised rights, either by adoption of a harmonious interpretation,<sup>47</sup> or a primacy of rights,<sup>48</sup> permitted of a considerable degree of legal indeterminacy. Such indeterminacy not only cuts against one of the virtues of the rule of law - the ability to know your legal obligations and regulate your behaviour on foot of them - it gives judges a considerable degree of discretionary power. Hardiman J extrajudicially expressed such sentiments:

a jurisdiction exercised without consistent, rational and clear exposition of the principles on which it is based is a jurisdiction which will become opaque in its working, inaccessible to the man on the street and therefore will acquire the reputation of being unpredictable and highly subjective.<sup>49</sup>

Legal determinacy is a principle which the judicial community, not least in the period under review, values. This would explain the take-off of the application of standards of review (if in an indeterminate fashion) amongst the judiciary in the period after their incorporation into the jurisprudence.

The rise of standards of review can then be seen also as a reactive attempt by the judicial community in this period to impose a structure upon their power in this area, and not simply from a desire to hamper their ability to engage with rights adjudication and defer to the elected branches. Whilst the coincidence between these standards of review and a motion towards deference is noted, the impetus behind this is the understandable desire to impose greater determinacy to the judicial role. This involves a diminution of power in an immediate sense, but it also integrates rights protection as a reliably enforceable component of a broader, orderly legal system.

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<sup>46</sup> Colm Ó Cinnéide, 'Irish Constitutional Law and Direct Horizontal Effect - A Successful Experiment?' in Dawn Oliver and Jörg Fedtke (eds) *Human Rights and the Private Sphere: A Comparative Study* (Routledge 2007) 213. 236.

<sup>47</sup> [1992] 1 IR 1.

<sup>48</sup> *The People (DPP) v Shaw* [1982] IR 1.

<sup>49</sup> Adrian Hardiman, 'The Role of the Supreme Court in our Democracy' in Mulholland (ed) *Political Choice and Democratic Freedom in Ireland: 40 Leading Irish Thinkers* (MacGill 2004) 31.

Whilst this may explain the rationale *behind* the emergence of general standards of rights review, that the standards were so approvingly adopted demonstrates a broad willingness within the judicial community to move away from the breadth of individual discretion in rights adjudication of the preceding bench. This was due to the factors already outlined: a reflective recognition of the dangers arising from an inflated rights protection role.

Whyte noted critically that, ‘the Supreme Court’s understanding of the doctrine of the separation of powers rests on certain pre-interpretative values that prize judicial restraint and fails to take account of other elements of the Constitution.’<sup>50</sup> Both premises in this statement are accepted: the constitutional order was designed with a social constitutionalist dimension grafted onto a classical conception of the separation of powers associated with figures such as Montesquieu and Jefferson.<sup>51</sup> What are these pre-interpretative values, however? To Kenny:

the prevailing culture of the judiciary has been a liberal judicial conservatism - underwritten by the goals of enlightenment liberalism, executed via a Burkean conservative incrementalism, thinking that these goals are best advanced by leaving the legislature to do its work rather than by intervening judicially.<sup>52</sup>

This seems accurate, and makes sense of the rise of greater deference to the rights reasoning of the elected branches. The dominance of such values within a judicial culture that was, so shortly beforehand, so judicially activist; and the consequent retraction in judicial rights protection arising from this cultural shift, reflects again my thesis argument: that the degree of rights protection a common law system offers corresponds with the dominant attitudes within a judicial culture about rights.

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<sup>50</sup> Gerry Whyte *Social Inclusion and the Legal System* (2<sup>nd</sup> edn. IPA 2015) 30.

<sup>51</sup> Colm Ó Cinnéide. ‘Zones of Constitutionalisation’ and the Regulation of State Power: The Missing Social Dimension to the Irish Constitutional Order’ (2014) 37(1) *DULJ* 173.

<sup>52</sup> David Kenny, ‘Remedial Innovation, Constitutional Culture, and the Supreme Court at a Crossroads’ (2017) 40(2) *DULJ* 85, 102ff. David Kenny, ‘Merit, Diversity, and Interpretative Communities: the (non-party) politics of judicial appointments and constitutional adjudication’ in Cahillane et al, *Judges, Politics and the Irish Constitution* (Manchester University Press 2017) 136, 142.



### III(B): Explaining the Demise of Unenumerated Rights Reasoning

With the demise of unenumerated rights, not only did such rights lead the Court to the brink of a constitutional crisis (a cause for reflection in and of itself) but the philosophical foundations upon which it was premised began to appear dubious. As Ryan noted in this period, of the three dominant forms of unenumerated rights reasoning,<sup>53</sup> ‘whatever the merits of these formulae [for finding unenumerated rights] they share a tendency to vagueness and uncertainty that is hardly helpful in determining the specific content of various rights.’<sup>54</sup> When, as in *Norris*, two different judgments could be given relying on the same philosophical foundation to reach diametrically opposite conclusions as to the right at hand, the coherence of the philosophy as a means for determining constitutional rights has to be challenged.<sup>55</sup> Keane J’s influential recognition in *O’T v B* of difficulties ‘developing a coherent, principled jurisprudence in this area’ reflects such concerns.<sup>56</sup>

Daly suggested that ‘the decline of natural law might be understood not simply in terms of secularisation, but also as reflecting a broader trend towards a more conservative judicial methodology in constitutional law, which seeks to properly delimit the judicial role.’<sup>57</sup> The reason for the coincidence in these two concurrent declines is that, as the Court’s jurisprudence to this point was largely founded on a theologically-inspired foundation for rights, upon the decline of religious observation in Ireland, the public legitimacy of relying upon these foundations for rights adjudication similarly declined. As MacCormaic noted, ‘as the years passed, and the grip of natural law and religion generally on mainstream legal thinking in the law faculties and the Four Courts began to

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<sup>53</sup> The Christian and Democratic nature of the State, natural law reasoning, and the human personality test, respectively.

<sup>54</sup> Fergus Ryan, *Constitutional Law* (Round Hall 2001) 13.

<sup>55</sup> *Norris v Attorney General* [1984] IR 36.

<sup>56</sup> [1998] 2 IR 321, 370. See also Keane CJ’s extrajudicial comment that: ‘I would also share the unease which has been expressed as to the somewhat dubious premises on which the doctrine of unenumerated rights rests and the dangers for democracy of unrestrained judicial activism in this area.’ Ronan Keane, ‘Judges as Law-makers: The Irish Experience’ (2004) 4(2) *JSIJ* 1, 12.

<sup>57</sup> Eoin Daly, ‘Public Philosophy and Constitutional Interpretation after Natural law: Republican Horizons’ in Eoin Carolan (ed) *The Constitution of Ireland: Perspectives and Prospects* (Bloomsbury Professional 2012) 99.

weaken, judges grew increasingly uncomfortable with the implications of the unenumerated rights doctrine.’<sup>58</sup>

Compounding this:

[a]cademically, particular concern arose [...] on foot of the unenumerated rights case law of the 1960s and 1970s, when various commentators expressed the view that Irish judges were operating in an unprincipled and unrestrained manner. This concern began to manifest itself on a judicial level in the late 1990s and early 2000s, when the Supreme Court, during the tenure of Chief Justices Ronan Keane and John Murray, adopted a noticeably restrained and deferential posture that has since filtered into judicial thinking in a range of cases at both the High Court and the Supreme Court level.<sup>59</sup>

As well as the adoption of this reasoning bringing the judicial community as close to a constitutional crisis as they had come then, sociologically, and academically, patience for unenumerated rights reasoning was also drying up.

### III(C): A Change in the Composition of the Bench

These reactive critiques to the extensive judicial function during the previous thirty years would not have been so influential upon the nature of rights protection in Ireland if not for a shift in the composition of the bench. A new generation of jurists came in as the second wave crested. By 1995 only two of the judges who had been on the bench in 1990 were still there.<sup>60</sup> As MacCormaic further observed, ‘by the spring of 2000 there would be just three survivors, Ronan Keane, Frank Murphy, and Susan Denham, of the Supreme Court from which Hugh O’Flaherty had resigned the previous year.’<sup>61</sup> The drive towards reconceptualising the role of the judiciary came largely from these recent appointees.

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<sup>58</sup> Ruadhán MacCormaic, *The Supreme Court* (Penguin 2016) 335.

<sup>59</sup> Conor O’Mahony, ‘Constitutional Amendment and Judicial Restraint: How restrained should the Irish courts be?’ in Eoin Carolan (ed) *The Constitution of Ireland: Perspectives and Prospects* (Bloomsbury 2012) 161, 161.

<sup>60</sup> They were O’Flaherty J and Hamilton CJ.

<sup>61</sup> MacCormaic (n 58) 330.

In particular, with the ascension of Keane CJ, Murray CJ, Murphy and Hardiman JJ to the bench, a shift in emphasis occurred as these judges were especially vocal in their rights reticence, both in regards unenumerated rights, and in regards the separation of powers.<sup>62</sup> In a very short period, then, the generation of judges on the bench for the *Abortion Information Bill* case left the Supreme Court. They were replaced by judges who did not share their interest in rights adjudication. Being the apex Court, *obiter* expressions such as those of Keane J in *O'T v B* gave a signal to the legal community that the Court were operating under a more restrained conception of the judicial role within the separation of powers than before. Without these appointments then, the change in rights protection in this period would not necessary have come about to the degree to which it did.

Again, this shift in emphasis within the Court's rights jurisprudence in this period is explicable by examination of contextual and philosophical factors within the judicial community. A drive towards creating a more coherent, consistent rights regime in this period involved a retraction in rights engagement, and so the limitation of the applicability of rights as legal claims.

Clarke has argued, 'the real significance of natural law theory was to potentially facilitate the emergence of a self-confident judicial oligarchy, arrogating to itself an interpretative monopoly over justice.'<sup>63</sup> During the third wave, the Court appeared to delegate rights protection, coincident with a greater appreciation of how the Oireachtas could act in substitution for that role which they had hitherto sought to monopolise.

However, the third wave also saw the emergence for the first time of dissentient countertrends within the judicial cultural attitude to rights. First, criminal process rights remained robust in this period.<sup>64</sup> As MacCormaic noted:

[T]he Court was noticeably strong on the rights of defendants - a stance that never endears a Court to the Department of Justice and the wider

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<sup>62</sup> See Hardiman (n 49).

<sup>63</sup> Desmond Clarke, 'Ireland: A Republican Democracy, A Theocracy, or a Judicial Oligarchy?' (2011) 29 *ILT* 81, 86.

<sup>64</sup>A notable exception to this was the right to silence jurisprudence commenced by *Heaney v Ireland* [1994] 3 IF 593.

bureaucracy but one that many judges felt strongly about. It took a strong line against any attempts to deny individuals due process or fair procedures - a line of thinking that has run through the court for decades and has resulted in Ireland having some of the highest standards of due process in criminal and civil cases of any common law country.<sup>65</sup>

Throughout the period under review, the strong exclusionary rule elaborated in *DPP v Kenny* providing the foundation for Irish criminal process rights was continuously upheld.<sup>66</sup> Evidence, however probative, would not be admitted if gathered by an intended action which, whether consciously or not on the part of the Gardaí, breached the constitutional rights of the accused; save for in strictly defined extraordinary excusing circumstances.<sup>67</sup>

This then goes against the retrenchment narrative conducted above. What explains the judicial attachment to criminal process rights during a period when, as a generality, rights review was in decline? Alongside the fact that such rights are necessarily negative in enforcement, it may be that the judiciary considered these rights as particularly related to *their* rights protecting function. As Hardiman J put it, extrajudicially, ‘The criminal law is, or should be, our gold standard of procedural fairness. The Constitution sees it that way.’<sup>68</sup> Partially, this attachment may arise from a recognition of the unique interface at which judges find themselves in regards criminal process. Judges stand directly between the State and the accused. The gravity of a state’s rights breach thus implicates the judiciary where they find against the accused anyway. The proximity of the judiciary to the determination of whether or not to permit that punishment may well endear these rights to the conscience of judges above others. It may also stem from their experience of having litigated

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<sup>65</sup> MacCormaic (n 58) 347 - 348.

<sup>66</sup> *The People (DPP) v Kenny* [1990] 2 IR 119 [Hereinafter ‘Kenny’]; *People (DPP) v Balfe* [1998] 4 IR 50; *Braddish v DPP* [2001] 3 IR 127; *Bowes and McGrath v DPP* [2003] 2 IR 25; *DPP (Walsh) v Cash* [2007] IEHC 108; *DPP v Mallon* [2011] IECCA 29; *Damache v DPP* [2012] IESC 11

<sup>67</sup> [1982] IR 1; *DPP v Lawless* (unreported 28 November 1985) *DPP v Delaney* [1997] 3 IR 453. Hardiman J was perhaps the most ardent defender of criminal process rights in this period. As Fennelly J noted extrajudicially, ‘there is an underlying assumption [in his reasoning] that the judiciary are as much or almost as much to be distrusted as the Gardaí.’ Nial Fennelly, ‘The Judicial Legacy of Mr Justice Adrian Hardiman’ (2017) 58 *Ir Jur* 81, 94.

<sup>68</sup> [2015] IESC 31. Adrian Hardiman, ‘Weasel Words and Doubtful Meanings: A Study in the Language of Law ‘Reform’’ (2007) 2(1) *JSIJ* 1, 9.

criminal cases themselves, as criminal process cases arise with greater frequency than any other rights dispute. In any event, it is clear that in this period, the presence of a robust criminal process jurisprudence departs from the general thrust of rights protection in this era.

#### IV: Conclusion

Between 1995 and 2011, the Court's constitutional adjudication could be understood to be pursuing two objectives in regards rights: one generally negative and one positive for the protection of certain types of rights. Negatively, the Court were granting a degree of deference to the elected branches which meant that - criminal rights apart - searching rights review was not occurring, and thus rights breaches could occur without arousing judicial responses.<sup>69</sup> Also as the following chapters show, the Court expressly allowed continuing breaches of recognised rights to occur without imposing a duty upon the State to act on foot of its obligations, due to a judicially-constructed conception of the separation of powers.

Positively, however, in this process of retraction from the peak of rights empowerment which the Court enjoyed prior to 1995, a structure emerged which had not existed before. Standards of review seek to provide greater clarity about the role of the Courts, and the means by which they will deliberate upon rights. This assists rights protection, as it allows rights holders to predict more accurately whether their rights claims will be vindicated. A sense of ownership of a right - the instance in which a person can feel that a right which they hold has a purposive value protecting them in a particular regard, such that a breach will be considered sufficiently serious as to be actionable - is an essential aspect of creating a culture of rights protection. Ownership is advanced by a coherent rights regime.<sup>70</sup>

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<sup>69</sup> As Langwallner noted of the Court in this period, 'Any judicial deference to the executive on principle is, itself, a policy, or, if you like an ideological choice a present majority of the court has made about the scope and enforceability of socioeconomic rights.' David Langwallner, 'Separation of Powers Deference, and the Failure to Protect the Rights of the Individual' in Eoin Carolan and Oran Doyle (eds) *The Irish Constitution: Governance and Values* (Round Hall 2008) 256.

<sup>70</sup> The positivity of this drive towards structure during the period under review will be illustrated by the fact the current judicial experimentation with the substantive limits of rights

For effective social rights protection, a foundational willingness to engage in judicial rights review must subsist alongside both a commitment to adjudicate social rights too, and a willingness to expand the conventional remedial power of Courts in order to ensure proper protection for social rights. That is, the Court must develop an ability to compel state action to vindicate rights. I now turn to examining the Irish Court's jurisprudence on this latter requirement during the second and third waves.

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protection is framed by an understanding that logic and consistency are valuable features of a rights regime which ought to be *maintained*. This is discussed in Chapter Eight of this doctorate.

## Chapter Six: The Development of Remedial Powers in Ireland

The previous chapters documented the emergence of judicial rights review in Ireland from 1965 to 1995. This emergence of rights protection in Ireland has been shown to track with changes in the composition and dispositions of the judicial community. Particularly, the elevation of jurists influenced by American constitutionalism and a Catholic natural rights doctrine whose professional experience was wholly under the current Constitution changed Irish legal culture in regards rights protection.

As I noted in Chapter Two, there are three essential commitments that must develop in a judicial community for a judicial role conception supportive of social rights protection to emerge. In this chapter, I examine the remedial dimension. Alongside the internalisation of an understanding that the Court rightfully has a role in rights adjudication, for social rights protection to develop it is also required that a judicial community accepts the propriety of issuing orders with resource implications against the State.

As noted in Part One, orders of compulsion are necessary not just for social rights protection, but also for the effective protection of classic civil-political rights such as voting rights or rights to legal aid. Furthermore, it *is* possible to provide a form of social rights protection through restrictive orders exclusively - limiting what actions can be taken that *undermine* the existing provision of an interest in an essential service, to which the social rights claim relates.<sup>1</sup> Nevertheless, given the unavoidable resource implications of creating a legal system where rights-bearers are entitled to certain essentials such as education or housing *as of right* - the capacity to compel the expending of resources to fulfil these rights commitments is necessary. This chapter examines the Irish judiciary's remedial jurisprudence. As noted in *Kelly*:

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<sup>1</sup> *Jaftha v Schoeman* [2004] ZACC 11. See also Henry Shue, *Basic Rights* (Princeton University Press 1980) for the paradigm theoretical examination of how the State's obligations can be trifurcated into duties to respect, protect and fulfil rights.

Neither the Constitution itself nor any other law prescribes a particular procedure as appropriate for remedying a breach of constitutional rights, just as no special procedure is laid down for challenging the constitutionality of statutes.<sup>2</sup>

Whilst the Constitution guarantees ‘in its laws to protect, and as far as practicable, by its laws to defend and *vindicate* the personal rights of the citizen,’<sup>3</sup> the limits of the Court’s remedial powers are largely self-defined by the Court themselves. Developing a recognition within a common law judicial culture that orders of compulsion, or positive remedies, can be issued to fulfil rights commitments involves a further step away from the judicial deference of the Westminster model.

This chapter examines what cultural factors have informed the development of the Court’s remedial jurisprudence. This examination will again show that fluctuations in judicial attitude correspond to fluctuations in the degree of rights protection afforded by the common law constitutional order. Whilst the Court’s attitude to rights adjudication has changed considerably since the coming into force of the Constitution, the judiciary’s remedial innovations have not matched their conceptual innovations. Orders of compulsion have not developed in Irish law. For this reason, social rights protection has not either.

## I: The Second Wave 1965 - 1995: Rights Innovation Without Remedial Innovation

As I have shown, the second wave of rights adjudication saw a significant expansion of the Court’s willingness to engage in rights adjudication. The emergence of unenumerated rights reasoning, and the Court’s expansion of rights commitments to horizontally bind private actors as well as the State reflect this burst of rights enthusiasm.<sup>4</sup> Given the exhortation of Ó Dálaigh CJ at the start of the second wave that, ‘no one can with impunity set these rights at naught or circumvent them, and that the Court’s powers in this regard *are*

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<sup>2</sup> Gerard Hogan, Gerry Whyte, David Kenny, and Rachael Walsh *JM Kelly: The Irish Constitution* (5<sup>th</sup> edn. Bloomsbury 2018) 1532.

<sup>3</sup> Article 40.3.1° of the Constitution of Ireland 1937 (emphasis added).

<sup>4</sup> Gerard Hogan, ‘The Farthest - December 1972’ (2019) 62 *Ir Jur* 1.



as ample as the Constitution requires,' the remedial uniformity which followed in this period is striking.<sup>5</sup>

Every successful rights case in the second wave, both for enumerated and unenumerated rights, was remedied by restraining the actions of the State, usually by declaring the impugned Act unconstitutional.<sup>6</sup> Whilst only utilising one remedy in cases of unconstitutionality, the Court cleaved to a particularly strong interpretation of this remedy, holding that declarations of unconstitutionality made the impugned legislation void *ab initio*. Consistent with the strong form judicial review developed in this period, the Court understood its remedial powers to be extremely strong and narrowly prescribed. The only option was a declaration of unconstitutionality - 'a judicial death certificate, with the date of death stated as the date when the Constitution came into operation.'<sup>7</sup>

### 1(A): *The State (Healy) v Donoghue*

The uniformity of this remedial approach is best illustrated by the case of *The State (Healy) v Donoghue*.<sup>8</sup> *Healy* challenged the constitutionality of the State provision of criminal legal aid. The prosecutor was 18 years old, had left school at 13, and had no professional legal representation when he pled guilty and was convicted of larceny.<sup>9</sup> The Court found that 'the basic fairness postulated by the guarantees in Article 40.3 of the Constitution required that the legal aid that had been judicially found to be essential in the interests of justice should not be arbitrarily removed from the accused by forcing a trial on them against their will without that legal aid.'<sup>10</sup>

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<sup>5</sup> *The State (Quinn) v Ryan* [1965] IR 70, 122 [emphasis added].

<sup>6</sup> In the only case brought before the senior bench in this period claiming a social right, the rights claim was rejected with little evaluation of whether the right alleged was recognisable with regard to the values the constitution underpinning the Constitution. *O'Reilly v Limerick Corporation* [1989] ILRM 181.

<sup>7</sup> *Murphy v Attorney General* [1982] IR 241, 307; followed by *Muckley v Ireland* [1985] IR 472. See Yvonne Scannell, 'Murphy v Attorney General - the Taxation of Married Women in Ireland' in Eoin O'Dell (ed) *Leading Cases of the Twentieth Century* (Sweet and Maxwell 2000) 327.

<sup>8</sup> *The State (Healy) v Donoghue* [1976] IR 325 [hereinafter '*Healy*'].

<sup>9</sup> Per O'Higgins CJ: 'when a person faces a possible prison sentence and has no lawyer, and cannot provide for one, he ought to be informed of his right to legal aid. If the person charged does not know of his right, he cannot exercise it; if he cannot exercise it, his rights is violated. [1976] IR 325, 352.

<sup>10</sup> [1976] IR 325, 355.

To this end, the Court imposed a duty upon the State to offer free criminal legal aid to all accused unable to hire their own representation. Unlike the other unenumerated rights, vindication of this right required a financial commitment by the State to actively fund criminal legal aid. Indeed, as Whyte would note, ‘the Supreme Court decision in *The State (Healy) v Donoghue* led to a five-fold increase in public expenditure on criminal legal aid, from approximately £54,000 in 1975 to approximately £252,000 in 1977.’<sup>11</sup>

By this, the Court further developed its self-made rights-recognising power: permitting the Courts to recognise rights which impose considerable financial obligations upon the State. However, whilst *Healy* found a positive rights commitment for the State to make provision for criminal legal aid, the order handed down by the Courts was confined to quashing the conviction of Healy. Even with this recognition of financial commitments following from unenumerated rights, the Court maintained its self-imposed aversion to compelling action that positively cures the rights breach, opting for the more conventional remedy of prohibiting a conviction with the indirect effect of curing the breach.

The considerable financial implications of the judgment in *Healy* shows that, in this period, the Court was not averse to making orders that affected state expenditure *per se*. After all it was also in this period that the Court intervened in the State’s taxation scheme, declaring a tax on married couples unconstitutional, with obvious implications for state financial planning.<sup>12</sup> The Court also did not feel particularly inhibited from intervening in areas formerly walled-off to the other branches of Government. Indeed, in *Crotty v an Taoiseach*, ‘the most spectacular example of an interlocutory injunction in a constitutional challenge,’<sup>13</sup> the Court prevented the State from entering into an international agreement because doing so conflicted with the Court’s interpretation of sovereignty.<sup>14</sup>

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<sup>11</sup> Gerry Whyte *Social Inclusion and the Legal System: Public Interest Law in Ireland* (2<sup>nd</sup> edn, IPA 2015) 430ff.

<sup>12</sup> [1982] IR 241.

<sup>13</sup> Hogan et al. (n 2) 941.

<sup>14</sup> *Crotty v An Taoiseach* [1987] IR 713.

Rather than an avoidance of complex polycentric issues, the sticking point appeared to be in the Court *directing* the actions of the State. While it felt empowered to *limit* the range of constitutionally permissible activities, even by the innovation of new rights commitments, and thereby to *indirectly* guide the State to protect rights, the Court was not able to overcome an aversion to directly *ordering* the State to positively act to fulfil its rights commitments.

### I(B): *Somjee v Minister for Justice*

The remedial restraint of the judiciary in this period is appositely reflected by *Somjee v Minister for Justice* - a case heard at the height of the unenumerated rights period, between the *McGee* and *Norris* judgments.<sup>15</sup> The State's immigration policy treated non-national husbands of Irish wives disfavouredly, as non-national wives of Irish husbands were given expedited residence status but not vice versa.<sup>16</sup>

Ultimately finding against the Plaintiffs, the Court declared it would have been unable to rectify the rights breach by giving non-national husbands the same expedited residency status as non-national wives - 'levelling up' the rights of non-national husbands to that of non-national wives - as to do so would require it to amend the text of the Immigration Act. Per the Court:

The jurisdiction of the Court in a case where the validity of an Act of the Oireachtas is questioned because of its alleged invalidity having regard to the provisions of the Constitution is limited to declaring the Act in question to be invalid, if that indeed be the case. The Court has no jurisdiction [...] to indicate to the Oireachtas the appropriate form of enactment which should be substituted for the impugned enactment.<sup>17</sup>

As noted, the text of the Constitution does not impose this limit on the judicial remedial power, nor is the text of the Constitution or any cases cited in support of this finding.<sup>18</sup> This shows that, even in the midst of the rights enthusiasm of

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<sup>15</sup> *Somjee v Minister for Justice* [1981] ILRM 324.

<sup>16</sup> Until 2016, marriage in Ireland was only contractable between two members of the opposite sex.

<sup>17</sup> [1981] ILRM 324, 327.

<sup>18</sup> Gerard Hogan 'Remedies for Inequality' (1992) 14 *DULJ* 115.

the unenumerated rights period, a residual, likely unconscious conservatism maintained itself in the Court's understanding of its remedial capacity.<sup>19</sup>

### I(C): *State (Richardson) v Governor of Mountjoy Prison*

While noting this, it was also in this period that the imposition of an order of *mandamus* was considered for the first time. In *State (Richardson) v Governor of Mountjoy Prison*, the Court held that, with detained persons, given they were unable to protect their health or bodily integrity themselves, the State could be obliged to 'take the steps necessary to protect [their] health.'<sup>20</sup> However, the Court continued:

The slopping out process made it inherently probable that human waste would appear in the toilet sink; that this procedure failed to respect the prosecutrix's health; and that she would be entitled to relief by way of *mandamus*, but since the authorities were willing to alter the regime the necessity for making an order did not arise.<sup>21</sup>

In a trend which will be shown to be general in the Court's remedial reasoning, the Court accepts a discretion to issue a *mandamus* order to vindicate a right, but does not do so in the expectation of swift governmental action curing the breach.<sup>22</sup> Reflecting the reliability of this approach, slopping out, the impugned behaviour, would still be used in the Irish penal system until a judgment of the Supreme Court almost forty years later in *Simpson v Governor of Mountjoy Prison*.<sup>23</sup>

## II: What Factors Conditioned the Court's Remedial Jurisprudence in the Second Wave?

What explains the Court's perspective on its remedial powers in this period? I suggest the Court's understanding of its remedial capacity was heavily

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<sup>19</sup> See also *MacMathúna v Attorney General* [1994] 3 IR 484; *Bloomer v Law Society of Ireland* [1995] 3 IR 14; *Dornan Research Ltd v Labour Court* [1998] ELR 256.

<sup>20</sup> *The State (Richardson) v Governor of Mountjoy Prison* [1980] ILRM 82; see also *The State (C) v Frawley* [1976] 1 IR 365.

<sup>21</sup> [1980] ILRM 82.

<sup>22</sup> [1980] ILRM 82.

<sup>23</sup> *Simpson v Governor of Mountjoy Prison* [2019] IESC 81.

influenced in this period by American constitutionalism. I have noted the influence of the US Supreme Court on the senior bench in this period already. America's constitutional jurisprudence provided a much broader template for the Court as rights adjudicators than the British model from which the bench was turning. Coupled with its accessibility and the aforementioned executive instruction to consider the jurisprudence of the US Supreme Court,<sup>24</sup> this naturally proved an inspiration to the Irish judiciary.

As noted in Part One, however, the US model is one based on a negative conception of rights. It is premised on a view of the State as a necessary evil whose powers must be curbed to ensure the protection of rights. Conceiving of the State as an actor that can affirmatively act to *provide* rights protection act is discordant with this conception. As I have shown, this negative understanding of the role of the state is not the philosophical conception of the State which ultimately prevailed in the drafting of the Constitution of Ireland. The Irish constitutional order is animated by a social objective to positively bring about a society which promotes the common good. In this endeavour, not only were rights with clear resource implications expressly included,<sup>25</sup> not only was the duty on the State to *vindicate* rights declared,<sup>26</sup> but the remedial power was left unrestrained. These factors indicate, at minimum, the compatibility of the Constitution with issuing orders of compulsion.

I suggest the approval which the Court received for expanding Ireland's fundamental rights protections in accordance with American constitutional practice also imported into Irish constitutional law a rejection of positive rights adjudication. The effect of this would be that, whilst the American experience would inspire judicial activism in Ireland, commitment to the American model of rights protection would also preclude the social constitutionalist aspects of the Constitution, that promote a vision of the State as positively *guaranteeing* rights protection, from receiving judicial consideration. In this way, the attention paid to American constitutional jurisprudence permitted an

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<sup>24</sup> See Chapter Four of this doctorate.

<sup>25</sup> Article 42.4 of the Constitution of Ireland 1937.

<sup>26</sup> Article 40.3.2° of the Constitution of Ireland 1937.

expansion of substantive engagement with rights, whilst also circumscribing the scope of the Court's understanding of its remedial capacity.

I have already noted the confluence in the second wave of American constitutionalism with a Catholicised understanding of natural law as informing the Court's rights protection. The form in which the Christian provisions of the Constitution were utilised by the Court in this period is, in significant parts, at variance with the Catholic communitarian thought that motivated their inclusion in the Constitution in the first place. As understood by the Court in this period, the effect of the Catholic-inspired provisions of the Constitution was to suggest a foundation upon which exclusively negative personal rights, rights which prevent state action offensive to the right, could be identified. By this, the tension between Enlightenment liberalism's negative conception of the State's role in rights protection and Catholic social constitutionalism's positive conception of the State was resolved: the Catholic aspects, stripped of their communitarian characteristics, could be used to divine the philosophical foundation of a constitutional order which, in keeping with Enlightenment liberalism, only understands rights as negative protections against State intervention.

Why was this interpretation of the religious influences upon the Constitution adopted? O'Donnell J has provided a compelling assessment:

Even if *Quadragesimo Anno* generated enthusiastic admiration in clerical and Catholic intellectual circles, neither its teaching nor the refinement perhaps discernible in the Constitution could be said to have percolated to such a level as to have been a generally accepted part of Irish thinking in 1937 or immediately thereafter [...] By contrast, natural law theory - whatever its weaknesses - was undoubtedly a significant catalyst in the encouragement of the active study of the Constitution among lawyers who, by their training, may have been sceptical of a written Constitution guaranteeing fundamental rights.<sup>27</sup>

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<sup>27</sup> Donal O'Donnell, 'Property Rights in the Irish Constitution' in Eoin Carolan and Oran Doyle (eds) *The Irish Constitution: Governance and Values* (Round Hall 2008) 418 and 418ff.

This insight is perceptive. Whereas the communitarian aspects of the Constitution were taken from a somewhat esoteric strain of Catholic social thought, the rights reasoning in this period was informed either by familiarity with Thomist natural law theory, most notably in *McGee*;<sup>28</sup> or a common understanding of Christian moral dogma, in the case of the majority in *Norris*;<sup>29</sup> or, from the most recent Encyclical, per *Ryan*.<sup>30</sup> These sources were far more widely known, then as now (perhaps excepting *Pacem in Terris*) than the communitarian philosophy of Popes Leo XIII and Pius XI. Whereas the latter is taught (when it is taught) in university, an understanding of God's law and of Christian morality is taught both in Catholic schools and at mass, two institutions with which the majority of the bench and bar from the 1960s until the 1990s were innately acquainted.

That this new generation of ambitious rights-conscious jurists were, with a notable exception,<sup>31</sup> the first judges to engage in natural law reasoning is not coincidental.<sup>32</sup> As I have noted already, not only was the judicial community which emerged in the 1960s the first to have their legal education and professional experience exclusively under an independent Irish legal system; they were also among the first generation in which the legal community developed a plurality of Catholic members. A Catholic education, invariably in early and mid-20<sup>th</sup> Century taught by clerics, would include an immersion in Catholic morality, including a cursory coverage of Aquinas' natural law theory. Of the twenty-six members of the Supreme Court bench between 1965 and 1995, at least fifteen of those judges went to Catholic secondary schools.<sup>33</sup> When confronted then with indeterminate aspects of the Constitution, such as references to 'the common good', 'social justice', and 'natural right'; the

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<sup>28</sup> *McGee v Attorney General* [1974] IR 284.

<sup>29</sup> *Norris v Attorney General* [1984] IR 36.

<sup>30</sup> *Ryan v Attorney General* [1965] IR 294.

<sup>31</sup> See Kennedy CJ in *The State (Ryan) v Lennon* [1935] IR 170, 204 - 205.

<sup>32</sup> Illustrative of the lack of regard for Catholic thought in the jurisprudence of the Court prior to the period under review, Edward McWhinney in 1966 commented how, 'the import of modern Catholic political, social, and economic ideas as legal developments was rather less significant of substantial than the adoption of the radically new Constitution of 1937 might have seemed at the time to foreshadow. Edward McWhinney *Judicial Review in the English Speaking World* (3<sup>rd</sup> ed, Toronto University Press 1965) 158, 178.

<sup>33</sup> See Brice Dickson *The Irish Supreme Court: Historical and Comparative Perspectives* (OUP 2019) Appendix 3: 'Biographies of the Judges of the Supreme Court 1924 - 2018'.

frame of reference of the judicial community was to perceive these clauses in a manner consistent with the natural law precepts with which they were familiar.

By this, during the expansion in rights adjudication during the second wave, a broader conception of the Court's rights protection role - one that would include a power to positively order action to protect rights entitlements - failed to develop. American constitutionalism was the catalyst for Ireland's rights revolution, and the form of rights protection that developed was conceptually closer to the American negative rights regime than the order which the Constitution was intended to bring about.

### III: The Third Wave 1995 - 2013: Conscious Remedial Conservatism

In the preceding chapter I detailed how the third wave saw a period of judicious avoidance in rights adjudication generally. Whilst it may be that, given the broad power to substantiate rights that the Court was exercising, the restraint of the judiciary to expand its remedial capacity during the second wave was largely unconscious, during the third wave the Court was confronted with a series of rights claims with direct resource implications. These cases explicitly demonstrated the judicial resolve against orders of compulsion within the Irish constitutional order. The most controversial of these rights claims concerned social rights and these will be analysed in particular depth in the next chapter. There were three less controversial, but not more remedially successful civil rights cases engaging with the Court's power to positively cure rights breaches which will here be considered.

#### III(A): The Right to State Documents in Both Official Languages

During the third wave, the senior Courts engaged with the right of Irish language speakers ('Gaeilgeoirs') to state documents in the national language. The Court's Irish language rights jurisprudence dates to the Free State



Constitution,<sup>34</sup> but was relatively underdeveloped until this time.<sup>35</sup> Ireland is a bilingual constitutional order. Article 8 of the Constitution states that, ‘the Irish language as the national language is the first official language,’ and that ‘the English language is recognised as a second official language.’<sup>36</sup> Article 25.4.4° requires that all Acts of the Oireachtas passed in one of the official languages shall be issued in the other official language. Whilst Article 8 protects English speakers as well as Irish speakers, as English is the dominant vernacular in Ireland, the language rights adjudication in Ireland has almost entirely related to Gaeilgeoirs.

Prioritising Irish as the national language notwithstanding its lack of vernacular use places a constitutional duty on the State to provide resources to enable the language to be practically usable in interactions with the State.<sup>37</sup> What makes this objective salient is that, unlike rights to education or secure facilities for children discussed in the next chapter, the importance of this right is comparatively uncontroversial to the Courts.<sup>38</sup>

The positive implications flowing from the language provisions were shown in *The State (MacFhearraigh) v MacGamhnia*.<sup>39</sup> O’Hanlon J issued an order of *mandamus* requiring the lower court to permit the plaintiff to conduct his cross-

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<sup>34</sup> There is a strong case to be made that the first successful rights case in independent Ireland was on the basis of (the ostensibly unenumerated) right to trial through the national language, in *R (Ó Coileáin) v Crotty* [1927] 61 ILTR 81. Unfortunately, the reporting of this case makes determination of whether this case indeed did hinge on the constitutional rights claim somewhat unclear.

<sup>35</sup> See Hogan et al. (n 2) 175 - 199.

<sup>36</sup> Article 4 of the Constitution of the Irish Free State similarly affirmed both Irish as the national language and English as an official language. However in *Ó Murchú v Registrar of Companies* [1980 - 1998] TÉ 112, 115: O’Hanlon held that, ‘The provisions of Article 8 of the Constitution of Ireland are stronger in the recognition given to the Irish language as the first official language of the State than was Article 4 of the Constitution of the Irish Free State.’

<sup>37</sup> The Irish language case law can be divided into two camps: that which pertains to the rights of Irish language speakers to use the national language in court proceedings, and that which seeks to promote a bilingual administration generally. This section will focus on the former, as it in their regard that the State has been most willing to consider constitutional obligations against the State.

<sup>38</sup> Níic Suibhne notes that ‘the use of ‘rights’ terminology by the judiciary is significant in itself as neither Article 4 [of the Constitution of the Irish Free State] nor Article 8 [of the Constitution of Ireland] were drafted in terms of fundamental personal rights. Both were included as a declaration by the State concerning the use of Irish from an official and administrative point of view.’ Niamh Níic Suibhne, ‘State Duty and the Irish Language’ (1997) 19 *DULJ* 33, 34.

<sup>39</sup> *The State (MacFhearraigh) v MacGamhnia* [1980 - 1998] TÉ 99 [Hereinafter ‘MacFhearraigh’].

examination through the Irish language.<sup>40</sup> Accepting that it would ‘add to the costs of the proceedings were it necessary to appoint an interpreter’ he nevertheless held that, ‘those difficulties must be endured in order to act in a constitutional manner.’<sup>41</sup> Whilst in this case the order for mandamus only required the provision of an interpreter, rather than a more costly remedy as in later cases, finding that this constitutional obligation necessitated the spending of monies to vindicate the language rights of Irish speakers demonstrates the resource implications implicit within this right.<sup>42</sup>

In *Delap v Minister for Justice*, O’Hanlon J expanded the content of the right, holding, ‘there was an obligation on the State in this case to make available a translation of the rules [of the superior courts] within a reasonable period after the Committee and the Minister accepted the rules in the English language version and that the State failed to fulfil that obligation.’<sup>43</sup> Mandating the State provision of translated rules of Court was considered. However, as with *Richardson*, the Court again demurred. Per O’Hanlon J ‘since the Court is now informed that the translation of the rules has been underway in the Translation Service for the past year and that it is hoped that the work will be completed shortly [...] I have decided to adjourn that part of the relief sought by the applicants.’<sup>44</sup>

Nevertheless, by mandating not just the presence of an interpreter but also plausibly the translation of the Rules of Court, the potential power of the Courts to impose resource costs on the Executive to vindicate language rights was demonstrated.<sup>45</sup>

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<sup>40</sup> [1980 - 1998] TÉ 99.

<sup>41</sup> [1980 - 1998] TÉ 99, 107.

<sup>42</sup> Of further note, this case was cited approvingly in an *obiter comment* by Hardiman J in *Ó Beoláin v Fahy*. [2001] 2 IR 279, 352.

<sup>43</sup> *Delap v Minister for Justice* [1980 - 1998] TÉ 116, 121 [hereinafter ‘*Delap*’] As the Rules of Court are not Acts of the Oireachtas, translation was not mandated by Article 25.4.4° of the Constitution of Ireland 1937. However given the practical impossibility of conducting a trial in Irish without provision of a translated Rules of Court, O’Hanlon J held that the constitutional rights of the applicant ‘to conduct his side of the proceedings entirely in the Irish language if he desires to choose the first official language’ were in continuing breach. [1980 - 1998] TÉ 116, 121.

<sup>44</sup> [1980 - 1998] TÉ 116, 121.

<sup>45</sup> Hardiman J expressly approved of this judgment in *Ó Beoláin v Fahy* [2001] 2 IR 279, 342.

These cases led up to the major judgment in this area: *Ó Beoláin v Fahy*.<sup>46</sup> Decided a year after *TD* and *Sinnott* (discussed in the next chapter), *Ó Beoláin* concerned the failure of the State to translate Acts of the Oireachtas into the Irish language since 1980, in breach of Article 25.4.4° of the Constitution. Additionally, the Rules of the District Court, 1997 had also not been translated, contra *Delap*.

The Supreme Court determined, per McGuinness J that, ‘it is clear that the State is simply unwilling to provide the resources to fulfil its clear constitutional duty,’<sup>47</sup> and granted a declaration that the State has ‘a constitutional duty to make available an official translation of the Acts of the Oireachtas in the first official language to the public in general when the President signs the text of a bill in the second official language.’ Again, this declaratory order was made on the assumption that the State would remedy the backlog within a short time frame.<sup>48</sup> A similar order was made for the District Court rules, notwithstanding it being only a statutory instrument, as, following *Delap*: ‘the issue is one of the right of access to the courts by persons who speak either of the two official languages named in Article 8 of the Constitution.’<sup>49</sup>

Hardiman J, generally the most vocal judicial opponent of issuing orders of compulsion to cure rights breaches, concurred with McGuinness J that the State is obliged to provide court documents in both languages.<sup>50</sup> For Hardiman J, ‘persons wishing to use [Irish] are absolutely entitled to do so and to be afforded every necessary facility in doing so at least to the extent that such

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<sup>46</sup> *Ó Beoláin v Fahy* [2001] 2 IR 279 [hereinafter ‘*Ó Beoláin*’].

<sup>47</sup> [2001] 2 IR 279, 308.

<sup>48</sup> [2001] 2 IR 279, 353.

<sup>49</sup> [2001] 2 IR 279, 309.

<sup>50</sup> See the discussion of Hardiman J’s reasoning in *Sinnott* and *TD* in Chapter Seven. See also Adrian Hardiman, ‘The Role of the Supreme Court in Our Democracy’ Joe Mulholland (ed) *Political Choice and Democratic Freedom in Ireland: 40 Leading Irish Thinkers* (MacGill Summer School 2004) 32. Hardiman J’s generally orthodox attitude towards the remedial power is illustrated by his interpretation of the aforementioned expansive conception of the remedial power of Ó Dálaigh CJ in *Quinn v Ryan* quoted at the start of this chapter as: ‘*not an assertion of an unrestricted general power in the judicial arm of government but rather a strong and entirely appropriate statement that a pettifogging legalistic response to an order in the terms of Article 40.4 will not be permitted to obscure the realities of the case or to preclude appropriate action by the Courts.*’ *Sinnott v Minister for Education* [2001] 2 IR 545, 709. (italics added).

facilities are available to those using the second official language.’<sup>51</sup> Thus it is ‘an absolute essential’ given this constitutional obligation that all court rules and Acts are translated.<sup>52</sup>

In contrast to his objections to issuing orders of compulsion in *Sinnott* and *TD*, Hardiman J adopted a much more interventionist stance here, holding, ‘the State itself must comply with its obligations, particularly those enshrined in the Constitution and can no more be heard to complain that such compliance is irksome and onerous than can the individual citizen.’<sup>53</sup> ‘In the hope that by so declaring this duty will at last be taken seriously’ Hardiman J concluded declaratory relief would suffice.<sup>54</sup> He continued, however that: ‘if this does not occur, it may be that some applicant will eventually be driven to seek mandatory relief in this regard.’<sup>55</sup>

This suggests, with this right anyway, Hardiman J could foresee imposing a positive order. Assuming Hardiman J did not believe the continued failure of the State to translate its Acts into the national language was such a crisis that orders or compulsion were necessary ‘as an absolute last resort [...] for the protection of the constitution itself,’ per his test in *TD*,<sup>56</sup> his judgment in *Ó Beoláin* suggests a particular disposition to protecting this right. Nevertheless, that he, and the majority, in this case made a declaratory order exclusively in response to twenty years of State inaction in breach of a relatively determinate provision of the Constitution show the limits of this increased tolerance for mandatory orders.<sup>57</sup>

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<sup>51</sup> [2001] 2 IR 279, 342.

<sup>52</sup> [2001] 2 IR 279, 343.

<sup>53</sup> [2001] 2 IR 279, 352.

<sup>54</sup> [2001] 2 IR 279, 353. This was the first time Hardiman J issued a declaratory order in a case with resource implications.

<sup>55</sup> [2001] 2 IR 279, 353.

<sup>56</sup> [2001] 4 IR 259, 372.

<sup>57</sup> David Langwallner alleged that ‘Hardiman J himself has enforced textual rights mandatorily. In *O Beoláin v Fahy* the judge determined that the State had to pay for and provide for Irish translations of documents necessary to conduct a criminal defence through Irish. Thus Hardiman J recognise a form of exceptionalism!’ On reading this case however, it is clear that Hardman J does not order a mandatory enforcement of the right. David Langwallner, ‘Separation of Powers Deference, and the Failure to Protect the Rights of the Individual’ in Oran Doyle and Eoin Carolan *The Irish Constitution: Governance and Values* (Round Hall 2008) 256.

In *Sinnott*, discussed in depth in the next chapter, Hardiman J posited that there was a relevant distinction between the constitutional obligation on the State to provide for free primary education and the obligation to translate statutes into both languages. The latter duty is, per Hardiman J:

a simple and specific requirement: it can be seen at a glance whether it has been done or not. *No question of policy is involved in complying with this requirement: the only policy decision that arises has already been taken and expressed in a constitutional provision.* The expense of complying with this provision is, certainly considered as a percentage of the education budget, tiny.<sup>58</sup>

This indicates that, whilst on first glance, Hardiman J appears to have a comprehensive aversion to imposing mandatory obligations to enforce rights, in fact his attitude towards such injunctions is both rights-specific and costs-specific.<sup>59</sup> From the fact that mandamus was not ordered in *Ó Beoláin*, notwithstanding serial breach of an express constitutional provision, relating to the right to access court - among the most uncontroversial liberal-democratic rights protected by the constitutional order - the extent of the Courts unwillingness to issue mandamus orders is demonstrated. The cost of translation would not be significant, compared with the costs involved in the cases of social rights protection the Court has considered. Moreover, the Court accepted that the State was constitutionally obliged to pay the costs of translation. Nevertheless, the Court remained unwilling. Nineteen years later in *Ó Murchú v An Taoiseach*, the Court noted how:

After approximately 40 years, the Rules of the Superior Courts, their amendments, forms and appendices had not been made available in Irish by late 2008' nor have Irish translations of the District and Circuit Court

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<sup>58</sup> [2001] 2 IR 545, 694. (emphasis added).

<sup>59</sup> In regards the cost, Niamh Níc Suibhne suggested 'the practical implications of translation resources alone will be considerable, given that the backlog of Acts for which an official translation in Irish has never been published dates back more than twenty years.' Niamh Níc Suibhne, 'The Use of the Irish Language for Official Purposes: *Ó Beoláin v Fahy*' (2001) 11 *ILT* 174, 175.

rules ‘notwithstanding the order made in *Ó Beoláin v Fahy* in 2001 [and *Delap* in 1990]’<sup>60</sup>

The Court in *Ó Murchú* held that the applicant, as a solicitor, was entitled to access to these documents. However, ‘on the assumption that the respondents will remedy the position relating to rules of court within a reasonable period of time of this judgment’ the Court held, ‘it is not [...] necessary to make any order beyond the declaration next provided for.’<sup>61</sup> Thereby, again a declaratory order was made asserting that the State was in breach of its constitutional obligations. Yet, as *Kelly* noted in 2018, ‘to date, more than 25 years after the decision in *Delap* there is still no complete Irish version of the Rules of the Superior Courts.’<sup>62</sup>

The greater theoretical willingness to consider mandatory orders for this right over others follows from the thesis of this doctorate - that rights protection is contingent upon judicial cleavages to the rights claims in question. As Fallon has noted, ‘even judgments of remedial unacceptability may be conditioned on a determination that the underlying right is not sufficiently important to warrant a remedy that might be acceptable if another right were at stake.’<sup>63</sup>

In looking at the language rights adjudication, the contingency of rights enforcement upon judicial preference is shown, as is the inveteracy of the Court’s resistance to imposing mandatory orders, even in pursuit of realising textually prescribed rights at relatively little expense. As O’Mahony wrote, ‘declaratory relief is perhaps the least problematic, but potentially least

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<sup>60</sup> [2010] 4 IR 520, 552. In 2005, in *Ó Gribín v An Chomhairle Mhúinteoireachta*, a further declaratory order was granted to ensure that the Teaching Council Act 2001 was translated into Irish, four years after promulgation of that Act, and four years after the *Ó Beoláin* decision held that Court was obliged to translate all Acts.<sup>60</sup> The necessity of issuing this order ‘to direct attention towards the State and its breach of its constitutional and statutory duties’ demonstrates that the right to documents necessary for legal procedure remains underenforced. Nevertheless, an order of mandamus again did not issue. *Ó Gribín v An Chomhairle Mhúinteoireachta* [2005] 3 IR 281.

<sup>61</sup> [2010] 4 IR 520, 552.

<sup>62</sup> Hogan et al (n 2) 185, 455ff.

<sup>63</sup> As Fallon has noted, ‘even judgments of remedial unacceptability may be conditioned on a determination that the underlying right is not sufficiently important to warrant a remedy that might be acceptable if another right were at stake.’ Richard H. Fallon, ‘The Linkage Between Justiciability and Remedies: and their Connection to Substantive Rights’ (2006) 92(4) *Virginia Law Review* 633, 648.

effective remedy for a breach of constitutional rights.’<sup>64</sup> Whilst in many cases the State - like in *Healy* - will respond appropriately to a declaratory order, cases such as *Ó Beoláin*<sup>65</sup> and *Ó Murchú*<sup>66</sup> demonstrate that this is not always so. In the meantime, the practical existence of these rights is disadvantaged, and the extent to which rights holders can view these - constitutionally recognised - rights as legal claims which they can rely on to have their rights breach cured is limited, essentially to the point of negligibility.

### III(B): The Right to Legal Aid

In this period, the Court also returned to the right to legal aid in two cases. First, in *Magee v Farrell*, the plaintiff sought the provision of legal aid in relation to an inquest into the death of her son in Garda custody.<sup>67</sup> As the inquest was a civil proceeding the plaintiff was not covered by the right found in *The State (Healy) v Donoghue*. The Supreme Court stressed the unenumerated right to criminal legal aid was tied to the right to personal liberty provided by Article 40.4, rather than a standalone provision. Thus, while the statutory legal aid had to be administered fairly,<sup>68</sup> and whilst the plaintiff’s right to fair procedures were violated, nevertheless, per Finnegan J ‘[a] right to legal representation does not carry with it a right to State funded legal aid. Where, however, the liberty of the individual is in issue before the criminal courts there is an entitlement to State funded legal aid.’<sup>69</sup>

The year following, in *Carmody v Minister for Justice*, the Court expanded the right to criminal legal aid substantially.<sup>70</sup> The plaintiff was facing a series of complex criminal charges but was not entitled under the legal aid statute to access a barrister.<sup>71</sup> In the absence of an entitlement to counsel, there was no legislation that could be struck down. The Court held the plaintiff was constitutionally entitled to be provided with a state-subsidised barrister. As no

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<sup>64</sup> Conor O’Mahony, ‘Education, Remedies, and the Separation of Powers (2002) 24(1) *DULJ* 57.

<sup>65</sup> [2001] 2 IR 279, 352.

<sup>66</sup> [2010] 4 IR 520.

<sup>67</sup> *Magee v Farrell* [2009] 4 IR 703 [hereinafter ‘*Magee*’].

<sup>68</sup> *O’Donoghue v Legal Aid Board* [2006] 4 IR 204.

<sup>69</sup> [2009] 4 IR 703, 718.

<sup>70</sup> *Carmody v Minister for Justice* [2010] 1 IR 635 [hereinafter ‘*Carmody*’].

<sup>71</sup> S2 of the Criminal Justice (Legal Aid) Act 1962.

law could be declared unconstitutional, the Court order merely prohibited the case from proceeding.<sup>72</sup> This was, like *Healy* not a positive order, however it indirectly added significantly to the financial costs to the State of legal aid.<sup>73</sup>

Whyte has suggested the reasoning behind finding for the plaintiff in *Carmody* but not in *Magee* ‘offer[s] an interesting insight into the philosophical values that may implicitly inform judicial reasoning in the current Supreme Court and also calls into question the cogency of the Court’s reasoning that underpins its rejection of the notion of justiciable socio-economic rights.’<sup>74</sup> A crucial determinant appears to have been not avoiding state expense, but rather avoiding courts *injuncting* the State to expend this money. In this, the predominance of an exclusively *negative* conception of rights is reflected. In this, *Carmody* and *Magee* show the court’s willingness to impose considerable financial burdens upon the State *indirectly* and *negatively* for rights claims which they consider compelling, such as liberty; whilst not affording similar latitudes to other rights claims including those based on breaches of other enumerated rights.<sup>75</sup>

### III(C): The Right to Vote

Finally, in this period, the right to vote was also raised in Court. In *Doherty v Government of Ireland*, a delay in running a by-election - the longest in the history of the State - was found to be so unreasonable as to breach the

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<sup>72</sup> As noted in *Kelly*:

*Carmody* was a landmark development in the way the courts approach [unconstitutional] lacunae, though this was not highlighted or emphasised in the Supreme Court judgment. It respected the principle that the courts would not demand that the legislature legislate, while providing a remedy for the plaintiff and a strong incentive for the legislature to solve the constitutional difficulty.

Hogan et al. (n 2) 1048.

<sup>73</sup> As Claire Michelle Smyth wrote, in cases where a barrister is granted per *Carmody* ‘it will involve significant costs to the State’ and ‘even where it is not granted, the application process and the potential appeal to its refusal will cost, and this is something clearly not considered apposite to the discourse of fundamental rights.’ Claire Michelle Smyth, ‘Socio-Economic Rights in the Irish Courts and the Potential for Constitutionalisation’ in Laura Cahillane, James Gallen, and Tom Hickey (eds) *Judges, Politics, and the Irish Constitution* (MUP 2017) 278.

<sup>74</sup> Gerry Whyte, ‘A Tale of Two Cases - Divergent Approaches of the Irish Supreme Court to Distributive Justice’ (2010) 32(1) *DULJ* 365.

<sup>75</sup> See the discussion of the right to provision for free primary education in the next chapter.



constitutional right to vote.<sup>76</sup> The Court issued a declaration that the failure was unconstitutional, but asserted that:

The court might in another case following on from this one feel constrained to take a more serious view if any government, and not just necessarily the present one, was seen by the courts to be acting in clear disregard of an applicant's constitutional rights in continually refusing over an unreasonable period of time to move the writ for a by-election. [...] This is not yet such a case but in my opinion it is not far short of it.<sup>77</sup>

Even with the right to vote - the paradigmatic civil right<sup>78</sup> - the longest deprivation of that right from a constituency in independent Irish history was not remedied by ordering an election, but by the more modest response of only *declaring* the breach unconstitutional. How to understand the Court's approach to remedial innovation in this period? In the discussed cases, the Court refused to issue orders of compulsion, all while expressing a greater judicial attachment to the rights interests engaged than will be shown to be the case with the social rights. Why is this?

#### IV: What Factors Conditioned the Court's Remedial Jurisprudence in the Third Wave?

A compelling explanation is that both the language and legal aid rights cases relate to the legal administration of justice, an area that appears to exercise particular enthusiasm on the senior bench, for the self-evident reason of overfamiliarity with this area through their legal careers.<sup>79</sup> Further, the

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<sup>76</sup> Per Kearns J:

It seems to me that a citizen's constitutional rights are trenced upon and significantly diluted when no effect is given to rights for representation clearly delineated in the Constitution. These are rights which might usefully be characterised as forming part of the "constitutional contract" between the citizen and the State.

*Doherty v Government of Ireland* [2010] IEHC 369 [45] See also David Prendergast, 'By Elections and the Filling of Dáil Vacancies within a Reasonable Time' (2011) 34 *DULJ* 242, 249.

<sup>77</sup> [2010] IEHC 369 [75] See also *O'Malley v An Ceann Comhairle* [1997] 1 IR 427.

<sup>78</sup> Jeremy Waldron, one of the most significant critics of contemporary judicial rights protection, deemed the right to vote 'the right of rights' Jeremy Waldron *Law and Disagreement* (Clarendon 1999) 251.

<sup>79</sup> Note the discussion in the previous chapter of *Burke*, *Buckley* and *O'Brien*. With the Irish language cases, there is also a self-selection factor. Prior to appeal to the Supreme Court, such cases were adjudicated by judges fluent in Irish, most notably O'Hanlon J who presided over

implications of a positive order in these cases, particularly the language cases, would cause a more manageable intervention in the State's finances than would the social rights claims that the Court also adjudicated upon in this period.<sup>80</sup>

Both in regards the foregoing rights cases, and the third wave social rights judgments I analyse in the next chapter, it is in part a consequence of unlucky timing that these rights disputes reached the bench at the same time as the Court were moving away from a substantive engagement with the content of rights. Explaining the emergence of the jurisprudence in this period, Ní Suibhne notes in relation to Irish language rights case law how it:

could be said to coincide with the corresponding increase in support for the Irish language among the middle and upper classes, most notably in urban areas [...] Thus, when the seemingly random incidence of court proceedings is linked to the relevant social and political concerns of a given time, a more enlightening approach to understanding the otherwise haphazard occurrence of litigation in this area is revealed.<sup>81</sup>

Had not, as Hardiman J described Irish language litigants, 'person[s] of unusual independence of mind and pertinacity' brought these cases in this period, the judgments would not have been made.<sup>82</sup> A consequence of this may have been that, today, the possibility of positive rights jurisprudence was not foreclosed upon, as it is today. To broach this possibility is to observe the impact which the emergence of these new areas of rights litigation during this period had upon the development of the Court's rights protection in general.

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almost every case in the Tuarsciart Éireann [1980 - 1998]. Further, the bench of this period was also composed of several fluent Irish language speakers, manifested by two of the three judgments in *Ó Beoláin v Fahy* being delivered as Gaeilge.

<sup>80</sup> However, as noted in the next Chapter, in *Re Article 26 and the Health Amendment (No 2) Bill, 2004* [2005] 1 IR 105 'the cost [of the judgment] to the State was ultimately €484 million, more than the annual current budget of the Department of Justice.' Ruadhán MacCormaic *The Supreme Court* (Penguin 2016) 259.

<sup>81</sup> Niamh Ní Suibhne, 'The Constitution, The Courts, and the Irish Language,' in Tim Murphy and Patrick Twomey (eds) *Ireland's Evolving Constitution: 1937 - 1997* (Hart 1998) 253, 255.

<sup>82</sup> [2001] 2 IR 279, 349.

## V: Conclusion

The second and third waves saw no expansions of the *form* of rights remedy available within the Irish constitutional order. My study of the positive remedial jurisprudence of the second wave showed that even during the high water mark of Irish rights adjudication, there was an unwillingness to issuing orders of compulsion to cure rights breaches that prevailed even as new rights that required state expenditure to be vindicated, such as the right to criminal legal aid, were recognised. Nevertheless, it can be readily assumed that the Court of Walsh J and Ó Dálaigh CJ would have felt less restraint compelling action to cure electoral delays or barriers to justice than the Court of Hardiman J and Keane CJ.

As I show in the next Chapter, in its social rights adjudication the Court in the third wave made its most comprehensive statements on the suitability of positive orders under the Constitution of Ireland. In the retrenchment away from the height of rights adjudication in the preceding decades, it was expectable that the Court would, in this period take an even more sanguine attitude towards fashioning novel remedies.

Even while expressing clear support for the protection of the language, voting, and legal rights noted above, the Court maintained a conventional aversion to positively mandating State action to remedy the breach. In the absence of this, as the Irish language cases show, failures to fulfil rights commitments continued, nullifying the ability of such rights to act as practicable protections of the entitlements to which they related. Whilst it is possible for declaratory orders to indirectly cause protection of rights with resource implications, this shows that such an iterated system did not develop in Ireland in this period.

## Chapter Seven: The Development of Social Rights in Ireland 1965 - 2013

Having analysed how judicial rights review and the Court's understanding of their remedial function in rights cases developed in the second and third waves, in this chapter I examine Ireland's social rights jurisprudence in this period. Social rights have been a textual feature of the Constitution of Ireland since its promulgation.<sup>1</sup> Article 42.4 of the Constitution of Ireland guarantees provision for free primary education.<sup>2</sup> Alongside this, the social dimension animating the text of the Constitution - the objective to create a society where social justice and the common good, understood with reference to the care of the socioeconomically vulnerable, is obtained - supports a reading of the Constitution where basic entitlements to certain necessities are due *as of right*.

In this chapter I survey the Court's positive rights adjudication: how it developed in the nearly fifty years of the second and third waves, and what informed the Court's reasoning. Whilst exercising restraint in their adjudication, the Court *has* accepted the justiciability of social rights, both enumerated and unenumerated. Themes which I noted in the previous chapter in regards the judicial community's understanding of their remedial limitations recur. Ultimately, I locate the primary impediment to the judicial development of social rights protection in Ireland in the Court's remedial conservatism, rather than their resistance to recognising that certain basic entitlements can be due *as of right*.

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<sup>1</sup> As noted in Chapter Three of this doctorate, social rights to education rights were included in the Constitution of the Irish Free State at Article 10 as well as Article 42.4 of the Constitution of Ireland.

<sup>2</sup> Per *Kelly*: 'The right to free elementary education is unusual in the Irish context in that it is one of the few explicit socioeconomic rights mentioned in the Constitution.' Gerard Hogan, Gerry Whyte, David Kenny, and Rachael Walsh, *Kelly: The Irish Constitution* (5<sup>th</sup> edn. 2018 Bloomsbury) 2329.

## I: The Second Wave 1965 - 1995: Rights Enthusiasm, but not Social Rights Enthusiasm

### I(A): *Crowley v Ireland*

Given the explosion in rights adjudication during the second wave, it is notable how little social rights adjudication there was. It was however in this period that the only social right enumerated within the Constitution - the provision for free primary education - was considered for the first time.<sup>3</sup> In *Crowley v Ireland*, it was alleged that a prolonged strike by the teachers of the three primary schools in Drimoleague constituted a breach of the rights of the children to provision for free primary education.<sup>4</sup> It was argued on behalf of the children that Article 42.4 of the Constitution, stating ‘the State shall provide for free primary education’ created a right actionable against the State when their source of primary education was withdrawn. As this right was personal to the child, it was further claimed that the State had a duty to defend and vindicate this right, per Article 40.3.

These arguments were rejected by the Supreme Court.<sup>5</sup> Kenny J, in his majority judgment, held that Article 42.4 guarantees that the State will ‘provide for’ free primary education, as opposed to providing free primary education *simpliciter*. This means ‘the State is under no obligation to educate.’<sup>6</sup> Rather, Article 42.4 obliges the State ‘to provide the buildings, to pay the teachers who are under no contractual duty to it but to the manager or trustees, to provide means of transport to the school if this is necessary to avoid hardship, and to prescribe minimum standards.’<sup>7</sup> The fundamental rights guarantee of Article 42.4, then, is not a right to free primary education for children, but a guarantee that the State will provide the infrastructure required for *third parties* to provide free primary education. Having exhausted this duty, the State is not

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<sup>3</sup> Article 42.4 of the Constitution of Ireland 1937. The *School Attendance Bill* case, noted in Chapter Three of this doctorate, did not relate to this right, but to parent’s rights over their child’s education.

<sup>4</sup> *Crowley v Ireland* [1980] IR 102.

<sup>5</sup> The decision was a 3-2 split, Henchy, Griffin and Kenny JJ in the majority, O’Higgins CJ and Parke J dissenting.

<sup>6</sup> [1980] IR 102, 126.

<sup>7</sup> [1980] IR 102, 126.

liable when children do not receive a free primary education due to the actions of third parties, such as their teachers going on strike.<sup>8</sup>

In rejecting the argument that Article 40.3 applied, Kenny J stressed that:

the obligation imposed on the State by both subsections of Article 40.3 is as far as practicable by its *laws* to defend and vindicate the personal rights of the citizen. It is not a general obligation to defend and vindicate the personal rights of the citizen. It is a duty to do so by its laws, for it is through laws and by-laws that the State expresses the will of the people, who are the ultimate authority.<sup>9</sup>

Per Kenny J's reasoning, as a law was not obstructing the provision for free primary education, rather a - lawful - strike was obstructing the provision, Article 40.3 was not engaged.<sup>10</sup> This argument was rejected by O'Higgins CJ, who, dissenting, contended:

If the requirements of a constitutional duty which is imposed on the State require particular action to be taken, the lack of appropriate statutory power or administrative machinery can be no excuse for not doing what is required [...] Once there is an apparent breakdown of a serious and long-term nature in the provision made for free primary education for particular children, the Minister has an obligation to explain to the Court which is investigating a complaint by these children that their constitutional rights have been infringed the reason why he has taken no action (if that be the case) to remedy what has happened.<sup>11</sup>

In his judgment, the Minister's failure to respond to the effect which the onset of the strike brought about for the provision for free primary education for the children of Drimoleague made him liable to damages on behalf of the children.

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<sup>8</sup> Per Kenny J, 'The State cannot compel teachers to teach when they do not wish to do so.' [1980] IR 102, 130.

<sup>9</sup> [1980] IR 102, 130 [emphasis not added].

<sup>10</sup> It is worth considering other cases where the Court has held an absence of laws protecting a right has not led the Court to hold it could not find a breach of a right. In *O'T v B*, the adoption in question was not regulated by law. Notwithstanding this, the Court found themselves capable of finding a rights breach under Article 40.3.2° of the Constitution of Ireland, 1937. *I O'T v B* [1998] 2 IR 321. See also *State (Healy) v Donoghue* [1976] IR 325.

<sup>11</sup> [1980] IR 102, 124 - 125.

However, as the trade dispute had been resolved by the time of the Supreme Court hearing, there was no question of imposing a mandatory injunction in addition to this.

*Crowley* is significant as much for what the Court did not do as for what it did. The majority did not evaluate the relationship of the guarantee in Article 42.4 with the values of dignity, justice, or charity as mentioned in the Preamble as they had in other rights-based cases of the period.<sup>12</sup> And whereas Kenny J instigated the trend for expansive readings of Article 40.3 in *Ryan v Attorney General*, holding that the meaning of ‘in particular’ in that sub-article presupposed the existence of additional rights (that could be discerned with the help of Papal encyclicals),<sup>13</sup> in *Crowley*, he construed that sub-article restrictively to limit the breadth of the Court’s rights-adjudicating duties to only instances where a *law* is impugned, rather than in instances of executive inaction.<sup>14</sup> On this construction, orders for compulsion on foot of Article 42.4 claims become almost unforeseeable, and no positive orders have ever been successfully issued on foot of this right. Conceivably, only where *no* infrastructure by which a free primary education is made available could an injunction be granted.

Amidst the general expansive renderings of rights occurring in this period,<sup>15</sup> the judgment in *Crowley* stands out as suggesting the limits to the judiciary’s conception of the constitutional propriety of its rights adjudication. Whilst hitherto unenumerated rights, reliant upon a judicial understanding of the values underlying the Constitution were recognised and protected, a rights claim deriving from a discrete enumerated sub-Article of the fundamental rights provisions of the Constitution was not.

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<sup>12</sup> See Chapter Four of this doctorate.

<sup>13</sup> *Ryan v Attorney General* [1965] IR 294, 314.

<sup>14</sup> The teacher’s union was found in a separate judgment to be liable for breaching the children’s rights to primary education through their industrial action. *Crowley v Irish National Teachers’ Organisation* [1991] 2 IR 305.

<sup>15</sup> *Crowley* was decided in 1980, in the period between *McGee v Attorney General* [1973] IR 284 and *Norris v Attorney General* [1984] IR 36.

## I(B): The Directive Principles Jurisprudence of the Second Wave

In the second wave, the influence of the Preamble on constitutional adjudication took off. The Preamble was cited both to inform conceptions of enumerated rights,<sup>16</sup> but also most notably in the development of unenumerated rights. All three mooted means of recognising latent rights within the Constitution noted in Chapter Four - the Christian and Democratic nature of the State, the natural law, and the human personality doctrine - were all premised upon an understanding of how the Preambular text informs the justiciable text of the fundamental rights provisions.<sup>17</sup> Indeed the Preamble was cited by both the majority *and* dissents in *Norris v Attorney General*. A non-justiciable provision of the Constitution was used in one case to construct three different interpretations of a right not in the constitutional text.

The premium of the Preamble is reflected in the fact that the *Abortion Information Bill* case rationalised disowning the natural law reasoning developed since *McGee* by holding that all rights found on foot of a natural law claim were those, “which could be reasonably implied from and [...] guaranteed by the provisions of the Constitution, interpreted in accordance with its ideas of prudence, justice and charity.”<sup>18</sup> Even then, when *rejecting* a jurisprudential doctrine which drew heavily on the preambular text, the Court referred to these values cited in the Preamble in its reasoning.

During this period of unenumerated rights enthusiasm, a marginal strain of High Court jurisprudence also developed which looked to the Directive Principles to inform what rights were protected by the constitutional order. In particular, the unenumerated right to earn a livelihood was understood in the second wave

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<sup>16</sup> For instance, in *Quinn’s Supermarket v Attorney General*, the Court substantiated both the right to free exercise of religion under Article 44; and the guarantee of non-discrimination under Article 40; and held the latter subordinate to the former, with regard to the Preamble’s religious references to the Holy Trinity and to our Divine Lord Jesus Christ. *Quinn’s Supermarket v Attorney General* [1972] IR 1; see also *Attorney General v X* [1992] 1 IR 1, 53.

<sup>17</sup> *McGee v Attorney General* [1974] IR 284, 319 [the natural law]; *Norris v Attorney General* [1984] IR 36, 64 [the Christian and democratic nature of the State]; 71 [the human personality].

<sup>18</sup> *Re Article 26 and the Regulation of Information (Services outside the State for Termination of Pregnancies) Bill 1995* [1995] 1 IR 1, 43.



with reference to the Directive Principles.<sup>19</sup> In *Murtagh Properties v Cleary*, Kenny J. held that the ‘non-cognisable’ clause in Article 45:

Does not mean that the courts may not *have regard* to the terms of the Article, but that they have no jurisdiction to consider the application of the principles in its making of laws. *This does not involve the conclusion that the Courts may not take it into consideration when deciding whether a claimed constitutional right exists.*<sup>20</sup>

Consequently, Kenny J held that the unenumerated right to earn a livelihood must be understood in light of Article 45.2.i, the principle stating, *inter alia* that ‘men and women equally have the right to an adequate means of livelihood.’ As a result, ‘a policy or general rule under which anyone seeks to prevent an employer from employing men or women on the ground of sex only is prohibited by the Constitution.’<sup>21</sup> Thereby, the unenumerated right was given substantive content by reliance upon the Directive Principles, notwithstanding the express preclusion on enforcement of those principles as standalone entitlements.

Following this case, the right to earn a livelihood was further interpreted with reference to the Directive Principles.<sup>22</sup> Per Finlay P. in *Landers v Attorney General*, Article 45.4.2° of the Constitution can be considered for the purpose of ;reaching a general conclusion as to what may be fairly embraced by the expression ‘the exigencies of the common good.’<sup>23</sup> Given this, Article 45.4.2° ,

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<sup>19</sup> The right to earn a livelihood predates this jurisprudence, being found first in *Tierney v Amalgamated Society of Woodworkers* [1959] 1 IR 254.

<sup>20</sup> [1972] 1 IR 330, 335 (emphasis added). As MacMenamin J noted extrajudicially, ‘the final observation in the passage just quoted may be seen as the high point of the Directive Principles penetration into the identification of justiciable rights in the pre-EC membership era.’ John MacMenamin, ‘Constitutional Principles and the Charter of Fundamental Rights’ in Kieran Bradley, Noel Travers and Anthony Whelan (eds) *Of Courts and Constitutions: Liber Amicorum in Honour of Nial Fennelly* (Hart 2014) 285, 294.

<sup>21</sup> [1972] 1 IR 330, 336.

<sup>22</sup> *Rodgers v Irish Transport and General Workers Union* [1978] ILRM 5; *Landers v Attorney General* [1975] ILTR 1. Between *Murtagh* and the later cases of *Rodgers* and *Landers*, another High Court case rejected reliance upon the Directive Principles of Social Policy. *O’Brien v Manufacturing Engineering* [1973] IR 334. This was done without reference to *Murtagh*; nor was it later cited in *Rodgers* and *Landers*; and upon appeal, the Supreme Court did not engage with this rejection of the *Murtagh* dictum. It seems fair thus to consider this dictum *per incuriam*.

<sup>23</sup> [1975] ILTR 1, 16.

‘imposes upon the State the *obligation* of endeavouring to ensure the strength and health of workers, men and women, and the tender age of children not be abused.’<sup>24</sup> So, prohibiting child employment, ‘could properly be considered by the legislature as part of the common good.’<sup>25</sup>

From this base line , the right to earn a livelihood under Article 40.3.1° continued to develop during the second wave, albeit without further reference to Article 45.<sup>26</sup> Article 45 would not again successfully ground a successful rights claim in the second wave.<sup>27</sup> Even during this brief venture into using the Directive Principles as an instrument of constitutional interpretation, the cases which relied upon the Principles used them to limit the extent of an unenumerated right which was itself construed as a negative entitlement not to be precluded from earning a livelihood. Whilst *Murtagh* did expand the right to work because of the text of Article 45, this was without regard to the communitarian-inspired passages which predominate the Directive Principles. Article 45 expressly mentioned the right to earn a livelihood without discrimination of sex.<sup>28</sup> Even then when the Directive Principles *were* used to substantiate the content of a right, it was with reference to a textually precise, non-communitarian aspect of Article 45; rather than to, for instance, the State’s endeavour to:

Promote the welfare of the whole people by securing and protecting as effectively as it may a social order in which justice and charity inform all the institutions of the national life.<sup>29</sup>

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<sup>24</sup> [1975] ILTR 1, 6 (emphasis added).

<sup>25</sup> [1975] ILTR 1, 6.

<sup>26</sup> *Cafolla v O’Malley* [1985] IR 486, 493; *Cox v Ireland* [1992] 2 IR 503.

<sup>27</sup> References to Article 45 to substantiate either a constitutional right or to the court’s understanding of the common good stopped in the middle 1970s with the exception of an *obiter* affirmation by Costello J. in *Attorney General v Paperlink* that:

I am not precluded by the introductory words of the Article from considering the principles of social policy set out in it for an intended purpose, namely, for assisting the Courts in ascertaining what personal rights are included in the guarantee contained in Article 40.3.1° and what legitimate limitations in the interests of the common good the State may impose on such rights.

*Attorney General v Paperlink* [1984] ILRM 373, 386.

<sup>28</sup> Article 45.2.i of the Constitution of Ireland 1937.

<sup>29</sup> Article 45.1 of the Constitution of Ireland 1937.

The limited case law that relied upon the Directive Principles, then, avoided the dominant communitarian social dimension of these Principles, and instead used the Directive Principles to find and delimit a negative unenumerated right. This conforms with a trend within the jurisprudence of the period I noted in the previous Chapters: an expansive power to find new rights, bounded by a requirement that such rights impose exclusively negative remedial obligations.

### I(C): *O'Reilly v Limerick Corporation*

None of the rights found to be latent within the Constitution during this period were social rights. In fact, only one claim of an unenumerated social right was made in this period, in *O'Reilly v Limerick Corporation*.<sup>30</sup> *O'Reilly* has been described by Byrne and Binchy as 'the beginning of an increased sophistication in the manner in by which the judiciary view their relationship with the other branches of government.'<sup>31</sup> The case concerned Travellers living on unofficial sites in Limerick City who sought damages for failure to provide them with a serviced halting site. Their claim was founded upon a contention that among the unenumerated rights contained within Article 40.3.2° was the right to 'a certain minimum standard of basic material conditions to foster and protect his or her dignity and freedom as a human person.'<sup>32</sup>

This right would presuppose an actionable duty upon the State to spend its finances to ensure citizens' living standards reached this minimum. Costello J rejected that such a right exists in a discussion of the limits of unenumerated rights which referred to no prior unenumerated rights case.<sup>33</sup> First, Costello J reasoned:

either the asserted right is one of those basic human rights which inhere in the citizen because of the particular concept of man enshrined in the Constitution or because it is one of those fundamental civil or social

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<sup>30</sup> *O'Reilly v Limerick Corporation* [1989] ILRM 181.

<sup>31</sup> Raymond Byrne and William Binchy *Annual Review of Irish Law 1988* (Round Hall 1989) 115. Gerard Hogan has described as, 'the first major attempt to invoke the Constitution in the domain of socio-economic rights.' Gerard Hogan, 'Directive Principles, Socio-Economic Rights and the Constitution,' (2001) 36(1) *Irish Jurist* 174, 181.

<sup>32</sup> [1989] ILRM 181, 192. This rights claim was directly founded in the language of the Preamble.

<sup>33</sup> In fact, no cases are cited by Costello J in his discussion of the constitutional rights claim.

rights which inhere in the citizen by virtue of the particular political regime which the Constitution has established.<sup>34</sup>

Costello J granted that, 'it is certainly at least open to argument that the personal freedom and dignity of which the Constitution speaks cannot be adequately achieved without the provision of certain basic services.'<sup>35</sup> However, rather than determining whether the asserted right *does* result from either of these sources of rights, Costello J moved from an assessment of whether the right exists to considering what the *consequences* of recognising such a right would be. Costello J considered that, 'if the court has jurisdiction to adjudicate on a claim by Travellers that the State has breached a duty to make adequate provision for their welfare there is no reason why it should not have jurisdiction to entertain similar claims by other deprived persons in our society.'<sup>36</sup> To grant the existence of the right in the present case, then, Costello J reasoned, would be to enable 'homeless and deprived young people' to sue the State for damages as well.<sup>37</sup>

This does not answer Costello J's own question as to whether the alleged right results from the particular concept of man enshrined in the Constitution or the particular political regime which the Constitution established. 'To help answer these questions' Costello J, citing Aristotle, proceeds to consider the difference between distributive and commutative justice.<sup>38</sup> Distributive justice, per Costello J, 'is concerned with the distribution and allocation of common goods and common burdens.'<sup>39</sup> As these goods are in common, it is up to the administrators of the common good to distribute them fairly. However, no person has an individual claim to any share of what is held in common - as if they did, the stock would not be common *per se*. As a result, a court cannot enforce upon the administrators an obligation to divert from the common stock to benefit a specific person.

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<sup>34</sup> [1989] ILRM 181, 192.

<sup>35</sup> [1989] ILRM 181, 193.

<sup>36</sup> [1989] ILRM 181, 193.

<sup>37</sup> [1989] ILRM 181, 193.

<sup>38</sup> [1989] ILRM 181, 193.

<sup>39</sup> [1989] ILRM 181, 194.

Commutative justice meanwhile concerns ‘what is due to an individual from another individual (including a public body) from a relationship arising from their mutual dealings.’<sup>40</sup> As what is due can be ascertained, and is due exclusively towards the claimant, a Court *can* adjudicate this dispute and impose duties to ensure commutative justice is achieved.

Costello J relied on Aristotelianism to explain why a court may award damages where someone commits a wrong, but not when someone fails to receive a just distribution of the community’s wealth. This distinction is made notwithstanding no references to Aristotle or his thought in the Constitution. Indeed, as Fennelly J noted extrajudicially, ‘Aristotle’s distinction between two forms of justice was a philosophical, not a legal one. The modern notion of rights plays no role in it. Aristotle was not concerned with the exercise of power in a modern State.’<sup>41</sup> As Costello J found nothing in the Constitution which *disagreed* with this Aristotelian distinction, he found it applicable.<sup>42</sup> In making this judgment, Costello J did not consider the existence of the right to provision for free primary education.<sup>43</sup>

Costello J posited that:

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<sup>40</sup> [1989] ILRM 181, 194.

<sup>41</sup> Fennelly J continued:

Yet the distinction provides us with a surprisingly useful framework for analysis. There can be no doubt that, in principle, the courts respect and have repeatedly restated that some claims involve ‘peculiarly matters within the field of national policy, to be decided by a combination of the executive and the legislature, that cannot be adjudicated upon by the courts.

Nial Fennelly, ‘Judicial Decisions and the Allocation of Resources’ (2010) 23(3) *The Advocate* 48

<sup>42</sup> ‘I must of course apply the law of the Constitution to the plaintiffs’ claims and if there was anything in the Constitution which would require me to ignore the principles which I have just outlined I should have to do so. But there is not; indeed I think they accord well with the constitutional text.’ [1989] ILRM 181, 194.

<sup>43</sup> Further, as de Blacam noted:

Of course, it is true that in many instances the issue before a judge may be characterised as one of commutative justice and that before a legislator as one of distributive justice; but it is manifestly not the case that judges are concerned only with the former and legislators with the latter. Thus, for example, in *Murphy v Attorney General* the question was whether the provisions of the Income Tax Act 1967, providing for the aggregation of the incomes of a husband and wife and subjecting them to a higher rate of tax than that imposed on unmarried couples in a similar situation, were consistent with the Constitution. In ruling that they were not, the Supreme Court clearly had to consider an issue of distributive justice.

Mark de Blacam, ‘Children, Constitutional Rights, and the Separation of Powers’ (2002) 37 *Irish Jurist* 113, 131.

What could be involved in the exercise of the suggested jurisdiction would be the imposition by the court of its view that there had been an unfair distribution of national resources. To arrive at such a conclusion it would have to make an assessment of the validity of the many competing claims on those resources, the correct priority to be given to them and the financial implications of the plaintiffs' claim.

This, he held, was not something which the Court had the jurisdiction to determine. This was asserted notwithstanding that the Court had already made assessments of the validity of competing claims on resources, the priority to be given to them, and the financial implications of plaintiffs' claims; most notably in the prior recognition of the duty upon the State to fund legal aid found in *The State (Healy) v Donoghue*.<sup>44</sup>

The plaintiff lost in *O'Reilly* not because the right claim was incompatible with the conception of man envisaged in the Constitution, nor because the right did not flow from the political regime the Constitution established. It was conceded that the right *may* flow from these sources. Instead, by imposing for the first time in Irish constitutional law an Aristotelian structure of justice upon the constitutional order, the Court restrained itself from finding for the plaintiff.<sup>45</sup>

In *O'Reilly*, then, a jurisdictional limit heretofore unknown in the case law was imported to preclude an unenumerated rights claim. Further, the compatibility of the rights claim with the values which were understood during this period to underpin the constitutional order was not rejected.<sup>46</sup> Amidst case law seemingly expressive of the unbounded scope of the Courts to adjudicate

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<sup>44</sup> [1976] IR 325. See *ibid.* Whyte has also commented how, 'Given that the Courts are prepared to recognise at least one implied constitutional right that requires public expenditure for its vindication, namely the right to criminal legal aid, the question has to be asked whether there is any principled legal reason for refusing to extend constitutional protection to rights targeting social exclusion.' Gerry Whyte *Social Inclusion and the Legal System: Public Interest Law in Ireland* (2<sup>nd</sup> edn, IPA 2015) 50.

<sup>45</sup> As Whyte noted, '*O'Reilly v Limerick Corporation*'s conception of the separation of powers is not necessarily the only one open under the Constitution. One could legitimately interpret this doctrine in a manner that would permit a more assertive role in relation to the protection of socio-economic rights.' Gerry Whyte, 'The Role of the Supreme Court in Our Democracy: A Response to Mr Justice Hardiman' (2006) 28 *DULJ* 1.

<sup>46</sup> This conforms with the commentary in the American context of Richard Fallon, see Richard H. Fallon, 'The Linkage between Justiciability and Remedies: and their Connection to Substantive Rights' (2006) 92(4) *Virginia Law Review* 633, 648.

rights, this rights claim was rejected.<sup>47</sup> In a period where the judiciary deemed previously off-limits areas such as foreign policy and tax policy adjudicable,<sup>48</sup> that the Court drew this jurisdictional line in *O'Reilly* is noteworthy.

## II: What Factors Conditioned the Court's Social Rights Jurisprudence in the Second Wave

The Court's selection of which rights claims were supportable in this period can be understood by considering judicial culture. Considering the social right to free primary education in *Crowley*, it was not available for the Court to reject the existence of such a right, however the Court *could* interpret that right in such a restrictive fashion as to foreclose on it imposing positive obligations. As I noted in the previous Chapters, the influence in this period of American constitutionalism upon the senior judiciary was considerable. The construction of rights as exclusively restrictive, rather than positive, may also have been influenced by the American jurisprudence.<sup>49</sup> In this construction, the guarantee of provision for free primary education lost all its practical applicability, save for where *no* infrastructural provision was made.

Further, with the muted Directive Principles jurisprudence, especially contrasted against the impact of the Preamble, the second wave did not stray far from the perspective of the earlier Court. Whereas with the first wave, judges such as Gavan Duffy J saw the Preamble's texts as a means of justifying a commencement of rights adjudication, to the second wave judiciary, it provided a further license - to transcend the constitutional text and engage in

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<sup>47</sup> Costello J would later resile from this position in *O'Brien v Wicklow UDC* (unreported, High Court 10 June 1994), stating at 3 - 4, 'if the view which I am now expressing represents a change of views on my part then I accept that my views have changed.' As Kelly noted: 'the potential impact of this change of heart was neutralized by the subsequent canonization of *O'Reilly* by the Supreme Court.' Hogan et al (n 2) 146.

<sup>48</sup> *Murphy v Attorney General* [1982] IR 241 *Crotty v An Taoiseach* [1987] IR 713.

<sup>49</sup> As Zackin noted, 'The [US] Supreme Court has never fully embraced a positive-rights reading of the Constitution.' This argument is so notwithstanding the US Supreme Court imposing limited obligations to bus in *Brown v Board of Education of Topeka* ('*Brown II*') (1955) 349 U.S. 294. See the discussion in Chapter Eleven of this doctorate. Emily Zackin, 'Positive Rights' in Mark Tushnet, Mark Graber and Sanford Levinson (eds) *The Oxford Handbook of the U.S. Constitution* (OUP 2015) 717, 730. See also Colm Ó Cinnéide. 'Zones of Constitutionalisation' and the Regulation of State Power: The Missing Social Dimension to the Irish Constitutional Order' (2014) 37(1) *DULJ* 173, 194.

abstract reasoning as to the *core* of the Constitution, from which additional rights could be gleaned.

That the Preamble and not the Directive Principles provided the more significant resource for the Court's rights interpretation in this time is partially explained by the dominant influence of natural law compared to communitarianism among the bench.<sup>50</sup> I am not suggesting that the negative-right-creating interpretation of the Catholic aspects of the Constitution were *intentionally* selected by the judiciary as the preferred means of interpretation. Rather, it followed from their familiarity with natural law theory and unfamiliarity with communitarian theory. The judicial community read the Catholic aspects of the Constitution in the manner which made most sense to them, to the exclusion of alternative understandings of the Constitution that were arguably in greater conformity with the constitutional order the drafters' intended to establish. As a result, the potential to judicially recognise and thereby give life to the social dimension introduced to the constitutional text by the inclusion of Catholic communitarian principles was lost. Sense is thus made of how, in the second wave, the reliance on the Directive Principles led the Court to only discern one right and one which only restricted, and did not impel, state action to ensure its protection.

Article 45.4.1° includes directions for the State to 'safeguard with especial care the economic interests of the weaker sections of the community, and, where necessary, to contribute to the support of the infirm, the widow, the orphan, and the aged.' Were rights, such as the right to property, read in light of this provision,<sup>51</sup> conceivably to limit property rights in accordance with the exigencies of the common good, the State may have had to show that the economic interests of the weaker sections of society were safeguarded.<sup>52</sup> This

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<sup>50</sup> In this, I am not suggesting that natural law cannot ground social rights *per se*. Consider for instance *G v An Bord Uchtála*, where the Court held that 'the child also has natural rights [...] to be fed and to live, to be reared and educated, to have the opportunity of working and of realising his or her full personality and dignity as a human person.' [1980] IR 32.

<sup>51</sup> Such as would arguably be permissible upon the reasoning of Kenny J pronounced in *Murphy Properties v Cleary* [1972] 1 IR 330 and the succeeding cases referenced in Section I(B) of this Chapter.

<sup>52</sup> My discussion of housing access rights in South Africa in Part Three, and the focus on making sure housing policies considers those most vulnerable among the affected, provides an example of this.



could provide an additional burden on the State when justifying the seizure of property in the common good. It also could inveigh against a general deference to the State in this regard, as a relevant dimension in the assessment of the common good would be of justiciable concern to the Courts.

This is without considering what unenumerated rights could have been found to be latent within a constitutional order containing this social dimension. Were the communitarian values expressed in Article 45 considered by the Court during this period, the possibility of the judiciary ‘discovering’ an unenumerated right to, for instance, shelter, as being a prerequisite for a society based on justice and charity, would be present. Considering *O’Reilly*, whether or not the outcome of the case would have been the same, it is at least fair to assume that the reasoning employed would have been different with reference to the constitutional objective of safeguarding the economic interests of the weaker sections of the community.<sup>53</sup>

When this counterfactual is contrasted with the case law that invoked the Preamble, it is clear how far from the judiciary’s comfort zone such adjudication had the potential to drift. The judiciary’s preference for interpreting rights in a way that avoided a positive-rights-protecting role would be disturbed if it determined that the Directive Principles could be utilised in rights interpretation. By this, the Court’s understanding of what ‘the common good’ pursued by the Constitution meant was understood to the exclusion of communitarian provisions which could clarify this phrase in a way discomfiting for the judicial community and its understanding of its own function.<sup>54</sup> As the extent of the Court’s recognition of rights claims was limited by this factor, so too was the degree of rights protection practically available under the Constitution.

In this way, the conspicuous absence of social rights adjudication during the apex of rights enthusiasm amongst the judicial community becomes

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<sup>53</sup> [1989] ILRM 181.

<sup>54</sup> As Colm Ó Cinnéide notes, ‘The Irish judiciary have been unwilling to extend the scope of constitutional rights protection to cover socio-economic entitlements, and the Irish ‘zone of constitutionalisation’ in this context adheres closely to the standard Anglo-American template.’ Colm Ó Cinnéide. (n 49) 194.

understandable. First as a reflection of the influence of constitutional thought which viewed rights as negative protections against state interference; and also as the result of an interpretation of the Catholic text of the Constitution not in a communitarian fashion supportive of recognising social rights, but in a natural law manner which did not particularly presume the existence of such rights. In observing this, once again the contingency of social rights protection upon judicial cultural dispositions is shown.

### III: The Third Wave 1995 - 2013: The Court Sets Itself Against Social Rights

While the second wave saw *Crowley* and *O'Reilly*, the Court's jurisprudence on social rights really emerges in the third wave, a period of general judicial reticence to rights adjudication. The focus of these cases was on the rights of children, both to provision for a primary education, and for secure detention facilities. In 2000, Osborough would note that, 'education problems supply one of the litigation battlefields of the modern Republic.'<sup>55</sup> The main sites of battle were two central cases in which the narrow obligation which the *Crowley* reading of Article 42.4 imposes upon the State was applied to the educational rights of persons with special needs.

#### III(A): *O'Donoghue v Minister for Health*

*Crowley* held that the State is in breach of its constitutional obligations when it fails to even provide the basic infrastructure necessary for a free primary education. Such extreme circumstances arose in *O'Donoghue v Minister for Health*.<sup>56</sup> Paul O'Donoghue was a nine year old boy with profound mental and physical disabilities for whom the State was not providing a free education, on the justification that, given his disabilities, the State considered him to be 'ineducable.'<sup>57</sup>

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<sup>55</sup> WN Osborough, 'Book Review: Education and the Constitution' by Michael Farry,' (2000) 35(1) *Irish Jurist* 416, 416.

<sup>56</sup> *O'Donoghue v Minister for Health* [1996] 2 IR 20 [hereinafter '*O'Donoghue*'].

<sup>57</sup> [1996] 2 IR 20, 61.

In the High Court, drawing on a range of medical, educational, and, once again, Vatican documents,<sup>58</sup> O’Hanlon J held the state’s claim that O’Donoghue was not covered by the guarantee of provision for free primary education was anachronistic and incorrect. Satisfied that O’Donoghue was capable of learning, O’Hanlon J held:

There is a constitutional obligation imposed on the State by the provisions of Article 42.4 of the Constitution to provide for free basic elementary education of all children and this involves giving each child such advice, instruction, and teaching as will enable him or her to make the best possible use of his or her inherent and potential capacities, physical, mental, and moral; *however limited those capacities may be.*<sup>59</sup>

The State was in default of this constitutional obligation. As this obligation requires a positive action to vindicate - making provision for O’Donoghue’s education - this raised the possibility of issuing a *mandamus* order against the State to vindicate his rights. Instead, O’Hanlon J expressly reserved the liberty to issue such an injunction in the circumstance whereby the applicant’s rights breach was not cured into the future by the State.<sup>60</sup> In lieu, O’Hanlon J issued a declaratory order, expressing the State’s failure in its duty to the applicant ‘in the expectation that the institutions of the State would respond by taking whatever action was appropriate to vindicate the constitutional rights of the successful applicant.’<sup>61</sup>

On appeal, the Supreme Court noted that the State is now providing O’Donoghue with an education appropriate to his current condition. As a result, the Supreme Court substituted O’Hanlon J’s declaration that the State was in breach for a new declaration that ‘the infant applicant is entitled to free primary education in accordance with Article 42.4 of the Constitution and the State is *under an obligation to provide for such education.*’<sup>62</sup> In *O’Donoghue*,

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<sup>58</sup> [1996] 2 IR 20, 69.

<sup>59</sup> [1996] 2 IR 20, 65 (emphasis added).

<sup>60</sup> [1996] 2 IR 20, 71.

<sup>61</sup> [1996] 2 IR 20, 71.

<sup>62</sup> [1996] 2 IR 20, 72 [editor’s note]. (emphasis added).

then, the Court recognised that Article 42.4 can impose positive obligations upon the State.

Whilst the Supreme Court order was superfluous as the State had already responded proactively to the declaratory order, the Supreme Court's express approval of the claim that the State is placed under a rights obligation by this Article is a significant affirmation. As Glendenning noted, the Supreme Court 'recognised that there was a right to be litigated again by the children who could prove that they had suffered loss or damage at the hands of the State as a consequence of deprivation of their constitutional right to primary education and care services, although it is necessary to take a constitutional action to vindicate this right and few parents can afford this investment in time and money.'<sup>63</sup> A family which accepted this investment was the Sinnotts, whose litigation would see the High Court issue, for the first time, a mandatory order against the State to vindicate a person's right to education.

### III(B): *Sinnott v Minister for Education*

*Sinnott v Minister for Education* was a challenge by a twenty-three year old man with severe autism and his mother, both claiming that the State had failed them by not vindicating his right to be provided with free primary education.<sup>64</sup> Similarly to *O'Donoghue*, the State had not been providing Sinnott with advice, instruction, and teaching as would enable him to make the best possible use of his inherent and potential capacities, physical, mental, and moral, however limited those capacities may have been. Indeed, Sinnott had only received two years of education from the State in his first twenty-three years.<sup>65</sup> Unlike *O'Donoghue*, Sinnott was over the age of eighteen.

The State raised two issues to recognising Sinnott's rights claim. First it submitted that the State's constitutional obligation as established in *O'Donoghue* to provide for free elementary education extended only to the age of eighteen. This was rejected in the High Court. Barr J, taking a purposive

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<sup>63</sup> Dympna Glendenning *Education and the Law* (2<sup>nd</sup> edn, Bloomsbury 2012) 198.

<sup>64</sup> *Sinnott v Minister for Education* [2001] 2 IR 545. The claim by Sinnott's mother will not be discussed.

<sup>65</sup> [2001] 2 IR 545, 591.

reading of the right to free primary education, and noting the absence of any express age limitation within the text of Article 42.4, affirmed that ‘the ultimate criterion in interpreting the State’s constitutional obligation to provide for primary education for the severely disabled is ‘need’ not ‘age.’<sup>66</sup>

This meant the right to provision of a free primary education was engaged. Having resolved this, the second issue was that, noting that it would have to expend public monies to realise Sinnott’s rights, the separation of powers may bar the Court from mandating such State expenditure. Barr J also rejected this claim, arguing that the separation of powers was subordinate to the maintenance of the rule of law:

It is the essence of a democratic society that we live under the rule of law. It is unjust that the grievously handicapped should have to struggle over the years to obtain their constitutional rights; that they should have to contend with persistent obstruction and obduracy from officialdom as the evidence in these actions illustrates and that they should be obliged to seek the aid of the courts as guardians of their constitutional rights.<sup>67</sup>

To Barr J, the State’s constitutional obligations include the vindication of constitutional rights. Holding the State to these obligations is necessary to make the State subject to the rule of law. To Barr J, upholding the rule of law is so important that it trumps the institutional framework of the separation of powers.

First, Barr J issued a declaratory order that the State was in continuing breach of Jamie Sinnott’s rights under Article 42.4. However, later that month, Barr J ‘granted a mandatory injunction that the first defendant provide for free education for the first plaintiff, to be reviewed in 2003 [three years later.]’<sup>68</sup> This was the first instance in which the Court had *mandated* the expenditure of public monies to vindicate a constitutional right to provision for free primary education. It suggested that, in the narrow range of cases in which the State failed to provide free primary education to rights-bearers - minors or adults -

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<sup>66</sup> [2001] 2 IR 545, 584.

<sup>67</sup> [2001] 2 IR 545, 571.

<sup>68</sup> [2001] 2 IR 545, 598.

who were in need, the State could be positively enjoined to spend money to realise these rights. Immediately however, this case was taken to the Supreme Court, where the High Court order was reversed.

The decision of the Supreme Court turned on the Court's interpretation of what class of persons are subject to the State's constitutional obligation to provide for free primary education. Only Keane CJ agreed with Barr J's determination that the State's obligation extends for as long as the plaintiff was in need of primary education. For the rest of the Court, as the State's assertion that eighteen was the cut-off point seemed reasonable and in conformity with social understandings of childhood and minority, this was the limit. Sinnott, twenty-three, was therefore too old to have had his rights claim upheld.

If the Supreme Court had only judged upon the 'age' aspect, then the imposition of mandatory injunctions to vindicate the educational rights of persons with severe mental disabilities under the age of eighteen would have been a practical possibility. However, similar to how Keane J's *obiter dictum* in *O'T v B* proved to have the most significant impact on rights jurisprudence,<sup>69</sup> the Court's *obiter* engagement with the proposition that the Court could impose positive obligations upon the State to spend public monies to advance constitutional rights would prove highly consequential. As this issue was moot, the discussion entered into is mostly significant for what it demonstrated in regards the Court's stance on positive rights adjudication. Effectively, along with their judgment in *TD* the next year, in *Sinnott* the Court's firm opposition to mandatory injunctive relief showed that any endeavour to develop a positive rights jurisprudence for those under eighteen not receiving primary education was unviable. By this, the possibility of effective rights protection for social rights cases with resource implications, was foreclosed upon.

Keane CJ, while holding that the right to education is 'need', not 'age' contingent, nevertheless held that 'this court would not grant mandatory relief requiring the Oireachtas to provide funds for a particular purpose in order to uphold the constitutional or purely legal rights of members of the public.'<sup>70</sup>

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<sup>69</sup> *O'T v B* [1998] 2 IR 321 See Chapter Five of this doctorate.

<sup>70</sup> [2001] 2 IR 545, 631.

The reason for this, per Keane CJ, is the separation of powers, and ‘the respect each of the three great organs of state owe to one another.’<sup>71</sup>

Keane CJ then engaged in an exercise which, as I noted in the last chapter, the Courts repeatedly use when confronted with an accepted continuing breach of a right. First, he affirmed that: ‘where, as here, the State have conspicuously failed in their constitutional obligations to provide the education to which a citizen is entitled the Court will ensure that the right is given full legal effect *by whatever remedy is appropriate*.’<sup>72</sup> This suggests that mandatory orders - a form of remedy - could conceivably be appropriate to ensure a right is given full legal effect.<sup>73</sup> Immediately following this, he noted how:

In practice, it may not be of any great significance whether the relief granted is by way of declaration or a mandatory injunction: the respect each of the three great organs of state owe to one another requires obedience to the order of this court or the high court, whether it takes the form of a declaration or a mandatory injunction. The raising of taxes, and the appropriation of public monies being quintessentially matters for Dáil Éireann alone, however, I am satisfied that the appropriate form of relief in this case was a declaration rather than a mandatory injunction.<sup>74</sup>

Thereby, Keane CJ theoretically suggested the possibility of mandatory injunctions in future, whilst rejecting their applicability in the present case, and promoted repeated declarations notwithstanding that the High Court’s mandatory order was itself issued because declaratory relief had not cured the rights breach.<sup>75</sup>

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<sup>71</sup> [2001] 2 IR 545, 640.

<sup>72</sup> [2001] 2 IR 545, 640.

<sup>73</sup> Keane CJ claimed to be in full agreement with Hardiman J in this regard, notwithstanding that, as will be seen below, his stance is considerably less open to mandatory orders than Keane CJ’s. [2001] 2 IR 545, 640.

<sup>74</sup> [2001] 2 IR 545, 640.

<sup>75</sup> Keane, writing in 2007 in relation to the *TD* decision, again cautions against viewing the Court’s unwillingness to ever issue a mandatory injunction as suggesting their practical unreality:

While a majority of the Supreme Court [in *TD*] were of the view that the order in form in which it was made was inconsistent with the separation of powers, it would be unsafe to assume that the decision wholly excludes the Court’s jurisdiction to grant mandatory

Denham J was more willing to consider mandatory orders.<sup>76</sup> Like Barr J, Denham J conceptualised the separation of powers not as a constitutional value in and of itself, but as a means by which other values are promoted, in particular the protection of rights.<sup>77</sup> The three of government branches are not sealed off from one another, but collectively pursue a broader function: advancing the interest of the State. Like Keane CJ, Denham J found:

A declaratory order, if any order is necessary, is usually appropriate. However, I would not exclude the rare and exceptional case where, to protect constitutional rights, the court may have jurisdiction and even a duty to make a mandatory order.<sup>78</sup>

As will be seen later, a similar reasoning would lead Denham J to be the only Supreme Court judge to ever issue an order of mandamus against the Minister for Education, in *TD v Minister for Education*.<sup>79</sup>

The judgment in *Sinnott* with the greatest effect on judicial culture was that of Hardiman J, due to his trenchant rejection of the power of the Court to issue mandatory injunctions for the spending of public monies. Hardiman J devoted the majority of his judgment to this, notwithstanding its mootness.<sup>80</sup> Hardiman J's very strong presumption against the issuance of mandatory orders proceeded from a rigid conception of the separation of powers. Per Hardiman J:

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injunctions in every case when a Minister disregards the constitutional rights of children or anyone else.

Ronan Keane, 'Book Review: Educational Rights in Irish Law' (2007) 1 *JSIJ* 209, 211 - 212.

<sup>76</sup> However, her comments in this regard were *obiter* given *Sinnott* in her reasoning was for age reasons not still entitled to protection under the right.

<sup>77</sup> [2001] 2 IR 545, 656. Denham J quoted from *Murphy v Dublin Corporation* how: 'as the legislature, executive and judicial powers of government are all exercised under and on behalf of the State, the interest of the State as such is always involved.' [1972] IR 215, 234, cited at [2001] 2 IR 545, 655

<sup>78</sup> [2001] 2 IR 545, 656.

<sup>79</sup> [2001] 4 IR 259.

<sup>80</sup> Hardiman J did not object directly to the idea that Article 42.4 creates a constitutional right to be provided with free primary education for children under the age of 18, nor did he engage with this question in detail. Rather, the focus of his judgment is the argument that, even if this right exists, it would not be possible for the Court to issue an injunctive order realising this right.



The constitutionally mandated separation of powers is a vital constituent of the sovereign independent republican and democratic state envisaged by the Constitution. *It is not a mere administrative arrangement, but a high constitutional value.* It exists to prevent the accumulation of excessive power in any one of the organs of government or its members, and to allow each to check and balance the others. It is an essential part of the democratic procedures of the State, not inferior in importance to any article of the Constitution.<sup>81</sup>

This statement contains two related and highly influential claims. First, that there is a constitutionally mandated separation of powers. Second, that this separation of powers is, in and of itself, a high constitutional value.

To say the Constitution mandates a separation of powers implies that the Constitution stipulates the limits of all the branches of government, that by reading the Constitution this institutional framework will be self-evident, and that the framework which emerges is one which would disallow the issuing of mandatory injunctions. This is a large claim; and has been criticised.<sup>82</sup> The most relevant critical argument against this stance is to note that the rights claim under review is the one express social right with resource implications enumerated within the Constitution. Asserting that the separation of powers is a ‘high constitutional value’ is perhaps accurate, and certainly the Constitution outlines *some* discrete powers which are vested in three textually discrete areas of government.<sup>83</sup> However, by empowering the senior judiciary to evaluate the validity of laws having regard to the provisions of the Constitution,<sup>84</sup> and by including the guarantee of provision of free primary education within the justiciable fundamental rights provisions at Article 42.4, notwithstanding that the executive power shall be exercised by or on the authority of the Government per Article 38.2, the judiciary have a strong claim to an oversight power within the text of the Constitution. The rigidity of the separation of powers which Hardiman J posits is not reflected in the permission

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<sup>81</sup> [2001] 2 IR 545, 702 (emphasis added).

<sup>82</sup> De Blacam (n 43) Whyte (n 44).

<sup>83</sup> [2001] 2 IR 545, 702.

<sup>84</sup> Article 34.3.2° and Article 34.5.5° of the Constitution of Ireland 1937.

which the Constitution gives for checking and balancing interventions by any branch in the affairs of the others.<sup>85</sup>

Hardiman J also permitted that ‘neither of [the elected] organs of government are in a position to disregard a constitutional duty and the courts have *powers and duties* in the unlikely event of such disregard.’<sup>86</sup> However, he continued, ‘excepting that extreme situation, the duty imposed by Article 42 is a duty to be discharged by the Executive and Legislature who must necessarily have a wide measure of discretion having regard to available resources and having regard to policy considerations of which they must be the judge.’<sup>87</sup> Even Hardiman J does permit of an ultimate overriding judicial power in extreme cases of failure by the elected bodies to have regard to their constitutional duties, including rights protection. There *are* higher constitutional values, then, even if they do not justify the positive realisation of an enumerated right in this case.<sup>88</sup>

Compounding his argument that the constitutional text mandates a separation of powers which prohibits mandatory injunctions in all but the most extreme circumstances, Hardiman J found support for his position ‘in most if not all of the great constitutional documents and in the writings of such commanding figures as Aristotle, Locke, Montesquieu and the founding fathers of the United States.’<sup>89</sup>

As I have explained above, in Ireland the Enlightenment liberal constitutional order associated with the United States, Locke, and Montesquieu had superimposed onto it a communitarian and social constitutionalist ethic which promoted positive state action to achieve constitutional goals such as the

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<sup>85</sup> Per Conor O’Mahony: ‘The will of the People is that the Constitution should grant them a right to education, and it cannot be considered to be undemocratic to give effect to this will by granting a remedy which, as an unfortunate side effect of being the only remedy available, interferes with Executive policy.’ Conor O’Mahony *Educational Rights in Irish Law* (Round Hall 2006) 228.

<sup>86</sup> [2001] 2 IR 545, 695 (emphasis added).

<sup>87</sup> [2001] 2 IR 545, 695.

<sup>88</sup> Note in this regard how in *Ó Beoláin v Fahy* [2001] 2 IR 279, discussed in Chapter Six, Hardiman J expressed a greater willingness to issue a mandatory order.

<sup>89</sup> [2001] 2 IR 545, 710.

realisation of the common good.<sup>90</sup> This communitarian influence changed the intended nature of the constitutional order from one wedded to the negative state liberalism which such commanding figures as Hardiman J, Aristotle, Locke, Montesquieu and the founding fathers of the United States espoused, to one in which the State is understood as a means of advancing social objectives, such as the pursuit of the common good. In this rendering, the judiciary and elected branches are not inherently oppositional, nor is the separation of powers so formally prescribed. Given this, the separation of powers as advanced by the figures Hardiman J cited, and as encouraged in his judgment, has not the rigid textual foundation in the Constitution that is claimed.

*Sinnott* is among the most significant social rights case in Ireland, not because of the *ratio*, but because of the Court's *obiter* commentary about the separation of powers. Along with *TD*, covered next, this case effectively foreclosed upon the possibility of social rights protection.<sup>91</sup> Since *Sinnott*, even in cases where children under the age of 18 were not receiving an education appropriate to their special needs, the Court has found against the applicants. This has been come about by diluting the right to education from its *O'Donoghue* reading as 'advice, instruction, and teaching as will enable him or her to make the best possible use of his or her inherent and potential capacities, physical, mental, and moral; however limited those capacities may be;' to whatever education would be 'adequate'<sup>92</sup> or which it was rational for the State to provide.<sup>93</sup>

### III(C): *TD v Minister for Education*

In the same period when education was a litigation battleground, a spate of cases came before the High Court concerning children with severe behavioural conditions who were in need of secure detention. The high incidence of these cases, alongside the inaction of the State to declarations of being in breach of

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<sup>90</sup> 'The sub-structure of the Constitution was fundamentally democratic and secular in nature, with the religiously-inspired provisions imposed upon this secular sub-structure.' Gerard Hogan, *The Origins of the Irish Constitution, 1928 - 1941* (RIA 2008) 156.

<sup>91</sup> See Ruadhán MacCormaic, *The Supreme Court* (Penguin 2016) 342.

<sup>92</sup> *O'Carolan v Minister for Education and Science* [2005] IEHC 296.

<sup>93</sup> *Ó C v Minister for Education and Science* [2007] IEHC 170.

their rights, eventually led to the decision in *TD v Minister v Education*, the most significant social rights case to come before the Court, as well as the most important rights case of this period.

Beginning in 1994, a series of cases came before the High Court concerning children in need of secure residential accommodation, because they were threats to their own safety. As Fennelly J has noted extrajudicially:

The background to *TD v Minister for Education* was that it had become clear that there were a small but significant number, usually but not exclusively of boys, in their early teenage years, who exhibit extreme behavioural problems [...] They were beyond the control of their parents, of normal schools, and even of normal criminal detention facilities. They required a period of time in a secure unit to contain them safely while attempts were made to confront this behaviour and treat the underlying problems. There was no legal provision for them.<sup>94</sup>

In *FN v Minister for Education*, concerning a child whose special needs could not be provided for by their parents, Geoghegan J held that in such instances ‘there was a constitutional obligation on the State under Article 42.5 to cater for those needs to vindicate the child’s rights.’<sup>95</sup> Geoghegan J held that it was not necessary to determine how absolute this right is, but that, ‘the State is under a constitutional obligation towards the applicant to establish as soon as reasonably practicable [...] suitable arrangements of containment with treatment for the applicant.’<sup>96</sup> While recognising the State was under a continuing rights obligation, he withheld from making a declaratory order until after an adjournment,<sup>97</sup> and seven days later, was given notice of the development of residential places for children in need of special care.<sup>98</sup> This decision was not subsequently appealed.

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<sup>94</sup> Nial Fennelly, ‘The Courts and the Doctrine of Separation of Powers in the Irish Constitution’ in Eoin Carolan (ed) *Judicial Power in Ireland* (IPA 2018) 45.

<sup>95</sup> *FN v Minister for Education* [1995] 1 IR 409, 416 [hereinafter ‘FN’].

<sup>96</sup> [1995] 1 IR 409, 416.

<sup>97</sup> [1995] 1 IR 409, 417.

<sup>98</sup> *DB v Minister for Justice* [1999] 1 IR 29, 34. [hereinafter ‘DB’]

As Glendenning noted, ‘it was on the basis of [this] precedent that many later similar cases were decided.’<sup>99</sup> In four succeeding cases, the High Court found the State in default of its obligations to children by failing to provide them with secure detention facilities.<sup>100</sup> Significantly, in one of these - *DD v Eastern Health Board* - the State accepted Geoghegan J’s rights argument in *FN*, and admitted to being it in breach of the child’s rights per *FN* to be cared for by the State.<sup>101</sup> Costello J ordered the Board to provide accommodation for the child until his hearing could be completed. As has been observed by Whyte, ‘*DD* implicitly confirmed Geoghegan J’s view [...] that the Courts had a constitutional power to order the protective detention of children at risk, but once again the problem was sent back to the administrative authorities for resolution of the final details.’<sup>102</sup>

Following these early dicta from Geoghegan and Costello JJ, ‘between 1998 and 2000, Kelly J took public interest litigation in this area to its logical conclusion by detailing the steps required of the authorities and by threatening them with contempt of court for failing to carry out court rulings.’<sup>103</sup> First, in *DB v Minister for Justice*, Kelly J challenged the inactivity of the State to respond to Geoghegan J’s judgment in *FN*.<sup>104</sup> Again, the State accepted that the underdefined right claimed in *FN* for State catering for disturbed children’s rights was engaged. Documenting the failure of the administrative and legislative branches to respond appropriately to *FN*, Kelly J stated that ‘it is no exaggeration to characterise what has gone on as a scandal.’<sup>105</sup> In light of failures of the Minister to respond appropriately to the Court’s ruling in *FN*, Kelly J concluded that ‘the time has now come for this Court to take the next

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<sup>99</sup> Glendenning (n 63) 191.

<sup>100</sup> The same day as deciding *FN*, Geoghegan J dealt with the similar case of *DT v Eastern Health Board* (unreported, High Court, 24 March 1995). Again, Geoghegan J stated that the State has a constitutional duty to cater for the behavioural needs of the applicant. Even though the Court was nowhere empowered to make such an order upon the State, ‘as this was necessary to vindicate the constitutional rights of the child, Geoghegan J asserted that he was constitutionally empowered to make the order.’ As with *FN* earlier in the day however, this assertion was made without issuing a declaratory order to the effect that the State was in breach. See also *GL v Minister for Justice* (unreported, High Court 24 March 1995).

<sup>101</sup> *DD v Eastern Health Board* (unreported, High Court 3 May 1995).

<sup>102</sup> Whyte (n 44) 287.

<sup>103</sup> *Ibid*, 292.

<sup>104</sup> [1999] 1 IR 29.

<sup>105</sup> [1999] 1 IR 29, 43.

step required of it under the Constitution so as to ensure the rights of troubled minors who require placement of the type envisaged are met.’<sup>106</sup>

Consequently, Kelly J issued a mandatory injunction against the Minister order him to act upon the policy programme the Ministry had published. This, Kelly J reasoned, was necessary in order for the Court ‘to carry out its duties under the Constitution in securing, vindicating, and enforcing constitutional rights.’<sup>107</sup> Like Barr and Denham JJ in *Sinnott*, Kelly J viewed the separation of powers as a constitutional value capable of subordination where necessary for the protection of rights.<sup>108</sup> In making the mandamus order, Kelly J noted that four factors had been satisfied which persuaded him that the time had come to exercise the mandatory injunctive power:

- 1) The High Court had already granted declaratory relief concerning minors of the type under consideration. In so doing it observed the constitutional proprieties owed by the Court to the administrative branch of government.
- 2) If the declaration was to be of any benefit to the minors in whose favour it was made, the necessary steps consequent upon it had to be taken *expeditiously*. Otherwise the minors would not be granted relief before reaching the age of majority.
- 3) The effect of a failure to provide the appropriate facilities must have had a profound effect on the lives of the minors and certainly put them at risk of harm up to and including the loss of their very lives.
- 4) Due regard must be had to the efforts made on the part of the Minister to address the difficulties to date. If the Court were to take the view that all reasonable efforts had been made to deal efficiently and effectively with the problem and that the Minister’s response was proportionate to the rights which fell to be protected, then normally no order of the type sought ought to be made.<sup>109</sup>

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<sup>106</sup> [1999] 1 IR 29, 44.

<sup>107</sup> [1999] 1 IR 29, 42.

<sup>108</sup> Kelly J did not engage substantively with the content of the right ‘of troubled minors who require placement of the type envisaged’, rather, as its breach was accepted by both parties, its content is in large part presumed to be as outlined in *FN*. [1999] 1 IR 29, 44.

<sup>109</sup> [1999] 1 IR 29, 42 - 43.

By these factors, Kelly J sought to restrain the potential for mandatory injunctions to proliferate. Only where the Ministerial response was understood to be disproportionate would an injunction be considered.<sup>110</sup>

*DB* was not appealed. A year later, in *TD v Minister for Education*, Kelly J again issued a mandatory injunction ‘to attempt to fill the vacuum which exists by reason of the failure of the legislature and the executive.’<sup>111</sup> Kelly J heard from children who sought an injunction to require the Minister to provide further residential places, in compliance with a ministerial proposal to accommodate children with severe behavioural issues. Again, Kelly J affirmed how ‘the injunction seeks to do no more than to compel the Minister to adhere to the latest plans which have been put before this Court’ by the Ministry.<sup>112</sup>

Kelly J noted that the State did not appeal his prior mandatory order in *DB* and that, ‘all of the evidence I have is that, to date, the injunction is complied with to the letter.’<sup>113</sup> Indeed, ‘until the hearing with which this judgment is concerned, there was full cooperation on the part of the Minister.’<sup>114</sup> Noting however ‘culpable delay’ in the execution of these planned residential places, the impact which the delay was having on the rights of the applicants, and the four part test *DB* for granting mandatory injunctions, Kelly J again ordered that ‘the Minister, who has already decided on the policy, lives up to his word and carries it into effect.’<sup>115</sup>

Writing in the immediate aftermath of the High Court judgment in *DB*, Quinn commented that, ‘it seems likely that this [decision] will be upheld in the Supreme Court (if appealed) if only because of the current composition of the

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<sup>110</sup> Proportionality in regards the fourth limb of Kelly J’s test should be understood consonant with the analysis of the deference endemic within the Irish application of proportionality discussed earlier.

<sup>111</sup> *TD v Minister for Education* [2000] 3 IR 62 [hereinafter ‘*TD*’].

<sup>112</sup> [2000] 3 IR 62, 75.

<sup>113</sup> [2000] 3 IR 62, 69.

<sup>114</sup> [2000] 3 IR 62, 70. As MacCormaic noted, ‘the only case in which the State had met its constitutional objectives was the one the previous year in which he had made an order compelling the government to act.’ MacCormaic (n 91) 343.

<sup>115</sup> As Kelly J noted in this regard: ‘even as things stand it will be fully seven years since the decision in *FN v Minister for Education* before these facilities are in operation.’ [2000] 3 IR 62, 85.

Court.<sup>116</sup> The Court's composition changed considerably in the intervening two years,<sup>117</sup> and whereas *DB* was not appealed, the State challenged Kelly J's decision in *TD* and won.

An interesting aspect of *TD* on appeal is that again the rights claim was uncontested. The State accepted that children have a right, in Keane CJ's construction, 'to be placed and maintained in secure residential accommodation so as to ensure, so far as practicable, his or her appropriate religious and moral, intellectual, physical and social education [...] as one of the unenumerated personal rights guaranteed under Article 40.3.1°'<sup>118</sup> Whilst Keane CJ recited his caution in *O'T v B* against finding rights<sup>119</sup> - particularly 'what are today frequently described as 'socioeconomic rights' to be unenumerated rights guaranteed by Article 40'<sup>120</sup> - this comment was *obiter* and, in granting declaratory relief, Keane CJ expressly recognised that an unenumerated right was in fact engaged.<sup>121</sup>

As the rights claim was uncontested, the case hinged on the nature of the remedy. As in *Sinnott*, Keane CJ held that 'the granting of an order of this nature is inconsistent with the distribution of powers between the legislative, executive and judicial arms of government mandated by the Constitution.'<sup>122</sup> Rights, per Keane CJ, must be subordinated to the maintenance of the separation of powers:

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<sup>116</sup> David Quinn, 'Rethinking the Nature of Economic, Social and Cultural Rights in the Irish Legal Order,' in Cathryn Costello (ed) *Fundamental Social Rights: Current European Legal Protection and the Challenge of the European Charter on Fundamental Rights* (Hart 2003) 35, 52.

<sup>117</sup> When *DB* was heard in July 1998, the Supreme Court was made up of Liam Hamilton, Hugh O'Flaherty, Susan Denham, Declan Costello, Donal Barrington, Ronan Keane, Francis Murphy, Kevin Lynch, and Henry Barron. When *TD* was heard on the 17<sup>th</sup> December 2001, only Denham and Keane (who by that time was Chief Justice), Lynch, and Barron remained, with the retiring judges being replaced by more conservative figures including John Murray and Adrian Hardiman. For a study of the social make-up of the judiciary in the third wave, see Jennifer Carroll, 'You Be the Judge' (2005) 10(5) *Bar Review* 153; and Jennifer Carroll, 'You Be the Judge Part II' (2005) 10(6) *Bar Review* 182.

<sup>118</sup> [2001] 4 IR 259, 279 - 280.

<sup>119</sup> [1998] 2 IR 321, 370.

<sup>120</sup> [2001] 4 IR 259, 282.

<sup>121</sup> As Glendenning noted, by this 'the Chief Justice acknowledges a constitutional injustice in the years 1995 - 2001 as a direct consequence of the Executive's failure to remedy the situation which the High Court in *FN* found to exist.' Glendenning (n 63) 191.

<sup>122</sup> [2001] 4 IR 259, 287.



It cannot be right that the executive power of the Government can only be exercised in a particular manner, even though to do so would not contravene any person's constitutional rights, without the sanction of the High Court.<sup>123</sup>

This suggests that, while the Executive has no express right to act in a way which contravenes constitutional rights - indeed while the Executive are presumed to act in a constitutionally compliant and thus rights compliant manner - the High Court cannot sanction a Minister who acts in a constitutionally non-compliant manner. Ministers may be restrained from actions, but they cannot be compelled to act. To permit this would allow contempt proceedings to be issued against a Minister for noncompliance, which Keane CJ suggested would breach the separation of powers.<sup>124</sup>

Denham J was the sole judge who agreed with the finding of Kelly J. As with her comments in *Sinnott*, Denham J emphasises that the separation of powers 'is not a doctrine applied rigidly within the Constitution' but rather 'a framework for government [...] which includes a functional separation of powers to independent organs of state.'<sup>125</sup> The function of this separation is to act in the benefit of the State.<sup>126</sup> This benefit, to Denham J, necessarily included the maintenance of the rule of law and the defence of constitutional rights.<sup>127</sup>

While expressing a reticence to make mandatory orders, and noting how in most instances 'a mandatory order is unnecessary, a simple declaratory order suffices', Denham J held that 'on those very rare occasions when such a declaratory approach is not feasible then the court has the power and indeed

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<sup>123</sup> [2001] 4 IR 259, 288.

<sup>124</sup> It bears considering in this regard that such threats of contempt proceedings against ministers - indeed, against the Taoiseach - have been raised in at least two prior and separate cases. *In re McArthur* [1983] ILRM 355; *Desmond v Glackin (No 1)* [1993] 3 IR 1. Whilst the prospect of contempt applications was in these cases was not in relation to constitutional rights obligations, the primacy of the Constitution as a source of law would only increase the plausibility that contempt could also be found against Ministers for breach of its rights provisions.

<sup>125</sup> [2001] 4 IR 259, 298 - 299.

<sup>126</sup> [2001] 4 IR 259, 303.

<sup>127</sup> Denham J: 'The function of the courts in protecting fundamental rights and the rule of law is part of the balance within a modern constitution. By including such a balance the democratic values, fundamental rights and the rule of law are protected.' [2001] 4 IR 259, 313.

the duty and responsibility to uphold the Constitution and to vindicate constitutional rights [as] this is at the core of the duty and responsibility of the High and Supreme Courts of Ireland.’<sup>128</sup> To Denham J, it is crucial to recognise that, ‘the separation of powers in Ireland is not absolute’ but ‘has to be balanced with the role given to the court to guard constitutional rights.’<sup>129</sup> In her interpretation, and that of Kelly J, in cases of serial breach of constitutional rights, the usual balance in favour of not disturbing the separation of powers tips the opposite direction, permitting judicial action to vindicate rights, and thereby ensure the maintenance of the supremacy of the Constitution and the rule of law.

As Doyle noted, Denham J’s argument is premised on a similar assertion to that of the majority: that there is one interpretation of the institutional order of the Constitution, and it is the interpretation with which they agree.<sup>130</sup> Denham J announced that:

Whilst acknowledging the separation of powers, and the respect which must be paid to all the great organs of State, if it is either a matter of protecting rights and obligations under the Constitution or upholding the validity of a statute then the Constitution must prevail.<sup>131</sup>

This presumes that the Constitution *requires* the supremacy of rights over the separation of powers. However, the majority, particularly Hardiman J, posit the same claim in reverse: that the maintenance of a rigid separation of powers is what is necessary for the Constitution.<sup>132</sup> From this comment then, we can again spot a key feature of the senior judiciary’s reasoning in these cases, distinguishable from the second wave. There is an effort to, legitimately or not, situate their constitutional interpretation fully within the text of the Constitution, and claim authority in that fashion, rather than to speculate as

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<sup>128</sup> [2001] 4 IR 259, 303.

<sup>129</sup> [2001] 4 IR 259, 307.

<sup>130</sup> Oran Doyle and Tom Hickey *Constitutional Law: Texts, Cases, and Material* (2<sup>nd</sup> edn Clarus 2019) 237 - 238.

<sup>131</sup> [2001] 4 IR 259, 307.

<sup>132</sup> [2001] 4 IR 259, 367.

to the sub-textual values latent within the constitutional order, and reason from there.

As with Keane CJ and Hardiman J, in *Sinnott* and in *TD Murray J* does permit that in certain instances, a judicial order breaching the separation of powers may be required, in instances of ‘a conscious and deliberate decision by an organ of state to act in breach of its constitutional obligations to other parties, accompanied by bad faith or recklessness.’<sup>133</sup> This sets the standard unreachably high. Again however, rather than adopting the more consistent stance that, given the Constitution seeks to avoid institutional paramountcy and given the standard which is set will never be reached, the right to issue a mandatory order should be absolutely prohibited, Murray J admitted of exceptional instances requiring a breach of the separation of powers.<sup>134</sup>

Hardiman J agreed largely with Murray J, arguing that upholding the appeal ‘would attribute to the judiciary a paramountcy over the other branches in the form of a residual supervisory governmental power which, once asserted and exercised, would certainly be appealed to again and again.’<sup>135</sup> This assertion is made without reference to the factors which Kelly J considered as prerequisites for the making of a mandatory injunction, nor, it seems, with regard for how senior judges such as himself could police the exercise of this power in the future.

To Hardiman J, the Constitution ‘creates three [branches of] equal power, none of which is generally dominant.’<sup>136</sup> The power to ‘fill the vacuum’ proposed by the High Court threatened this by ‘asserting a general residual power in the courts in the event of a (judicially determined) failure of the other branches to discharge some (possibly judicially identified) constitutional duty.’<sup>137</sup> Yet, notwithstanding this criticism, as with Murray J, Hardiman J permitted an exception that this residual power is potentially exercisable ‘as an absolute

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<sup>133</sup> [2001] 4 IR 259, 337.

<sup>134</sup> [2001] 4 IR 259, 337.

<sup>135</sup> [2001] 4 IR 259, 339.

<sup>136</sup> [2001] 4 IR 259, 367

<sup>137</sup> [2001] 4 IR 259, 367 - 368

final resort in circumstances of great crisis and for the protection of the constitutional order itself.’<sup>138</sup>

Hardiman J’s defence of the separation of powers was motivated not only by concern for the fate of the elected branches, but also of what permitting the appeal may mean for the Courts. He considered the consequences of the people in a referendum deciding to vest the Courts with powers of mandamus. This would, he continued, ‘either fossilise [political] developments on such issues or lose that basis in formal and technical logic and consistency which is an essential hallmark of legal, though not necessarily political, discourse.’<sup>139</sup> This argument is, identifiably, not related to the presently-written Constitution, but reflects a general political objection to positive rights litigation. It shows the presence of a political disposition (not just among Hardiman J but among his contemporary judicial community) away from expanding the power of the Courts in this fashion, even where such an expansion is instigated by constitutional amendment.

The inconsistency - that the separation of powers is rigid, but yet can be breached where necessary in cases of bad faith, recklessness, or constitutional crisis - permit of the observation that to none of the members of the bench is the separation of powers absolute in its enforcement. The question then becomes: what justifies breaching the separation of powers? To answer this, the judiciary rely upon their own conceptions of their constitutional function, particularly the obligations arising from their function as rights protectors. And, informatively, in this, these standards appear higher for social rights than for Irish language rights.

The judgment in *TD* cast a long shadow over constitutional rights adjudication.<sup>140</sup> It signalled a lack of interest in positive rights adjudication, if not rights adjudication generally. Further, writing in 2012, Glendenning noted that, ‘more than a decade after the Supreme Court’s decision in *TD*, the

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<sup>138</sup> [2001] 4 IR 259, 372

<sup>139</sup> [2001] 4 IR 259, 358.

<sup>140</sup> As Fennelly J has noted extrajudicially, ‘The decision of the Supreme Court [in *TD*] represents the paradigm case on the entire subject.’ Nial Fennelly, ‘Judicial Decisions and Allocation of Resources’ (2010) 23(3) *Advocate* 48, 50.

Executive is still promising substantial reforms in respect to provision of new facilities [...] for troubled children.’<sup>141</sup>

#### IV: What Factors Conditioned the Court’s Social Rights Jurisprudence in the Third Wave

The Court’s social rights reasoning in these cases is curious because the justiciability of social rights - the finding that the Court *can* litigate such rights disputes - is accepted. This was unavoidable in *O’Donoghue* and *Sinnott* as the right to a free primary education is expressly enumerated within the text. Perhaps it was also unavoidable in *TD*, as the State had accepted the argument that it was constitutionally obliged to vindicate the right in question. Nevertheless, the recognition of the right in *TD* contrasted with Costello J’s judgment in *O’Reilly* that such unenumerated rights were incompatible with the Irish constitutional order (notwithstanding that *O’Reilly* was repeatedly cited affirmatively in both *Sinnott*<sup>142</sup> and *TD*).<sup>143</sup>

The Court’s attitude towards social rights is partially informed by the retrenchment away from rights adjudication in this period which I noted in the previous two chapters. That these social rights claims arose during a period of greater judicial rights conservatism, and not in the preceding decades, is one factor then in explaining the under-protection of social rights in Ireland. Whyte noted critically that, ‘the Supreme Court’s understanding of the doctrine of the separation of powers rests on certain pre-interpretative values that prize judicial restraint and fails to take account of other elements of the Constitution.’<sup>144</sup> Both premises in this statement are accepted: as I have written, the drafting of the Constitution, the constitutional order which it was designed to create was one in which a social constitutionalist dimension was grafted onto the classical conception of the separation of powers associated with figures such as Montesquieu and Jefferson.<sup>145</sup>

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<sup>141</sup> Glendenning (n 63) 214.

<sup>142</sup> [2001] 2 IR 545 699, 707, 711.

<sup>143</sup> [2001] 4 IR 259 388, 304 - 306, 332, 357 - 360, 373 - 375.

<sup>144</sup> Whyte (n 44) 30.

<sup>145</sup> Ó Cinnéide (n 54).

Costello J in *O'Reilly v Limerick Corporation* grafted an Aristotelian distinction between commutative and distributive justice into the Constitution.<sup>146</sup> Hardiman J, as well as citing extensively Costello J's judgment, associated the separation of powers with 'Aristotle, Locke, Montesquieu and the founding fathers of the United States.'<sup>147</sup> Further, Murphy J writing extrajudicially asserted that 'the Constitution of 1937, like most other constitutions, adopts the Montesquieu principle of the separation of powers.'<sup>148</sup>

It is thus clear that among the pre-interpretative values that informed constitutional adjudication in this period was an internalisation of the American separation of powers amongst the members of the bench. The broad influence of American legal thought has already been noted, and in this period, the conception of the separation of powers appears to have similarly been highly influenced by the US. This is despite the fact that, 'the Constitution recognises in substance a broadly tripartite distribution of governmental power but acknowledges that this distribution does not amount to a clinical, categorical separation of powers in practice.'<sup>149</sup>

Even if the separation of powers in the USA is distinguishable from that established by the Constitution of Ireland, the acceptance of Enlightenment liberal arguments for the separation of powers among the judicial community in this period clearly informed their interpretation. Thereby, whilst claiming loyalty to the 'constitutionally mandated separation of powers,' it was a separation of powers mandated by a rather different Constitution that was enforced.<sup>150</sup>

Gearty has written how, 'constitutional adjudication has a momentum of its own [...] generated by a combination of determined litigants and ingenious

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<sup>146</sup> [1989] ILRM 181.

<sup>147</sup> [2001] 2 IR 545, 710. As MacCormaic noted, Hardiman J 'saw himself as a proud nineteenth-century liberal.' MacCormaic (n 91) 327.

<sup>148</sup> Francis Murphy, 'The Administration of Justice,' in Jeremy Sarkin and William Binchy (eds) *The Administration of Justice: Current Theories in Comparative Perspective* (Four Courts Press 2004) 252.

<sup>149</sup> Michael McDowell, 'Reflections on the Law's Ambitions' in Bláthna Ruane, Jim O'Callaghan, and David Barniville (eds) *Law and Government: A Tribute to Rory Brady* (Round Hall 2014) 31, 32.

<sup>150</sup> [2001] 2 IR 545, 702.

counsel.’<sup>151</sup> Similar to the Irish language case law, with social rights, that litigants in this period were able to bring claims heretofore not adjudicated upon also impacted the development of the rights jurisprudence in this period.<sup>152</sup> Glendenning noted of the right to education jurisprudence from this period how, ‘in recent decades [...] individual parents have begun to vindicate their children’s right to education in the absence of supporting legislation, as was the case, until the enactment of the Education Act 1998.’<sup>153</sup> As well as this, the right of children to be placed in secure residential accommodation was not recognised until 1994. Had Geoghegan J decided *FN* without reliance on the Constitution, this area of rights jurisprudence may not exist. Timing, then, and the raising of previously maligned rights issues, appears to have played a subtle but significant role in the development of this jurisprudence.

However, amidst this thrust *against* social rights protection in the third wave there is in the *Health Amendment Bill* case one large, if idiosyncratic, exception to this trend. The *Health Amendment Bill* case was a challenge to proposed legislation that would retrospectively validate an otherwise illegal taking of certain in-patient charges from elderly persons of limited means. ‘The effect of the Bill’ the Supreme Court held ‘is to abolish the property rights in question in their entirety without compensation.’<sup>154</sup> This taking was found to be a violation of their property rights, per Article 40.3.2°. The Court engaged

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<sup>151</sup> Conor Gearty ‘Democracy and a Bill of Rights: Some Lessons from Ireland’ in Keith Ewing, Conor Gearty and Bob Hepple (eds) *Human Rights and Labour Law: Essays for Paul O’Higgins* (Mansell 1994) 188, 196.

<sup>152</sup> As Murray has noted:

Notably, during the 1990s and 2000s, as socio-economic rights’ constitutional recognition strengthened internationally, oppressed and electorally insignificant groups, including Travellers, asylum seekers, children, the homeless, and the disabled, combined constitutional litigation strategies with civil society activism to claim rights to housing, education, and dignity. Nevertheless, throughout this long period of social transformation, Ireland’s constitution-makers’, judges’ and governments’ recognition of socio-economic rights remained strictly limited.

Thomas Murray, *Contesting Economic and Social Rights in Ireland: Constitution, State, and Society 1848 - 2016* (CUP 2016) 38.

<sup>153</sup> Dymna Glendenning (n 63) 146 A similar conclusion is reached by Conor O’Mahony, that ‘the enactment of the Education for Persons with Special Needs Act 2004 was not brought about by political lobbying by parents or interest groups at the gates of Leinster House, but as a result of persistent high-profile constitutional litigation on foot of the continuing failure of the State to vindicate the right to education of children with special educational needs. O’Mahony (n 85) 223.

<sup>154</sup> *Re Article 26 and the Health (Amendment) (No 2) Bill 2004* [2005] 1 IR 105, 182 [hereinafter ‘*Health Amendment Bill*’].

in this case in a substantive evaluation of the property right in a manner unusual for the period. They linked property to the humanity of each individual<sup>155</sup> and even suggested that:

In a discrete case, in particular circumstances, an issue may well arise as to the extent to which the normal discretion of the Oireachtas in the distribution or spending of public monies could be constrained by a constitutional obligation to provide shelter and maintenance for those with exceptional needs.<sup>156</sup>

At the time this gave the impression that the Court may consider finding a right of those of limited means to shelter and maintenance.<sup>157</sup> Evidently, this would have been at great variance with the surrounding social rights case law. However, this did not come to pass, making this case an interesting contrast to the case law I have discussed here but, nevertheless, an outlier which provides little explanatory value to determining the judicial attitude towards rights in this period.<sup>158</sup>

The rationale given by the State to justify the Health Amendment Bill was in part that it was necessary to avoid the drastic financial consequences arising from having to pay back the pensioners. This was rejected by the Court.<sup>159</sup> Only in a case of ‘extreme financial crisis or a fundamental disequilibrium in public finances’ could justify such a retrospective taking of personal property.<sup>160</sup> As, at the time, those seemed like unforeseeable occurrences, the Court ordered the State to pay back the money owed. As MacCormaic noted, ‘the cost to the State was ultimately €484 million, more than the annual current budget of the Department of Justice.’<sup>161</sup> This shows, the Court *were* willing to make orders

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<sup>155</sup> [2005] 1 IR 105, 201.

<sup>156</sup> [2005] 1 IR 105, 166.

<sup>157</sup> Gerry Whyte and Eoin O’Dell, ‘Is This a Country for Old Men and Women? *In Re Article 26 and the Health (Amendment) (No 2) Bill 2004*’ (2005) *DULJ* 27(1) 268.

<sup>158</sup> This is particularly the case because, being an Article 26 reference, the case was subject to the one judgment rule and therefore it is not possible to know which judge(s) authored the judgment.

<sup>159</sup> ‘There is no balancing of competing constitutional rights, as claimed by the Attorney General. The only justification advanced is the financial interest of the State. This is not a case such as *Tuohy v Courtney*.’ [2005] 1 IR 105, 183.

<sup>160</sup> [2005] 1 IR 105, 207.

<sup>161</sup> MacCormaic (n 91) 259.



with sizeable resource implications in this period where it was to *negatively* protect due necessities for a vulnerable group, by *restraining* the State from resiling from its obligations.<sup>162</sup>

## V: Conclusion

By the end of the third wave, the incompatibility of developing social rights protection seemed settled. Whereas under the second wave, social rights adjudication was conspicuously absent, during the third wave the Court engaged directly with social rights claims and found that, whilst the rights *were* justiciable, ‘in reviewing executive action that trenches on such rights, the courts are essentially restricted to the remedies of prohibitory injunctions, damages and declarations.’<sup>163</sup>

In the relationship of these shifts to general changes within judicial cultural attitudes towards rights protection, my thesis argument is supported. In the next chapter, I complete my analysis of the development of rights protection in Ireland by considering the Court’s most recent jurisprudence which, whilst not creating a system of social rights protection, nevertheless provides a positive indication that changes may be underway in the Court’s attitude towards such rights.

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<sup>162</sup> As Whyte and O’Dell noted:

There is [...] a very significant difference between asking a court to grant a mandatory injunction directing the State to protect a socio-economic interest in the absence of any legislation [...] and inviting a court, as in the instant case, to review legislation that affects such an interest.

Whyte O’Dell (n 157) 371 - 372.

<sup>163</sup> Hogan et al. (n 2) 2316.

## Chapter Eight: Social Rights Protection in Ireland

### 2013 - 2020

In this chapter, I bring my study of the development of rights protection in Ireland up to the present day. A positive shift is currently underway in the senior judiciary's willingness to engage in rights review. Alongside this, the Irish judiciary are exploring the breadth of their remedial capabilities in earnest for the first time. The inveteracy of judicial resistance to issuing orders of compulsion - even in relatively inexpensive cases - may therefore potentially give way in the future. Whilst affirmative support for social rights protection may yet be unforthcoming, this nevertheless shows how, per my thesis, even judicial conceptions of the limits of their rights powers, even long-standing ones, can - and do - change over time. In studying how these changes occur, the process by which social rights protection develops in common law systems can also be studied.

### I: Judicial Rights Protection 2013 - 2020: Rights Engagement Revisited

There are two particularly significant areas where this shift in regards a willingness to engage in judicial rights review generally is shown: a relaxation of procedural rules, and the development of a substantive conception of rights as deriving from one's individual human worth/personality/dignity.<sup>1</sup> These developments suggest a departure from the reticent attitude of the Court in the preceding two decades and the emergence of a new disposition within the senior judiciary towards constitutional rights review, which could potentially have profound consequences for rights protection going forward.

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<sup>1</sup> These phrases, as will be shown, are used interchangeably by the Court and appear to be referring to a general concept of a sphere of private autonomy beyond state control due as an inherent right to all humans within the constitutional order, in particular in the judgment of O'Donnell J in *Simpson v Governor of Mountjoy Prison* [2019] IESC 81.

## I(A): Procedural Developments

In recent years the Court has revised the rules by which it determines what rights claims it will adjudicate upon.<sup>2</sup> As noted in *Kelly*, ‘curiously, the possible rights of other interested parties to be served and to appear in constitutional litigation has only recently received attention from the Courts.’<sup>3</sup> Recently, non-human persons were granted standing in *Digital Rights Ireland v Minister for Communications*.<sup>4</sup> In *Fleming v Ireland*, the Supreme Court went further and admitted a *bona fide* case of an *indirect* breach of the plaintiff’s constitutional rights.<sup>5</sup> That is, the impugned law did not directly criminalise the actions of the applicant. Nevertheless, the Court decided the applicant could challenge the constitutionality of the law, as she would be affected by it binding other parties. This reflects a willingness to hear rights claims which contrasts with the avoidant attitude towards rights in the third wave.<sup>6</sup>

Clarke J in *Persona Digital Telephony v Minister for Public Enterprise* has expressed *obiter* support for expanding standing rules in the future.<sup>7</sup> The common law system is relatively inexpensive for the State to administer, Clarke J noted, because it moves costs chiefly onto litigants. The prohibitive expense placed on litigants led Clarke J to state that: ‘there is at least an arguable case that the constitutional right of access to the court may include an entitlement that that right be effective, not just as a matter of law and form, but also in

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<sup>2</sup> See Cian Henry, ‘Standing on Thin Ice: Standing Rules and Public Interest Litigation in Ireland and the United States’ (2017) 21 *TCLR* 315.

<sup>3</sup> Gerard Hogan, Gerry Whyte, David Kenny and Rachael Walsh, *Kelly: The Irish Constitution* (5<sup>th</sup> edn. Bloomsbury Professional 2018) 923.

<sup>4</sup> *Digital Rights Ireland v Minister for Communications* [2010] 3 IR 251. See also *Mohan v Ireland* [2019] IESC 18; *Friends of the Irish Environment v Government of Ireland* [2020] IESC 49. Whilst pertaining to a right protected by the European Charter, this increased willingness by McKechnie J, now of the Supreme Court, to admit cases where a *bona fide* claim of rights breach was alleged by a non-human person remains a notable early indication of a greater adjudicate upon fringe rights cases. *BUPA v Health Insurance Authority*, a High Court judgment by McKechnie J presents another notable instance in which he demonstrated a willingness to relax procedural rules in rights cases. McKechnie J held that the onus of proof in rights cases shifts from the applicant to the State upon establishment of the rights infringement. Not followed at the time, it awaits deliberation whether McKechnie J would reiterate his stance in this regard. [2006] IEHC 431, [247].

<sup>5</sup> *Fleming v Ireland* [2013] 2 IR 417 [hereinafter ‘*Fleming*’].

<sup>6</sup> More recently in *Mohan v Ireland*, the Court again permitted a plaintiff to challenge legislation whose impugned unconstitutionality only indirectly affected him. *Mohan v Ireland* [2019] IESC 18.

<sup>7</sup> *Persona Digital Telephony v Minister for Public Enterprise* [2017] IESC 27 [hereinafter ‘*Persona*’].

practice.’<sup>8</sup> Whilst this was raised as a hypothetical, and whilst the case concerned the right of access to the Court which is not fully equated to relaxing standing rules, relaxing standing is evidently a component part of enabling greater access.<sup>9</sup> Taken in conjunction with the surrounding cases cited here, this comment seems further indication of the growing disposition towards expanding the Court’s existing constitutional rights procedure.

More significantly, a week after handing down *Persona*, a unanimous Supreme Court in *NHV v Minister for Justice* admitted a judicial review notwithstanding that the rights breach had been cured and the case was thus technically moot.<sup>10</sup> In reaching this conclusion, it was noted how as ‘this case is plainly a test case [it] is probably desirable that it be dealt with now rather than to wait for another case to make its way through the legal system.’<sup>11</sup> That the Court is willing to relax its standing rules in order to hear cases which they would otherwise be able to exclude so as to allow them to adjudicate upon an alleged rights breach is suggestive of a shift in judicial attitudes towards rights reasoning.<sup>12</sup>

Whereas taken by itself this relaxation of standing may appear insufficient to amount to a new wave in rights engagement, when considered alongside the development of a distinct dignitarian trend within Irish rights jurisprudence, these developments suggest that the mood towards rights adjudication has undergone a recent shift.

### I(B): A Renewed Substantive Engagement with Rights

Over the last decade, there has been a discernible shift in the dominant judicial discourse as to the substance of the constitutional rights provisions.<sup>13</sup> Various,

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<sup>8</sup> [2017] IESC 27 [2.9].

<sup>9</sup> Henry (n 2).

<sup>10</sup> *NHV v Minister for Justice and Equality* [2017] IESC 35 [hereinafter ‘*NHV*’]. O’Donnell J for the Court held that: ‘a person affected by the operation of a statute which he or she contends is unconstitutional may be entitled to maintain the claim even if the statute is no longer being applied to them.’ [2017] IESC 35 [6].

<sup>11</sup> [2017] IESC 35 [6].

<sup>12</sup> Further, ‘the Courts are now willing to appoint interested parties as *amici curiae* in appropriate cases.’ See Hogan et al. (n 3) 924.

<sup>13</sup> David Kenny, ‘Remedial Innovation, Constitutional Culture, and the Supreme Court at a Crossroads’ (2017) 40(2) *DULJ* 85.

this has been associated with conceptions of personhood, the human personality, or human dignity.<sup>14</sup> These three bases derive from different parts of the Constitution but share a common foundation: that some rights are granted by virtue of one's individuality, or personhood. From this premise, future rights may be found to be necessary to vindicate these values.<sup>15</sup>

In a series of High Court judgments in 2011, Hogan J established that the hitherto unactionable right to the person protected by Article 40.3.2° of the Constitution was capable of imposing duties, both upon the State and upon private parties. In *A v Refugee Appeals Tribunal*, Hogan J held that one's physical personhood was protected by the right to the person, such that placing someone at risk of female genital mutilation would not be permitted.<sup>16</sup>

Whilst conceivably this right could have been protected under the unenumerated right to bodily integrity, Hogan J situated it within the underused but more textually grounded right to personhood.<sup>17</sup> Following this finding, Hogan J advanced to hold that the right to person also protects one's mental personhood as well, holding in *Kinsella v Governor of Mountjoy Prison*:

detention in a padded cell [...] involves a form of sensory deprivation in that the prisoner is denied the opportunity of any meaningful interaction

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<sup>14</sup> This trend proceeds in part from the earlier jurisprudence of Henchy J, particularly his human personality reasoning in *McGee v Attorney General* [1974] IR 284, and *Norris v Attorney General* [1984] IR 36, and Denham J's recognition of a dignity right in *re a Ward of Court* [1996] 2 IR 79. Indeed, the Court have recently affirmed that the Henchy J dissent in *Norris* would be the majority opinion if the case were heard today. *P v Judges of the Circuit Court* [2019] IESC 26; see also the discussion of the right to privacy in *Simpson v Governor of Mountjoy Prison* [2019] IESC 81.

<sup>15</sup> Already, in *AM v Refugee Appeals Tribunal* [2014] IEHC 388, an unenumerated right to secular conscientious objection was found with reference to the constitutional objective of promoting human personhood. In the 2019 case of *Habte v Minister for Justice and Equality* [2019] IEHC 47 the right to have one's identity correctly recognised by the State was also found to exist from this source.

<sup>16</sup> *AM v Refugee Appeals Tribunal* [2011] IEHC 373 This right was further relied upon by Hogan J to justify detaining someone in state care for their own personal safety, in *H v HSE* [2011] IEHC 297, and for transfusing blood into a child of a Jehovah's Witness in *Temple St v D* [2011] IEHC 1.

<sup>17</sup> Gerard Hogan, 'Unenumerated Personal Rights: The Legacy of *Ryan v Attorney General*' in Laura Cahillane, James Gallen, and Tom Hickey (eds) *Judges, Politics and the Irish Constitution* (Manchester University Press 2017) 49.

with his human faculties of sight, sound and speech - an interaction that is vital if the integrity of the human personality is to be maintained.<sup>18</sup>

*Kinsella* drew directly on the conception of the human personality as an attribute that the right to the person is meant to protect.<sup>19</sup> As noted by Kenny, ‘Hogan J has rescued the right of the person from obscurity, and given it a broad meaning, raising the possibility that the provision could lead to a significant and novel development in the protection of personal rights under the Constitution.’<sup>20</sup> Following this, private parties causing ‘acute mental stress’ such as by stalking another private person, were found also commit a tortious breach of the right to the person.<sup>21</sup> From a right which had not previously been substantively engaged with, this was a noteworthy expansive development.

In *Fleming v Ireland*, the High Court proposed broadening the content of the personhood right even further.<sup>22</sup> Assisted suicide is criminalised under the Criminal Law (Suicide) Act 1993, and Fleming, a woman with multiple sclerosis, sought to find this criminalisation an unconstitutional infringement of her personhood rights. Kearns P gave a broad reading of personhood:

[t]he protection of personal autonomy in matters of this kind is a *core constitutional value*. The protection of the person is accordingly juxtaposed with other rights which are key to the fundamental freedom of the individual - liberty, good name and the protection of property. To this may be added the Preamble’s commitment to the dignity and freedom of the individual as a fundamental constitutional objective and the recognition by Article 44.1 of freedom of individual conscience. For good measure, one might here also include similar and over-lapping rights such as the right to bodily integrity and personal privacy which

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<sup>18</sup> *Kinsella v Governor of Mountjoy Prison* [2011] IEHC 236 [8].

<sup>19</sup> This conception of what the right to the person protects was later assented to by O’Donnell J in a concurring judgment in *Simpson v Governor of Mountjoy Prison* assented to this conception of the right to the person. [2019] IESC 81.

<sup>20</sup> David Kenny, ‘Recent Developments in the Right of the Person in Article 40.3: *Fleming v Ireland* and the Spectre of Unenumerated Rights’ (2013) 36(1) *DULJ* 322, 322.

<sup>21</sup> *Sullivan v Boylan (No 2)* [2013] IEHC 104.

<sup>22</sup> *Fleming v Ireland* [2013] IEHC 2 (emphasis added).

have been judicially held to be protected as implied personal rights for the purposes of Article 40.3.1°. <sup>23</sup>

From a broad conceptualising of the rights regime as founded upon personhood and personal autonomy, the High Court concluded that the decision to end one's life 'is in principle engaged by the right to personal autonomy which lies at the core of the protection of the person by Article 40.3.2°: it is rather a facet of that personal autonomy which is necessarily protected by the express words of Article 40.3.2 with regard to the protection of the person.'<sup>24</sup>

Whilst ultimately this rights claim was balanced against the fundamental objective of preserving life, the High Court nevertheless suggested that a basket of recognised rights should be understood as protecting the ultimate goal of upholding human personality. Implicit within this, indeed was the understanding that further unenumerated rights may be necessary to fill out this constitutional obligation to promote the human person.<sup>25</sup>

The Supreme Court were unwilling to assent to the expansive reading of human personhood. Without rejecting the presence of rights deriving from personal autonomy the Court rejected the High Court's broad interpretation. Per Denham CJ:

[t]he concept of autonomy which extends not just to an entitlement, but to a positive right to terminate life and to have assistance in so doing, would necessarily imply a very extensive area of decision in relation to activity which is put, at least prima facie, beyond regulation by the State.'<sup>26</sup>

Even the attenuated reading given by the Supreme Court, however, merits recognition for the extent to which the rights claim of the High Court was diluted not by a charge of judicial overreach *per se*; but because the interpretation proffered as to the content of the right to personhood was itself too strong. It was an engagement with the content of the right, rather than

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<sup>23</sup> [2013] IEHC 2 [49] (emphasis added).

<sup>24</sup> [2013] IEHC 2 [52].

<sup>25</sup> Kenny (n 20).

<sup>26</sup> [2013] 2 IR 417, 447.

with the downstream implication for the power of the Courts. In contrast to the limited rights reasoning which prevailed over the previous nearly-twenty years, this suggests a significant reconsideration of the judiciary's stance on substantive rights evaluation.

The most important case of the fourth wave thus far is *NHV v Minister for Justice*.<sup>27</sup> *NHV* concerned a Burmese migrant, who used to be prohibited from accessing the employment market due to his status as an asylum seeker. O'Donnell J held that, as the Constitution holds at Article 40.1 that 'all citizens shall, as human persons, be held equal before the law', all human persons can rely on those constitutional rights which pertain to humans *qua* human personhood; whilst being barred from holding those rights which obtain to humans *qua* citizenship.<sup>28</sup> It followed that 'in principle, therefore, [...] a non-citizen, including an asylum seeker, may be entitled to invoke the unenumerated personal right including possibly the right to work which has been held guaranteed by Article 40.3 if it can be established that to do otherwise would fail to hold such a person equal as a human person.'<sup>29</sup> Here again, the Court's rights reasoning proceeded from the premise that certain faculties of humans *qua* humans are constitutionally protected.

To determine whether the right to work was such a right, the Court tasked itself with considering whether 'the right protects something which 'goes to the essence of the human personality, so that to deny it to persons would be to fail to recognise their essential equality as human persons.'<sup>30</sup> With this premise assumed, the Court evaluated that 'work is connected to the dignity and freedom of the individual which the Preamble tells us the Constitution seeks to promote'<sup>31</sup> and that therefore 'a right to work at least in the sense of

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<sup>27</sup> *NHV v Minister for Justice* [2017] IESC 35. For commentary on this case see Kenny (n 13); Conor O'Mahony, 'Unenumerated Rights: Possible Future Directions after *NHV*' (2017) 40(2) *DULJ* 171; Eoin Carolan 'A Dialogue-Oriented Departure in Constitutional Remedies? The Implications of *NHV v Minister for Justice* for Inter-branch Roles and Relationships' (2017) 40(1) *DULJ*; Dáire McCormack-George, 'Asylum Seekers and the Right to Work in Irish Law: *NVH v Minister for Justice and Equality*' (2019) 61 *Ir Jur* 174.

<sup>28</sup> [2017] IESC 35 [11].

<sup>29</sup> [2017] IESC 35 [11].

<sup>30</sup> [2017] IESC 35 [13].

<sup>31</sup> [2017] IESC 35 [15].



a freedom to work or seek employment is part of the human personality and accordingly [...] cannot be withheld absolutely from non-citizens.’<sup>32</sup>

Human personhood is here also stressed and linked to the concept of dignity. From this, an Act was declared unconstitutional due to conflicting with an unenumerated right which had seldom been litigated before.<sup>33</sup> Whilst the decision not to relate the reasoning to the foundations in the unenumerated rights case law is likely intentional, and while the Court did not expressly say it was recognising any new rights in this case, this was the first time a Supreme Court judgment was hinged upon a latent rights claim since *O’T v B*.<sup>34</sup> In an unanimous verdict, it placed human personhood and individuated dignity at the centre of present rights interpretation, and developed the right to work from this base.

Since *NHV*, the concept of dignity as a foundation for the constitutional rights regime has been repeated by the Court.<sup>35</sup> Further, for a while, an ‘unenumerated personal constitutional right to an environment that is consistent with the human dignity and well-being of citizens at large,’<sup>36</sup> was also understood to be latent within the constitutional order. However, the Court in July 2020 reversed this finding.<sup>37</sup>

As O’Mahony noted:

Thus, while *NHV* may not have been a case where a new right was recognised, it was a case where a comparatively ill-defined unenumerated right was successfully asserted against the State - to the point where a statutory provision was found to be unconstitutional. This was a notable occurrence in itself, given how reluctant the courts have

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<sup>32</sup> [2017] IESC 35 [17].

<sup>33</sup> The right to work was first recognised in *Tierney v Amalgamated Woodworkers* as ‘a right to earn a livelihood’ [1959] 1 IR 254.

<sup>34</sup> As Hogan J, writing extrajudicially, further noted, ‘*NVH* [is] probably the first time in 25 years or so that the Supreme Court has invalidated a major item of social legislation or social policy.’ Gerard Hogan ‘Harkening to the Tristan Chords’ (2017) 40 *DULJ* 71, 75.

<sup>35</sup> *Simpson v Governor of Mountjoy Prison* [2019] IESC 81.

<sup>36</sup> *Merriman v Fingal County Council* [2017] IEHC 695 [241]. For criticism of this judgment see James Rooney, ‘International Human Rights as a Source of Unenumerated Rights: Lessons from the Natural Law’ (2018) 41(2) *DULJ* 141.

<sup>37</sup> In *Friends of the Irish Environment v Government of Ireland*, the Supreme Court rejected that an unenumerated environmental right had been discovered. [2020] IESC 49 [8.11]

been to engage with unenumerated rights since the turn of the millennium.<sup>38</sup>

What becomes clear here is the emergence of a new attitude, both towards the procedure of admitting rights disputes, and also in relation to the normative content of the rights regime. The Court appear to be more willing to engage in a consideration of what values underpin rights than they have been since the middle 1990s.<sup>39</sup> Whereas in the second wave, the explosion of rights reasoning emerged perhaps with insufficient regard for the possible unintended consequences of an expansive judicial power (until the *Abortion Information Bill* case brought such issues starkly to light), such a criticism can less easily be levelled at the present bench.

In *Friends of the Irish Environment v Government of Ireland*, the July 2020 case where the Court reversed the finding of an unenumerated right to a clean environment, the Supreme Court gave their most explicit endorsement to finding new rights since the end of the second wave. Clarke CJ, for a unanimous court held:

I would consider the term “derived rights” as being more appropriate, for it conveys that there must be some root of title in the text or structure of the Constitution from which the right in question can be derived. It may stem, for example, from a constitutional value such as dignity when taken in conjunction with other express rights or obligations. It may stem from the democratic nature of the State whose fundamental structures are set out in the Constitution. It may derive from a combination of rights, values and structure. However, it cannot derive simply from judges looking into their hearts and identifying rights which they think should be in the Constitution. It must derive from

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<sup>38</sup> O’Mahony (n 27) 180.

<sup>39</sup> As O’Mahony noted in relation to *NHV*: ‘The decision was notable for bucking the recent trend of judicial disengagement from unenumerated rights; it developed and asserted a comparatively underdeveloped right and contained some interesting analysis of the sources which could be used to ground and interpret that right.’ *Ibid*.

judges considering the Constitution as a whole and identifying rights which can be derived from the Constitution as a whole.<sup>40</sup>

This appears to reflect both a willingness to consider the existence of additional ‘derived’ rights, which is founded itself upon a sense that any new rights *must* possess a strong textual link. This suggests that the current judicial expansion into the realm of greater rights adjudication is building off of the experience of the third wave, when the need to maintain a policed separation of powers and to exercise caution in recognising rights, was prioritised. Whereas between 1965 and 1995, various discrete forms of rights reasoning were used to read in latent unenumerated rights, such as the natural law, the human personality, and the Christian and democratic nature of the State, a more coherent focus on the individual appears to be informing the Court’s jurisprudence in the present period.<sup>41</sup> This, it is anticipated, inveighs against a return to judicial maximalism, the aftermath of which hindered rights engagement by the Court over the preceding two decades.

## II: What Factors Conditioned the Court’s General Rights Jurisprudence in the Fourth Wave

It is especially perilous to attempt to explain the influences upon the jurisprudence of a period in which you are yourself living. As MacCormaic has written:

shifts in the Supreme Court’s thinking do not occur overnight. Change occurs gradually by a slow, almost imperceptible process that can take years or even decades to become apparent. At times, nobody outside the Four Courts, and few within the building itself, will even notice until the process has been completed and the wheel has fully turned. That’s partly because no single judge, no matter how firm their views or persuasive their

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<sup>40</sup> [2020] IESC 49 [8.6]

<sup>41</sup> Note however some the recent jurisprudence prioritising international human rights law as a means of finding unenumerated rights discussed in Rooney (n 36).

arguments, can effect much change unless they have a majority who share the same view.<sup>42</sup>

However certain influences may be at play which explain the current pivot towards a new form of rights adjudication. In regards the personhood jurisprudence of Hogan J, his academic commentary provides some indicator as to the factors which likely influenced his decision-making. Hogan J was a noted critic of unenumerated rights reasoning in the 1990s, due to its divorce from the text of the Constitution. His centring of the right of personhood in Article 40.3.2° of the Constitution thus can be understood as informed by this aversion to supporting the form of rights reasoning which grounded the decision in *Ryan v Attorney General* recognising the similar right to bodily integrity.<sup>43</sup>

An indication of the factors conditioning O'Donnell J's jurisprudence in this area can also be gleaned from examining his extrajudicial writings. In 2018 O'Donnell J noted that, 'when the detection of unenumerated rights is divorced from the careful analysis of the text of the Constitution, then it can easily become a game played backwards: the only right asserted in truth is the right to win the case.'<sup>44</sup> From the judge who found the right to work for non-citizens a year before, this suggests an awareness on his part to not repeat the reasoning of the second wave, but rather to maintain a cautious awareness that any progressions of the Court's rights jurisprudence must be situated within a logical, consistently-applied structure.<sup>45</sup>

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<sup>42</sup> Ruadhán MacCormaic (Penguin 2016) 333.

<sup>43</sup> See Hogan (n 17).

<sup>44</sup> Donal O'Donnell, 'International Aspects of the Constitution: The Skibbereen Eagle or a Shaft of Dawn for the Despairing and Wretched Elsewhere' (2018) 59 *Ir Jur* 1, 14.

<sup>45</sup> In another telling extrajudicial comment, O'Donnell critiqued:

One of the things I do not like about the way *State (Ryan) v Lennon* is discussed, and certainly was discussed as of 1977, was the implicit endorsement of the approach of the view that a lawyerly approach to the Constitution should be discarded in favour of a more mystical philosophical approach in which the judge was to delve into natural law to ascertain desirable developments in society. There has always been, I think, a weakness in the Irish legal world for the image of the judge as part lawyer, part poet, part philosopher, sometimes with a reference to Brehon law when of course the judges fulfilled all three functions. I am not immune to the appeal of this approach, but I do think that when we hear the strains of that ethereal Celtic mystic music starting up in the background, we should be on our guard.

Donal O'Donnell, 'The Sleep of Reason' (2017) 40(2) *DULJ* 191, 194.

In the positions of both these influential judges then, it appears that the desire amongst the judicial community post-1995 to introduce greater coherence to the rights regime remains strong in the bench today. The departures taken from the status quo of rights restraint then are departures building off the constructive focus on standardising constitutional law which animated the Courts over the previous almost-twenty years.

Perhaps influencing this also is the recent creation of the Court of Appeal. Until 2014, the Supreme Court was a general appellate Court. For the last six years, the Supreme Court has been able to set its own docket, which may have ‘fostered an enthusiasm to tackle issues that might previously have been dampened down due to time constraints.’<sup>46</sup> As the Chief Justice has noted:

The single most significant change [by establishing the Court of Appeal] is that the [Supreme] Court will henceforth be able to concentrate on dealing with a relatively small number of cases which raise important constitutional and legal issue. In being able to so concentrate it is hoped that the Court will be able to give those cases the detailed attention they deserve and that the process of the evolution of our constitutional and legal jurisprudence will thereby be enhanced.<sup>47</sup>

Finally, once again, it is tempting to also consider how generational shifts within the judicial community play a role in shifting conceptions of the judicial function and, consequently, the degree of rights protection afforded to rights bearers. With the retirement of Denham CJ, every judge who sat on the *TD* and *Sinnott* decisions are no longer on the bench.<sup>48</sup> The Supreme Court is currently composed of members who have been there, at the earliest, since 2010. Similar to how the Ó Dálaigh and Keane courts can be seen as having summoned in

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<sup>46</sup> Francesca Comyn, ‘Law in a Golden Age: The Reimagining of the Supreme Court’ (2020) *The Currency* 3. At 4, Comyn observed: ‘Spinning fewer plates has allowed the court more of that most valuable resource, time. The result has been an in-depth analysis of net points of law, a shifting approach to remedies and an apparent drive towards greater consensus.’

<sup>47</sup> Frank Clarke, ‘The shape of things to come - the Conduct of Appeals in the Supreme Court after the 33rd Amendment,’ in Eoin Carolan (ed.) *Judicial Power in Ireland* (IPA 2018) 88, 108 - 109.

<sup>48</sup> Even noting this, it bears recalling that Denham CJ was the dissenting opinion in *TD v Minister for Education* [2000] 3 IR 62.

discernible shifts in rights review, it can similarly be claimed that the present Clarke court is undertaking a similarly iterative change.

As observed by Kenny:

Our constitutional law has had periods of judicial expansion and contraction in its 80-year history. A long period of slow contraction and stability followed after a similarly long period of expansion and change. It looks now as if we might move again toward an expansionary period.<sup>49</sup>

What makes the current period of Irish rights protection particularly novel is that, for the first time, this engagement with the substance of rights is matched by remedial innovation, which I will now examine.

### III: The Remedial Power 2013 - 2020: Remedial Innovation

As Kenny has suggested, the current Supreme Court has ‘signalled that it is ready to take a new departure in the area of constitutional remedies, taking first steps towards embracing a new and innovative approach to the way we deal with unconstitutionality.’<sup>50</sup> This can be seen in the emergence of a jurisprudence of admonitory decisions and most of all in the development of suspended declarations of unconstitutionality as a means of curing rights breaches.

#### III(A): Admonitory Decisions

Recently the Court has indicated discontent with the reasoning in *Somjee* that precluded the ‘capacity of the Courts to provide an effective remedy in those cases where the Oireachtas had breached Article 40.1 by unjustly conferring a privilege on one select group of society.’<sup>51</sup> In *BG v Judge Murphy*, Hogan J proposed the sense in following the approach of the German Constitutional Court, and issuing ‘admonitory decisions’ which, without declaring unconstitutionally under-inclusive legislation invalid, indicate to the legislature, until the unconstitutionality is cured by ‘levelling up’ the

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<sup>49</sup> Kenny (n 13) 104.

<sup>50</sup> *Ibid*, 85.

<sup>51</sup> *BG v Judge Murphy* [2011] IEHC 445 [36].

legislation to treat all classes equally, the Court will not impose orders that have the effect of treating the classes differently.<sup>52</sup>

Admonitory decisions involve the Court declaring a law ‘is *constitutional for the time being*, but with the implication that it might become unconstitutional in the near future if action [is] not taken.’<sup>53</sup> *Kelly* speculated that this ‘novel and elegant solution to the problem of dealing with legislative lacunae [...] is likely to become a common way of dealing with cases of omission and broader Article 40.1 cases where invalidation is inapposite.’<sup>54</sup> It has received *obiter* assent from the Supreme Court in *Persona Digital Telephony v Minister for Public Enterprise*,<sup>55</sup> where the Court indicated that it would ‘in the appropriate case, issue an admonitory declaration in the expectation that the legislature would address the problem, but also *reserving power to take further action in the effect that the decree was ignored.*’<sup>56</sup> Clarke J noted that

[it] has long been said that the courts must act to find a remedy in any case where there is a breach of constitutional rights. While the choice, as a matter of policy, between a range of possible ways in which a potential breach of constitutional rights might be removed is fundamentally a matter for either the Oireachtas or the Executive, it may be that circumstances could arise where, after a definitive finding that there had been a breach of constitutional rights but no action having been taken by either the legislature or the government to alleviate the situation, *the courts, as guardians of the Constitution, might have no option but to take measures which would not otherwise be justified.*<sup>57</sup>

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<sup>52</sup> [2011] IEHC 445 [46]. In this Hogan J was expressly following on from the Court’s approach in *Carmody* of not invalidating the statute but merely prohibiting the prosecution until the statute was changed. [2009] IESC 71. This reasoning was followed in *Byrne v Director of Oberstown School* [2013] IEHC 562 and *McCabe v Ireland* [2014] IEHC 435 without citing the concept of an ‘admonitory decision.’. See also Gerard Hogan, ‘Declarations of Incompatibility, Inapplicability and Invalidity: Rights, Remedies and the Aftermath’ in Kieran Bradley, Noel Travers and Anthony Whelan (eds) *Of Courts and Constitutions: Liber Amicorum in Honour of Nial Fennelly* (Hart 2014) 233, 236.

<sup>53</sup> Kenny (n 13) 93.

<sup>54</sup> Hogan et al. (n 3) 1050. For an instance of the invalidation of legislation because of a legislative lacuna, see *McCann v Judges of Monaghan District Court* [2009] 4 IR 200.

<sup>55</sup> [2017] IESC 17.

<sup>56</sup> Hogan et al. (n 3) 1078. (emphasis added).

<sup>57</sup> [2017] IESC 27 [4.1] (emphasis added).

This reasoning, Kenny speculated, ‘suggests a broader remedial toolset that could apply to all sorts of breaches of constitutional rights.’<sup>58</sup> Whilst this may turn out to be little more than another form of pre-emptive declaratory relief - declaring that something *will become* unconstitutional without action - the implication that the Court *may* proceed in a further case of breach to fashion a new remedy may make this development sufficiently noteworthy as to give the threats made in declaratory orders greater bite.

### III(B): Suspended Declarations of Unconstitutionality

The most noteworthy recent change has been the complementary emergence of delayed or suspended declarations of unconstitutionality, which *Kelly* has suggested ‘has the potential to be the most important doctrinal innovation since the development of unenumerated rights in the mid-1960s.’<sup>59</sup> I would go further: in regards the remedial power, it has the potential to be the most important doctrinal innovation since the Court first innovated the power to declare acts unconstitutional in *The State (Burke) v Lennon* in 1940.<sup>60</sup>

As noted above, in *NHV* the Court established that the right to work, protected by the Constitution, extended to non-citizens. Rather than declare the law absolutely barring asylum seekers from working to be immediately unconstitutional, nullifying the law and leaving Ireland’s asylum scheme in suspense, O’Donnell J decided to ‘adjourn consideration of the order the Court should make for a period of six months and invite the parties to make submissions on the form of the order in the light of the circumstances then obtaining.’<sup>61</sup>

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<sup>58</sup> Kenny (n 13) 93. See also *Minister for Justice and Equality v O’Connor* where the Supreme Court, *per* O’Donnell J, indicated, obiter, that where a constitutional challenge was based on the absence of a provision from legislation, it was conceivable that ‘in such circumstances a court might stop short of invalidating the Act, and instead make a declaration that insofar as the legal regime did not make available some feature required by the Constitution, it could not be operated.’ [2017] IESC 21 [14].

<sup>59</sup> Hogan et al. (n 3) Preface to the Fifth Edition. See also Robert Noonan, ‘The Nature of Unconstitutionality in the Irish Courts’ (2018) 41(2) *DULJ* 45; Carolan (n 27).

<sup>60</sup> *The State (Burke) v Lennon* [1940] IR 136.

<sup>61</sup> [2017] IESC 35 [21]. In the later judgment, the Court further extended the delay in declaring the unconstitutionality, ultimately doing so 19 February 2018. *NHV v Minister for Justice* [2017] IESC 82.



This permitted the State to respond to a declaration of unconstitutionality, whilst being aware that failure to do so timeously would lead to the nullification of the Act.<sup>62</sup> The pressure on the State to act is considerably more profound than in instances where simply a declaratory remedy is provided. Moreover this enables the Court to avoid the invidious circumstance in which they found themselves ten years before in the *A v Governor of Arbour Hill* case, wherein at the High Court the release of sexual offenders was ordered following the Act upon which they were prosecuted being found to be unconstitutional.<sup>63</sup> Whilst at the Supreme Court that outcome was avoided through an assertion that the effects of a declaration of unconstitutionality were not absolutely retrospective,<sup>64</sup> as Comyn noted, the case showed ‘the seismic impact landmark decisions of appellate courts can have on the legislature and the public.’<sup>65</sup> Importantly, the issue in *A* would likely not have arisen had a remedy such as that provided in *NHV* existed.<sup>66</sup>

Since this order, four similar delayed or suspended declarations of unconstitutionality have been made.<sup>67</sup> Thus, a trend appears to be emerging, whereby the Court liberates itself from the heavy burden it imposed on itself

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<sup>62</sup> Kelly however noted that:

The remedy as utilized in *NHV* and *PC* might be textually problematic. Article 15.4.2 provides that unconstitutional laws ‘shall ... be invalid.’ However, in these cases, the laws were not invalidated though they were unconstitutional. The Canadian approach - though still open to this objection - may be less problematic, as the law is invalidated but the effect is suspended. This might be a better approach for the courts to adopt rather than long delay in issuing a declaration.

Hogan et al. (n 3) 1075.

<sup>63</sup> *A v Governor of Arbour Hill Prison* [2006] 4 IR 88; See also *Bederev v Ireland* [2015] IECA 38 [2016] IESC 34.

<sup>64</sup> Given Murray CJ’s separation of powers reasoning in *Sinnott* and *TD* expressively promoted how bound the Court was by the text of the Constitution, it is noteworthy how, confronted with the prospect of maintaining the imprisonment detained under a non-existent law contrary to Article 40.4.1° of the Constitution of Ireland 1937, Murray CJ explains how ‘the law is too old and too wise to be applied according to a rigid abstract logic or a beguiling symmetry. [2006] 4 IR 88, 118.

<sup>65</sup> Comyn (n 46).

<sup>66</sup> See David Kenny, *Grounding Constitutional Remedies in Reality: the Case for As-Applied Constitutional Challenges in Ireland* (2014) 35 *DULJ* 53.

<sup>67</sup> *PC v Minister for Social Protection* [2017] IESC 63; *AB v Director of Saint Loman’s Hospital* [2018] IECA 123; *Agha v Minister for Social Protection* [2018] IECA 155; overturned in *Michael (A Minor) v Minister for Social Protection* [2019] IESC 82. As of the judgment in *AB v Director of Saint Loman’s Hospital*, this is now being expressly formally referred to as a ‘suspended declaration.’ [2018] IECA 123 [113].

by holding that immediate declarations of unconstitutionality were the only form of declaration available.

The abovementioned remedial innovations, as notable as they are, notably do not of themselves suggest any movement towards the making of orders of compulsion. However, in *Ó Maicín v Ireland*, an implication may be drawn of greater willingness than in the past to consider issuing such orders as well. The plaintiff claimed the right to an all-Irish-speaking jury at his trial.<sup>68</sup> Clarke J noted:

This case does not involve the consideration of an argument put forward on behalf of the State that a particular level of commitment to Irish would involve a disproportionate demand on the State's resources. [...] I would, therefore, leave to a case in which the issue specifically arose, the question of whether a conflict between Irish language rights, on the one hand, and the State's allocation of scarce national resources, on the other, ought to be judged by a standard of reasonableness, practicability, or [...] one of feasibility.<sup>69</sup>

This suggests that, in a future case, the Court will assess the issuing of a mandamus order in this area by standards such as reasonableness, practicability or feasibility - considerably lower bars to overcome than the limits on granting positive injunctions imposed by the Court in the previous period.

Add to this, in an interesting recent development, the Court relaxed the general test for granting interlocutory injunctions. In *Merck Sharp & Dohme v Clonmel Healthcare*,<sup>70</sup> the Supreme Court removed the requirement, when granting an injunction, to find damages would be an inadequate remedy.<sup>71</sup> The removal of this requirement makes the issuance of injunctions more likely, which may only benefit the proliferation of injunctions, including mandatory injunctions, generally. This may in itself therefore also increase the likelihood

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<sup>68</sup> *Ó Maicín v Ireland* [2014] 4 IR 583. *Ó Maicín's* case was dismissed for reasons which do not need to be dealt with in detail. *Ó Maicín's* rights claim was found to conflict with the right to trial before a representative jury, and the latter prevailed.

<sup>69</sup> [2014] 4 IR 583, 645.

<sup>70</sup> *Merck Sharp & Dohme v Clonmel Healthcare* [2019] IESC 65.

<sup>71</sup> *Campus Oil v Minister for Industry (No 2)* [1983] IR 88.

of such orders being issued for rights breaches, as greater familiarity with the remedy develops.

#### IV: What Factors Conditioned the Court's Remedial Jurisprudence in the Fourth Wave

First, the senior bench is now unconnected to the seminal third wave decisions on the limits of the Court's rights protecting function, particularly *TD v Minister for Education*. Further, senior jurists such as Donal O'Donnell, John MacMenamin, and Gerard Hogan have demonstrated a clear interest in reengaging with rights adjudication.<sup>72</sup> This interest was suggested to derive in part from their experiences under the third wave, and the emergence of a sense that *more* rights adjudication could profitably be undertaken, if greater remedial breadth is permitted.

Informing the remedial instincts of this group then are two contextual factors. First, in a series of cases, the deficits of only permitting *ab initio* declarations of unconstitutionality was made clear in a series of landmark judgments. Most notably, as aforementioned, in *A v Governor of Arbour Hill*, the - ultimately avoided - possibility of releasing convicted sexual predators by the nullification of the legislation under which they were sentenced, would have concentrated the attention of members of the judicial community.<sup>73</sup> So too would have the temporary decriminalisation of hard drugs in *Bederev v Ireland*, after a finding that regulations following from the Misuse of Drugs Act were unconstitutionally delegated.<sup>74</sup>

The stark consequences of immediate declarations of unconstitutionality in such cases likely impelled the judiciary - senior barristers or judges at the time of their determination - to consider alternative means whereby

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<sup>72</sup> See Hogan (n 52); Hogan (n 34); and the remarks of John MacMenamin at the 12<sup>th</sup> Annual Trinity College Law Student Colloquium (15 February 2020).

<sup>73</sup> *A v Governor of Arbour Hill* [2006] IESC 45. For a fascinating account of the legal and political fallout of this case see the Introduction to MacCormaic (n 42).

<sup>74</sup> *Bederev v Ireland* [2015] IECA 38; overturned in [2016] IESC 34.

unconstitutional legislation could be nullified without giving rise to such potentially damaging circumstances.<sup>75</sup> As Hogan J has observed extrajudicially:

If a finding of unconstitutionality had uncontrolled and devastating consequences for society in general and the legal system in particular which the courts found themselves unable to limit, then this would inevitably impact on the practical willingness of the courts to make such a finding of unconstitutionality. This would represent a form of functional asymmetry which, absent a necessary flexibility in the manner in which these remedies are administered, might well have the effect of dissuading the courts from making a finding of unconstitutionality in the first place.<sup>76</sup>

A growing sense amongst members of the court that the field of constitutional rights protection could be expanded thus complemented a sense that such existing remedial approaches hampered judicial willingness to engage in rights adjudication. This, it appears, may likely have stimulated the development of suspended declarations of unconstitutionality, which enable the Oireachtas time to pass legislation to fill the gaps left by declaring key legislation null.<sup>77</sup>

In the relaxation of remedial rules to allow for suspended declarations and admonitory decisions, the Court has again taken instruction from comparative constitutional literature. O'Donnell J has made this clear:

We do not hear so much now about the United States Supreme Court today in either academic writing or judicial opinions. If anything, when looking abroad we collectively look more readily to the European Court of Human Rights, and perhaps most particularly the United Kingdom Supreme Court's analysis of the Human Rights Act and the courts of Canada and other jurisdictions.<sup>78</sup>

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<sup>75</sup> As Donal O'Donnell has noted extrajudicially, 'There is no better vantage point from which to analyse a judgment than from the point of view of the participants in the case, particularly the losing side. I think it fair to say that some of the more ambitious claims of the judgments did not convince some at least of the audience to whom they were addressed.' O'Donnell (n 45) 200. See also the comments of Hogan on the A case (in which he was counsel for the state) in Hogan (n 52) 234.

<sup>76</sup> *Ibid*, 251.

<sup>77</sup> Hogan (n 34) 79.

<sup>78</sup> O'Donnell (n 45) 201.

The jurisprudence of suspended declarations appears to have taken considerable direction from the experience in Canada.<sup>79</sup> Indeed, in *A v Governor of Arbour Hill*, Denham J explicitly considered the favourability of the Canadian model.<sup>80</sup> Moreover, as mentioned earlier, the concept of an ‘admonitory decision’ was imported with direct reference to German constitutionalism.<sup>81</sup>

Further to this - and combining the development of the remedial commitment with the rise of greater engagement with the substantive content of rights - in *YY v Minister for Justice and Equality*, Humphreys J ‘suggested that the right to an effective remedy should be recognized as a freestanding unenumerated right in the Irish Constitution.’<sup>82</sup> This right deserved protection, Humphreys J asserted, as:

Our Constitution recognises, rather than creates, rights, and thus enshrines a theory of the natural rights of the individual. By definition, that cannot be viewed as a peculiarly national phenomenon; natural rights must be universal rights. Thus, guidance as to the scope and content of such constitutional *rights can legitimately be derived from widely agreed conceptions of rights and duties as recognised at the regional and international level and in individual foreign jurisdictions as appropriate.*<sup>83</sup>

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<sup>79</sup> *Manitoba Language Rights cases* [1985] 1 SCR 721; *Schachter v Queen* (1992) 93 DLR (4<sup>th</sup>) David Kenny ‘The Separation of Powers and Remedies for Unconstitutional Legislation in Comparative Perspective’ in Eoin Carolan (ed) *The Irish Constitution: Perspectives and Prospects* (Bloomsbury Professional 2012) 191. See also in South Africa *Zondi v Minister of the Executive Council for Traditional and Local Government Affairs* [2005] ZACC 18.

<sup>80</sup> [2006] IESC 45 [161] - [163].

<sup>81</sup> [2011] IEHC 445 [36]. See also Hogan’s extrajudicial endorsement of the German admonitory decision jurisprudence in Hogan (n 52) 236.

<sup>82</sup> *YY v Minister for Justice and Equality* [2017] IEHC 176; *Brownfield Restoration Ireland v Wicklow County Council* [2017] IEHC 456. See also *S (A Minor) v Minister for Justice* [2010] IEHC 131.

<sup>83</sup> [2017] IEHC 176 [62] (emphasis added). Humphreys also noted the international legal premium of the right to an effective remedy in Richard Humphreys, ‘The Constitution and Law as Living Instruments for a Living Society’ (2017) 40 *DULJ* 45, 67.

On appeal, the Supreme Court reserved judgment on whether an unenumerated right to an effective remedy exists.<sup>84</sup> Nevertheless, that international and comparative rights law can be used to discern what rights commitments obtain within the Irish constitutional order suggests that the judiciary are much more willing to expand their conception of their rights obligations at present, including of their remedial capacities.<sup>85</sup> It indicates an increased engagement by members of the judiciary with the judicial duty Ó Dálaigh CJ noted 55 years ago in *The State (Quinn) v Ryan* to not allow for the State to ‘set these rights at naught or circumvent them.’<sup>86</sup>

In this, however, the Court appears keen to act more cautiously, ‘embarking on this path slowly, with the benefit of argument, and not prematurely committing itself to this course until it has had time to consider what exactly this will mean.’<sup>87</sup> Whilst the requisite remedial experimentation to enable social rights protection to develop has not occurred, there are signs of greater judicial willingness to test their powers to issue reliefs. In this, my thesis that rights protection is itself contingent upon judicial cultural attitudes towards rights, and that changes in culture occasion changes in protection is once again shown to be compelling.

Whilst the text of the Constitution does not limit the Court’s remedial powers, in their development of the remedial function, the Court has maintained a strictly negative restraining conception of the Court’s rights protection function.<sup>88</sup> This corresponds with an orthodox, liberal conception of rights in the common law world. It suggests that Hogan was correct in noting ‘when all

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<sup>84</sup> [2017] IESC 61. As noted in *Kelly*: ‘Other judges have suggested that such an entitlement derives equally effectively from other constitutional protections, though have not recognized an independent right of this sort.’ Hogan et al. (n 3) 1533.

<sup>85</sup> I have criticised the reasoning in these cases elsewhere, see Rooney (n 36).

<sup>86</sup> [1965] IR 70, 122.

<sup>87</sup> Kenny (n 13) 103.

<sup>88</sup> As Fennelly J wrote extrajudicially:

There is no constitutional principle which says that the courts may not compel the State to respect individual rights where to do so would expose the State to significant financial liability. The courts pronounce upon the constitutional obligations of the State with monotonous regularity in cases where they restrain State action which encroaches on rights.

Nial Fennelly, ‘Judicial Decisions and Allocation of Resources’ (2010) 23(3) *Advocate* 48.

is said and done the Constitution was really too radical a document for a legal system based on the common law fully to absorb.’<sup>89</sup>

The absence of a positive capacity to cure rights breaches has had adverse implications for social rights protection. It is to the Court’s recent social rights reasoning which I now turn.

## V: Social Rights Protection 2013 - 2020: Signs of Greater Willingness to Engage in Social Rights Adjudication

There are indications over the past decade of a possible shift away from the *TD*-era resistance to social rights adjudication. Whilst *TD* has not been overruled these cases alongside the developments noted above give reason to speculate that the potential for a form of social rights protection to develop may be more now than before.

*O’Donnell v South Dublin County Council* concerned a minor Traveller with cerebral palsy, living in an overcrowded mobile home with eight other members of her family.<sup>90</sup> It was accepted by the Council that the mobile home was unfit for human habitation,<sup>91</sup> meaning the plaintiff was ‘homeless’ for the purposes of the Housing Act 1988, and thus the Council was obliged to provide assistance. This Act, MacMenamin J held, had to be interpreted consistent with ‘constitutional values established by our jurisprudence, specifically those of autonomy, bodily integrity and privacy.’<sup>92</sup> By failing to provide her with suitable accommodation consistent with her rights, the Court held the Council in breach of the statute. For this, the plaintiff was entitled to damages. However, an order to provide her with suitable accommodation was not granted.

*TD* was not cited by the Supreme Court.<sup>93</sup> As Casey noted:

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<sup>89</sup> Gerard Hogan, ‘The Farthest - December 1972’ (2019) 62 *Irish Jurist* 1.

<sup>90</sup> *O’Donnell v South Dublin County Council* [2015] IESC 28. The case also concerned the other members of her family, however the Court dismissed their case.

<sup>91</sup> [2015] IESC 28 [60].

<sup>92</sup> [2015] IESC 28 [68].

<sup>93</sup> ‘There was no mention of Murphy J’s dicta in *TD* of the Constitution not providing any form of socioeconomic right or benefit to citizens ‘no matter how needy or deserving.’ Liam Thornton, ‘Socioeconomic Rights, the Constitution and the ECHR Act: *O’Donnell v South Dublin County Council* in the Supreme Court.

*Contra* to the dicta of Murphy J in *TD*, then, *O'Donnell* suggests the right to bodily integrity and the person protected by Article 40.3 could, in certain circumstances, require for its vindication the positive provision of care and maintenance, including a right to adequate shelter.<sup>94</sup>

Interestingly, *O'Brien v Wicklow UDC* - a post-*O'Reilly* judgment where Costello J *ordered* the Council to act to realise constitutionally protected rights or values - was cited.<sup>95</sup> This is likely in part because, as with *O'Brien* and not *TD*, a statute was engaged which could be interpreted by the Court, a less interventionist act than innovating new law in the form of recognizing an unenumerated right.<sup>96</sup> However in later cases concerning housing rights, Casey has noted the High Court 'did not engage with the Supreme Court judgment [in *O'Donnell*] or its potential scope.'<sup>97</sup>

In *O'Donnell*, dignity and individual autonomy were again stressed as values informing the Court's constitutional interpretation.<sup>98</sup> Housing rights were again engaged with in *Wicklow County Council v Fortune*.<sup>99</sup> Concerning the demolition of an illegal dwelling where the plaintiff lived, in light of the Article 40.5 right to the inviolability of the personal dwelling, Hogan J in the High Court held it was necessary to show:

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<https://liamthornton.ie/2015/03/16/socio-economic-rights-the-constitution-the-echr-act-2003-odonnell-v-sdcc-in-the-supreme-court/> (accessed 6 April 2020)

<sup>94</sup> Conor Casey, 'Courts, Public Interest Litigation and Homelessness: A Commentary on Recent Case Law' (2020) 42 *DULJ* (forthcoming).

<sup>95</sup> [2015] IESC 28 [65].

<sup>96</sup> See Conor Casey and Dáire McCormack-George, 'An Analysis of the Right to Shelter in Irish Law for Children and Adults' (2015) 54(2) *Ir Jur* 131. In a similar vein, in *A v Minister for Justice and Equality*: MacEochaidh J, having cited Murphy J.'s remarks in *TD*, said, obiter, "where State action results in a breach of human rights and where the only remedy is the expenditure of additional money, the Court, in my opinion, must be entitled to make an appropriate order, even if the consequence is that the State must spend money to meet the terms of the order.' *A v Minister for Justice and Equality* [2014] IEHC 532 [12.6]; see also *VQ v Judge Horgan* [2016] IEHC 631.

<sup>97</sup> Casey (n 94) see *Middleton v Carlow County Council* [2017] IEHC 528; *Tee v Wicklow County Council* [2017] IEHC 623; *C v Galway County Council* [2017] IEHC 784.

<sup>98</sup> Per MacMenamin J: Because of the exceptional overcrowding, and the destruction of the sanitation facilities, and in light of Ellen O'Donnell's disability, her capacity to live to an acceptable human standard of dignity was gravely compromised. Her integrity as a person was undermined. Her rights to autonomy, bodily integrity, and privacy were substantially diminished.' [2015] IESC 28 [68].

<sup>99</sup> *Wicklow County Council v Fortune* [2012] IEHC 406.



that the continued occupation and retention of the dwelling would be so manifestly at odds with important public policy objectives that demolition was the only fair, realistic, and proportionate response.<sup>100</sup>

This appeared to ‘confer a right to remain in one’s dwelling in the face of countervailing public interest considerations.’<sup>101</sup> In *Murray v Meath County Council*, the Supreme Court cautiously gave some credence to this expansion in the understanding of the protection granted by Article 40.5, ‘notwithstanding its rejection of Hogan J’s approach to demolition orders.’<sup>102</sup>

Once again, *NHV* merits examination. In interpreting the right to work, the Supreme Court considered the strain of jurisprudence inflected by the Directive Principles on the right to a livelihood from the second wave.<sup>103</sup> Further to this, the Court referred to General Comment 18 of the CESCR, the UN Committee on Economic, Social and Cultural Rights.<sup>104</sup> The citation of such international human rights instruments supported the assertion that the right to work is consistent with the constitutional objective to protect human dignity.<sup>105</sup> International human rights instruments have also recently been construed as suggestive that social rights to housing,<sup>106</sup> and to education, including secondary education,<sup>107</sup> exist within the constitutional order.

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<sup>100</sup> [2012] IEHC 406 [45].

<sup>101</sup> Hogan et al. (n 3) 2047. *Wicklow County Council v Fortune (No 2)* [2013] IEHC 229.

<sup>102</sup> *Murray v Meath County Council* [2017] IESC 25; *ibid* 2050.

<sup>103</sup> Hogan J, in a Court of Appeal dissent followed in large part by the Supreme Court, noted how, whilst he may not recognise a right to work per *Murtagh* if the matter was up to him, ‘at all events the matter is far from *res integra*’ given that judgment. So, whilst the Article 45 jurisprudence may not be wholly supported by the bench, it has residual persuasive authority. *NVH v Minister for Justice and Equality* [2017] IESC 35[12].

<sup>104</sup> [2017] IESC 35 [17].

<sup>105</sup> Per Rooney:

The comment of the UNCESCR is noted to be compatible with a conception of the purpose of the Constitution, one which is ‘set on a foundation on the essential equality of the human person.’ [2017] IESC 35 [14] That the Comment aligns with this conception thus provides a coincidental further buttress to the argument raised but does not suggest that any right will gain any constitutional authority due to its citation within the Comment or the ICESCR proper.

Rooney (n 36).

<sup>106</sup> *Duniyva v Residential Tenancies Board* [2017] IEHC 578; *EBS v Kenehan* [2017] IEHC 604; *Ulster Bank v Costelloe* [2018] IEHC 289.

<sup>107</sup> *KRA v Minister for Justice and Equality* [2016] IEHC 289; *Carter v Minister for Education* [2018] IEHC 539 [2019] IECA 150.

More notably in this regard in *Habte v Minister for Justice and Equality*, Humphreys J, found an unenumerated right to have one's identity correctly recognized by the State.<sup>108</sup> In discovering this, Humphreys J held it arose 'from the inherent dignity of the individual referred to in the Preamble and the personal rights of the citizen in Article 40.3 of the Constitution,' in conformity with the prevailing dignitarian rights approach.<sup>109</sup> Then, Humphreys J continued:

While 'the application of [Article 45] principles in the making of laws' is not justiciable, that does not mean that the Article is not cognisable by constitutional organs, or even by courts in other contexts, or that it is not constitutional law.<sup>110</sup>

Given the aforementioned potential for the Directive Principles to integrate a greater social dimension to the Court's rights jurisprudence, and thereby promote the coherence of social rights within the Irish constitutional order, these re-engagements with Article 45 appear noteworthy, even if no social rights have yet been found with reference to these Principles.<sup>111</sup>

These cases do not, of themselves, constitute a change in the judicial attitude towards remedying social rights breaches. However they do indicate the orthodoxy that such rights and the Directive Principles are beyond constitutional consideration is more precarious than before. As Kenny has noted of the recent jurisprudence:

Nothing in the court's actions to date suggest to me that it is on the verge of completely overhauling the separation of powers and breaking with

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<sup>108</sup> *Habte v Minister for Justice and Equality* [2019] IEHC 47.

<sup>109</sup> [2019] IEHC 47 [44].

<sup>110</sup> [2019] IEHC 47 [45].

<sup>111</sup> As Whyte has commented:

In identifying preinterpretative principles and values, it is important to note that that Irish Constitution is not simply concerned with establishing a system of government - it also endorses, through the Preamble and Article 40, 42, and 45, an ideological position that [...] commits the State, *inter alia*, to work for social inclusion. In cases where ordinary politics has failed a marginalised individual or group, this ideological commitment is to protect such socio-economic rights as are necessary to enable the individual or group to participate in society.

Gerry Whyte, *Social Inclusion Inclusion and the Legal System: Public Interest Law in Ireland* (2<sup>nd</sup> edn. Institute of Public Administration 2015) 30.

the most major precedents on the outer limits of judicial power. However, it is not impossible that the court's embrace of innovation might lead farther than I believe, and farther than the court is currently suggesting. Perhaps the court's caution in embracing this development is simply the last vestige of an old paradigm, soon to be discarded for a bolder approach.<sup>112</sup>

As will be shown in the study of South Africa's social jurisprudence in Part Three, dignity - the conceptual anchor for most of the Court's most innovative recent jurisprudence - lends itself as a foundation on which to conduct social rights adjudication.<sup>113</sup> Thus, whilst this may be beyond the Court's current conceptual threshold, this does not mean they are beyond the reach of a future judicial community following the precedent which is being established.<sup>114</sup>

## VI: Conclusion

In Part Two of the doctorate, I have provided an overview of the development of rights protection, particularly social rights protection, in Ireland. By tracing the Court's jurisprudence alongside the impact of cultural changes upon the judicial community, changes in the degree of rights protection in Ireland is explained. Ireland has, in a final analysis, failed to develop effective social rights protection despite having a Constitution favourable to adjudication to this effect. The reasons for this failure result from features of Irish judicial culture, particularly cultural attitudes to the separation of powers which relate more to an Anglo-American conception of the state than that which the Constitution was designed to produce. That this has occurred is in important respects not the fault of the judges, nor of anyone else. They were as likely as anyone to read the Constitution in the way that made the most sense to them,

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<sup>112</sup> Kenny (n 13) 104.

<sup>113</sup> As MacMenamin J noted in *Simpson v Governor of Mountjoy Prison* [2019] IESC 81: The value of dignity underlies rights declarations as diverse as the Charter of the United Nations, the Universal Declaration of Human Rights, the German Basic Law, and the Charter of Fundamental Rights of the European Union, where it is described as "inviolable" (Article 1). It is also to be found in the Preamble to the Constitution of India. In a sense, it is a value which underlies all fundamental rights, especially that of equality before the law.'

<sup>114</sup> As Kenny wrote: It feels as though this development (alongside others) represents a small but potentially significant change in the constitutional and judicial culture, a change in the outlooks and suppositions of our judges on certain core constitutional matters. Kenny (n 13) 102.

and that was in the way that they read it. This has spent the potential for social rights to be effectively protected in Ireland. When litigants such as Sinnott or TD or O'Reilly seek to have their rights vindicated, the Court restrains itself, denuding these rights of any practicable viability.

Several key points can be taken from this part of my doctorate. First, the value of studying judicial culture to explaining rights protection within a common law legal system is apparent. Second, with cultural changes come changes to the regime of rights protection afforded by the constitutional order. Within Ireland, four cultural waves can be discerned. Whilst in the first decades of independence, the judicial community demonstrated a strong cleavage to judicial deference in the British mould, by the 1960s a shift was underway which would see an explosion in engagement with the rights provisions of the Constitution. This change corresponded to the replacement of a senior judiciary heavily immersed in the pre-independence British model, with a younger community whose only legal experience was under an entrenched Constitution with rights provisions, which they were eager to explore. This also corresponded with the installation of a structure whereby (some) rights claims could be reliably protected for the first time in Ireland.

The trajectory of the Court in the second wave can be understood with reference to from the primary influence of both American constitutionalism and Catholic natural law theory. These influences upon the judiciary do not correspond to the sole nor primary resources in the drafting of the Constitution. Through the judicial community interpreting the Constitution through the lens of these inspirations, the rights protection afforded by the Constitution developed in the direction of affording exclusively negative protections against breach. This has occurred notwithstanding the existence of social rights with resource implications within the enumerated text of the Constitution, as well despite the discovery of unenumerated rights such as to criminal legal aid, that place considerable financial commitments upon the State.<sup>115</sup>

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<sup>115</sup> As noted in the most recent edition of *Kelly*: 'The implications of having both liberal *and* *communitarian* elements in the Constitution have yet to be squarely addressed by the Courts.' Hogan et al. (n 3) 2513.

The effect of this has been to frame out the possibility of social rights protection. As Ó Cinnéide has written:

Constitutional jurisprudence remains focused on the protection of rights and the policing of conformity with the separation of powers, in a move that remains faithful to the classical Anglo-American liberalism. In contrast, the principles and goals set out in Article 45 and other elements of the constitutional text (such as the references to dignity, etc.) play a limited role in shaping the development of case law or influencing public governance at large.<sup>116</sup>

This is shown to be a consequence of cultural factors within the judiciary rather than an inoperability of social rights within the Irish constitutional order. For the Irish legal community, the fault is not with our Constitution, but with ourselves.<sup>117</sup>

In Part Two I have shown how judicial culture was formative in the development of a role conception within the Irish judicial community which, while enabling rights protection, precludes social rights protection. This supports my thesis contention that social rights protection is contingent upon the nature of judicial culture within a common law jurisdiction. In the next Part of my doctorate, I undertake a similar study of South Africa. Like Ireland, the current South African constitutional order succeeded from one wedded to a very rigid conception of parliamentary supremacy. Unlike Ireland, since the transition to democracy, South Africa has transcended these origins to develop robust rights social rights protection. After studying this in Part Three, in Part Four I draw the study of Irish and South African social rights protection together and

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<sup>116</sup> Colm Ó Cinnéide, ‘Zones of Constitutionalisation’ and the Regulation of State Power: The Missing Social Dimension to the Irish Legal Order’ (2014) *DULJ* 173; see also Colm Ó Cinnéide, ‘Commentary on *MhicMhatúna v Attorney General* in Máiréad Enright, Julie McCandless, and Aoife O’Donoghue (eds) *Northern/Irish Feminist Judgments: Judges’ Troubles and the Gendered Politics of Identity* (Bloomsbury 2017) 137.

<sup>117</sup> Hogan has suggested, ‘There is clear evidence that the judiciary are uncomfortable - even unhappy - if they are required to give full effect to the wording of the Constitution because they privately understand that the logical corollary of doing just this would bring about too radical a break with the established world of the common law which many consider to be the true bedrock of our legal system.’ Hogan (n 13); Gerard Hogan, ‘The Farthest - December 1972’ (2019) 62 *Irish Jurist* 1, 20.

examine what factors contribute to a common law system developing social rights protection.

PART THREE: SOCIAL RIGHTS IN THE SOUTH  
AFRICAN CONSTITUTIONAL ORDER

## Chapter Nine: The Development of Judicial Rights

### Review in South Africa

I will now examine South Africa's experience of social rights protection. The comparison of South Africa with Ireland is founded on relative similarities between these constitutional orders. Prior to the constitutional dispensations in both jurisdictions, the legal systems were premised on a Westminster model of parliamentary sovereignty. Whilst Ireland was a corporate part of the United Kingdom run via Westminster, South Africa was first a British colony, and then under apartheid the professed virtues of a deferential judiciary and supreme parliament were pronounced even more so than they were in Ireland pre-independence.

Nevertheless, it is in South Africa that a regime of social right protection has developed. As with Part Two, to understand how this occurred, I begin with an overview of the legal order which preceded the constitutional dispensation, and so informed the constitution-making process. Given how implicated the law and legal community were in the apartheid system of racial oppression, to properly understand South Africa's contemporary rights regime it is also necessary to become familiar with the apartheid legal order that obtained prior to democracy.

With this contextual grounding, in this chapter I analyse the development of judicial rights review in the aftermath of the transition to democracy, and the cultural influences that informed the senior judiciary's transformation of their role.

### I: Apartheid Law

Contemporary South African law grew out of a mix of the legal systems of the two European states that colonised South Africa from the 17<sup>th</sup> to 20<sup>th</sup> Century. The law of Holland, one of the provinces of the Netherlands, which was derived from Roman law, was accepted as the law of the Dutch Cape Colony at the time of colonisation and settlement in 1652. This Roman-Dutch legal system then became intermixed with English law following British conquest and settlement



of the Cape in the 19<sup>th</sup> Century.<sup>1</sup> After Britain's defeat of the Boer Republics in the early 20<sup>th</sup> Century, in 1909 the Union of South Africa - the contiguous predecessor to the present Republic - was established.<sup>2</sup>

British conquest 'resulted in a dominance of English legal tradition such that the South African legal profession, both academic and practising, adopted an almost slavish adherence to Anglocentric legal traditions and concepts.'<sup>3</sup> Whilst maintaining the Roman-Dutch common law, English constitutional theory, in particular the doctrine of parliamentary supremacy, gained a position of unrivalled dominance within the judicial community, so much so that Cockrell would observe, 'historically, the South African legal system has been situated even more firmly on the 'formal' side of the spectrum [of parliamentary sovereignty] than the English legal system.'<sup>4</sup>

This regime of parliamentary supremacy was paired with an electoral system that discriminated in favour of the minority white population.<sup>5</sup> As Klug noted:

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<sup>1</sup> Per Code and van Garderen:

It is different from Anglo-American common law in that the rules of the common law are based on writings from Dutch writers from the Enlightenment who were commenting on the use of ancient Roman law in the provinces of the Netherlands at that time. South Africa was originally a Dutch colony and, as such, inherited this system. [...] As a British colony, however, English common law and statutes also found their way into South African law. As a result, today's system is seen as a mixture of the two systems, but with an obvious preference toward Roman-Dutch rules.

David Cote and Jacob van Garderen, 'Challenges to Public Interest Litigation in South Africa: External and Internal Challenges to Determining the Public Interest' (2011) 27 *SAJHR* 167, 170. See also AB Edwards, *The History of South African Law: An Outline* (Lexis Nexis 1996).; Ndimiso Dladla, 'The Liberation of History and the End of South Africa: Some Notes Towards an Azanian Historiography in Africa, South,' (2018) 34 *SAJHR* 415.

<sup>2</sup> South Africa Act 1909. The Boer Republics of the Orange Free State and the South African Republic both operated under enumerated Constitutions, which contained provisions such as Article 9 of the Constitution of the South African Republic 1889: The national will not allow an equality of coloured and white inhabitants.' Anon. 'The Constitutional Law of the South African Republic' (1890) 7 *Cape Law Journal* 11,12.

<sup>3</sup> Dennis Davis, Matthew Chaskalson, and Johan de Waal, 'Democracy and Constitutionalism: the Role of Constitutional Interpretation' in Dawid van Wyk, John Dugard, Bertus de Villiers and Dennis Davis (eds) *Rights and Constitutionalism: The New South African Legal Order* (Clarendon Press 1995) 1, 1. For a prominent commentary on the South African legal community in this period, see Martin Chanock, *The Making of South African Legal Culture 1902 - 1936: Fear, Favour and Prejudice* (CUP 2001).

<sup>4</sup> Alfred Cockrell, 'Rainbow Jurisprudence,' (1996) 12 *SAJHR* 1, 7.

<sup>5</sup> As Dyzenhaus observed:

The white minority in South Africa has oppressed the black majority ever since white settlers first arrived in the Cape in 1652. But systematic racial discrimination dates from the turn of this century when South Africa became one political entity under the control of an exclusively white Parliament. Whatever the differences between the governments which followed, until 1990 they agreed that racial segregation had to be

The constitutional order created by the South Africa Act [1909] - and replicated in every constitutional reform until the end of apartheid - was an essentially colonial order 'of a special type' in which the 'white' state was simultaneously a pseudo-democratic system based on a Westminster-style parliamentary system and also an authoritarian order in which the majority of the country's inhabitants lived under a classical system of colonial 'indirect rule'.<sup>6</sup>

In 1948, the white electorate voted into government the National Party, and 'after a period of consolidation, they began to implement the most radical policy of racial segregation the century has seen:' apartheid.<sup>7</sup> As part of this policy, shortly after the election, the Nationalists precipitated a constitutional crisis which would remove the possibility of the judiciary developing a checking function on their power, leaving the power of the apartheid executive virtually unchecked.

Section 35 of the South Africa Act 1909 had entrenched the voting rights of Coloured voters in the Cape, such that a two-thirds majority of Parliament was necessary to disenfranchise this group.<sup>8</sup> In the 1950s the National Party attempted to purge these voters from the poll. At first, this move was resisted by the Courts. As the Government majority did not pass this threshold, the Appellate Division declared the law purging the voters null and void.<sup>9</sup> In response, the Nationalist Government packed the upper house of parliament to ensure they had a sufficient majority and expanded the membership of the Court from five to eleven, with the six new judges appointed by the National Party, expecting - correctly - their support for the bill if challenged again, as it was in *Collins v Minister of the Interior*.<sup>10</sup>

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enforced in order to ensure the material, political, and social domination of white over black.

David Dyzenhaus, *Hard Cases in Wicked Legal Systems: South African Law in the Perspective of Legal Philosophy* (Clarendon 1991) vii.

<sup>6</sup> Heinz Klug *The Constitution of South Africa: A Contextual Analysis* (OUP 2010) 9.

<sup>7</sup> Dyzenhaus (n 5) vii.

<sup>8</sup> 'Coloured' here refers to the mixed-race population of South Africa classified by the apartheid regime as 'Coloured' under the Population Registration Act 30 of 1950.

<sup>9</sup> *Harris v Minister of the Interior* 1952 (2) SA 428 (A); Edward McWhinney, 'Race Relations and the Courts in the Union of South Africa' (1954) 32 *Canadian Bar Review* 44.

<sup>10</sup> *Collins v Minister of the Interior* 1957 (1) SA 552 (AD).

Cameron described the Court's decision in *Collins* as an 'incalculable set-back [which] heralded 35 bleak years in which pliant executive-mindedness, dressed up in doctrines closely akin to legalism, cast a lengthening shadow over South Africa's courts.'<sup>11</sup> After this, the South African superior courts did not again challenge directly the apartheid programme, as the Government increasingly filled senior posts with sympathetic appointments.<sup>12</sup>

Consequently, under the National Party, virtually all aspects of South African life became legally regulated according to skin colour.<sup>13</sup> The state was divided into racially classified zones, with the white population claiming 87% of the land, and assigning 13% as black homelands or 'bantustans.'<sup>14</sup>

Far from being challenged by the Court, in this period the judiciary cleaved to a rigidly positivist conception of the law that asserted that the law meant whatever Parliament *must have meant it to mean*.<sup>15</sup> The pro-executive stance of the Judiciary was neatly encapsulated in Chief Justice Steyn's declaration that, 'The task of our Courts - I would emphasise, their only task - was to ascertain the intention of Parliament as expressed in this enactment.'<sup>16</sup> Evaluations as to the morality of legislation were to be rejected or invariably overturned on appeal. In this, 'the judge [was] denied any creative power in his mechanical search for the legislature's intention, and desirable policy considerations, based upon traditional legal values, [were] viewed as

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<sup>11</sup> Edwin Cameron, 'Judges, Justice and Public Power: The Constitution and the Rule of Law in South Africa' (2018) 18 *Oxford University Commonwealth Law Journal* 73, 81.

<sup>12</sup> Albie Sachs stated in 1973 how 'The enlargement of the Appeal Court was seen by some critics as a packing, and by others as a dilution of the Bench, but on any view it changed the complexion of the Court and introduced it to a number of persons whose thinking of constitutional, race, and security matters was closer to that of the Government. Albie Sachs, *Justice in South Africa* (1973 Sussex University Press) 145.

<sup>13</sup> For instance, see Prohibition of Mixed Marriages Act 55 of 1949 (criminalising interracial marriage); Immorality Amendment Act 21 of 1950 (criminalising interracial sexual intercourse); Population Registration Act 30 of 1950 (requiring the racial classification of all South Africans); Group Areas Act 41 of 1950 (dividing urban areas into racially exclusive zones); Native Building Workers Act 27 of 1951 (restricting places black South Africans could be employed); Native Laws Amendment Act 54 of 1952 (requiring black South Africans to carry passes when in 'white' areas); Bantu Education Act 47 of 1953 (segregating educational facilities) Reservation of Separate Amenities Act 49 of 1953 (segregating public premises, vehicles and services according to race).

<sup>14</sup> See Group Areas Act 41 of 1950; Bantu Authorities Act 68 of 1951; Promotion of Bantu Self-Government Act 46 of 1959.

<sup>15</sup> Dyzenhaus, (n 5).

<sup>16</sup> LC Steyn 'Regsbank en Regsfakulteit' (1967) 30 *Tydskrif vir Heedendaagse Hollandse-Romeinse Reg* 101, 106.

irrelevant.<sup>17</sup> This judicial commitment to parliamentary supremacy extended even to allowing the legislature to negate substantive and procedural rights protected by Roman-Dutch legal principles and by the English common law values of natural justice.<sup>18</sup>

In their professed amorality, the Court also disowned any political role, notwithstanding the deeply political, pro-executive outcome of their judgments.<sup>19</sup> As Steyn CJ remarked in 1967:

It is not our function to write an indignant codicil to the will of Parliament. If, in the eyes of some, there is any blame in avoiding such a course, I will have no doubt that our judges, one and all of them, will not thereby be pressed into unwise participation, before or after the event, in a political conflict.<sup>20</sup>

Ensured of a legislative majority and an inactive, pro-executive judiciary,<sup>21</sup> the Government therefore faced no real restraint on its power, and could carry out its apartheid programme unchecked, all within a formal Westminster constitutional structure. As Dugard noted, ‘in South Africa, few holds are barred as far as Parliament is concerned: parliamentary sovereignty has been taken to its logical and brutal conclusion at the expense of human rights.’<sup>22</sup> Familiar principles to common law systems such as the independence of the bar

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<sup>17</sup> John Dugard, ‘The Judicial Process, Positivism, and Civil Liberty’ (1971) 88 *SALJ* 181, 182.

<sup>18</sup> Denis Davis noted a 1987 interview in which Chief Justice Rabie of the Appellate Division ‘seems unperturbed by the Government’s encroachment on rights guaranteed by Roman-Dutch common law. ‘As far as the Court is concerned, there is no question of conflict. Once Parliament says this is law, it is the law.’ DM Davis ‘The Chief Justice and the Total Onslaught’ (1987) 3 *SAJHR* 229, 231. See also John Dugard *Human Rights and the South African Legal Order* (Princeton University Press 1978).

<sup>19</sup> As Hoexter noted, ‘However inarticulate the premiss that guides a pro-executive decision, however apolitical the judge, the result is a political choice, a choice *that gives direction to society*. Only when the political nature of the choice is recognized and its implications are understood will judges feel free to give effect to their own policy, a policy which informs and legitimates the choice of certain values and which supports its own view of justice.’ Cora Hoexter, ‘Judicial Policy in South Africa’ (1986) 103 *SALJ* 436, 441. See the judgment of Holmes JA in *Minister of the Interior v Lockhat* 1961 (2) SA 587 (AD) 602.

<sup>20</sup> Steyn (n 16) 107.

<sup>21</sup> Edwin Cameron, ‘Legal Chauvinism, Executive-Mindedness and Justice - LC Steyn’s Impact on South African Law’ (1982) 99 *SALJ* 38.

<sup>22</sup> As Dugard observed, ‘in South Africa, few holds are barred as far as Parliament is concerned: parliamentary sovereignty has been taken to its logical and brutal conclusion at the expense of human rights.’ Dugard (n 18) 36.

and bench,<sup>23</sup> the public administration of justice,<sup>24</sup> and a thin conception of the rule of law were observed,<sup>25</sup> to the end of operating a regime that perpetrated a crime against humanity.<sup>26</sup>

As Kader Asmal observed: ‘apartheid is a case study of how legal norms - which ought to embody our common humanity at its most cultured and articulate - came instead to express violence, divisiveness, and, in the end, lawlessness.’<sup>27</sup> In this, the members of the judicial community are invariably implicated.

## II: Apartheid Lawyers

The apartheid system was a common law system. As a result, the legal community existing within this regime were to a considerable degree involved in the maintenance and operation of the apartheid system.<sup>28</sup> Unsurprisingly, this community was overwhelmingly - almost entirely - white and male,<sup>29</sup> and inflected thereby by the social and racial attitudes that predominated within that section of South Africa’s population. Further, legal education during apartheid was strictly positivist. As Dugard noted, ‘lawyers were trained to concern themselves with rules of law alone and their mechanical application

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<sup>23</sup> As Robert F. Kennedy remarked, in his address to the Johannesburg Bar, ‘I stand in the midst of a Bar which has maintained a clear head and an honest heart: lawyers and judges alike, respected and honoured for your courage, your perseverance, and your dedication to the fundamental tenets of the law. No Bar, anywhere in the world, holds a higher position.’ Robert F. Kennedy, ‘Address of Robert F. Kennedy to the Johannesburg Bar’ (1966) 83 *SALJ* 273.

<sup>24</sup> David Dyzenhaus *Judging the Judges, Judging Ourselves: Truth, Reconciliation and the Apartheid Legal Order* (Hart 1998) 27 - 28.

<sup>25</sup> *Ibid* Chapter Four.

<sup>26</sup> What is distinctive about apartheid among crimes against humanity is its reliance upon a robust functioning legal system. As submitted to the Truth and Reconciliation Commission’s hearing on the complicity of the legal profession with apartheid, ‘law was the primary tool used to give effect to apartheid.’ Anon. ‘The Truth and Reconciliation Commission and the Bench, Legal Practitioners, and Legal Academics’ 115 (1998) *SALJ* 15, 22.

<sup>27</sup> Foreword to Dyzenhaus (n 24) viii.

<sup>28</sup> ‘In the opinion of Cameron: All lawyers who participated in the legal system “legitimated” it and were thus also complicit. This includes not only lawyers who supported apartheid and who acted for the government, the police and other apartheid institutions in its enforcement, but also lawyers who considered themselves “politically neutral”, and who pursued their commercial and other activities within the framework created by apartheid. It includes even lawyers who actively opposed apartheid through the legal system. In their case, by their continued participation in the legal system, they lent it the respectability and plausibility that was essential to the continuation of its role as an instrument of apartheid.’ Edwin Cameron, ‘Submission on the Role of the Judiciary under Apartheid’ (1998) 115 *SALJ* 436, 436.

<sup>29</sup> ‘In 1990 no black judges served on the South African bench - outside of the apartheid Bantustans - and only one senior female judge served at that time.’ Klug (n 6) 235.

and to avoid any speculation about the law as it ought to be.<sup>30</sup> The result of this was that, ‘when squarely faced with deliberately discriminatory laws, judges and law teachers would seek refuge in the literal approach to the interpretation of statutes [...] which absolves the judge or law teacher from complicity in legalised injustice.’<sup>31</sup>

This was the dominant legal culture that obtained upon the transition to democracy in 1994.<sup>32</sup> All the more remarkable it is then to consider that it would be a community of lawyers from within this system that would engage with an explicitly morally-motivated constitutional text, and develop a sustained culture of social rights adjudication. The crucial factor explaining this is the existence within the legal community of a fringe subculture that rejected the legitimacy of the apartheid regime and sought to use laws as a means to restrain the state and promote human rights.<sup>33</sup> Particularly from the 1980s onwards, both through academic critique and public interest litigation,<sup>34</sup> this small group - Ellman estimates that of the 686 advocates at the bar in 1982, about 40, or 6%, could be classified as members of this group of ‘political’ lawyers<sup>35</sup> - presented a counterargument to the positivist status quo, asserting common law principles of equality and legality must inform statutory interpretation and thereby override racist statutes.<sup>36</sup>

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<sup>30</sup> Dugard (n 18) 185.

<sup>31</sup> CRM Dlamini, ‘The Law Teacher, the Law Student, and Legal Education in South Africa’ (1992) 109 *SALJ* 595. 601.

<sup>32</sup> As wu Murua noted in 1997: ‘The apartheid bureaucracy has been largely left intact through the guarantee of tenure for judges and magistrates, civil servants, law enforcement officials and defence.’ Makau wa Murua ‘Hope and Despair for a New South Africa: The Limits of Rights Discourse’ (1997) 10 *Harvard Human Rights Journal* 63, 69.

<sup>33</sup> See Stephen Clingman *Bram Fischer: Afrikaner Revolutionary* (University of Massachusetts Press 1988); Stephen Ellman *In a Time of Trouble: Law and Liberty in South Africa’s State of Emergency* (Clarendon Press 1992); Richard L. Abel *Politics by Other Means: Law in the Struggle Against Apartheid 1980 - 1994* (Routledge 1995); Tembeka Ngcukaitoibi *The Land Is Ours: South Africa’s First Black Lawyers and the Birth of Constitutionalism* (Exclusive Books 2018)

<sup>34</sup> The Centre for Applied Legal Studies, and the Legal Resources Centre, established in 1978 and 1979 respectively, were perhaps the most important firms advancing this public interest litigation. See Jason Brickhill, ‘Introduction: The Past, Present and Promise of Public Interest Litigation in South Africa’ in Jason Brickhill (ed) *Public Interest Litigation in South Africa* (Juta 2018) 3.

<sup>35</sup> Ellman (n 33) 222.

<sup>36</sup> Dyzenhaus (n 5); AS Mathews, ‘The South African Judiciary and the Security System’ (1985) 1 *SAJHR* 199; Hoexter (n 19); John Dugard, ‘The Quest for a Liberal Democracy in South Africa’ (1987) *Acta Juridica* 237; Hugh Corder, ‘Crowbars and Cobwebs: Executive Autocracy and the Law in South Africa’ (1989) 5 *SAJHR* 1.

Whilst the capacity of these lawyers to restrain the actions of the apartheid state was limited by their minority status within the legal community, the presence of a constituency advocating for human rights protection within South Africa would be of profound significance to the transition to democracy. First, by showing law could be used in a rights-enforcing manner, the actions of this group arguably provided credence to the claim that law could be used to pursue legitimate ends.<sup>37</sup> Second, key participants in the constitution-drafting process and almost the full bench of the Constitutional Court during the first ten years of democracy came from this legal insurgency against apartheid positivism. Despite seldom securing decisive victories during the apartheid regime then, the presence of this marginal group proved instrumental to the development of South Africa's rights jurisprudence.

### III: The South African Bills of Rights

This chapter has so far explained the apartheid legal order which predominated prior to the constitutional dispensation. To understand how, out of this, rights protection became so important to the present constitutional order, I now examine the constitution-drafting process.

I do not attempt to comprehensively explain how the democratic transition came about.<sup>38</sup> Rather I provide an overview of the drafting of the Bill of Rights, and will summarise the key contents of the Bill of Rights, particularly its social rights provisions, and document the decision to institute a new apex Court. With this, I can commence my study of the South African Court's rights jurisprudence later in this chapter.

Briefly, after decades of state oppression and internal resistance, the imposition of sanctions and a change in command in the National Party, in the

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<sup>37</sup> However, there is also an argument that the actions of this group provided legitimacy and cover to the apartheid legal regime, by bestowing it with a veneer of fairness which was unwarranted. See Raymond Wacks, 'Judges and Injustice' (1984) 101 *SALJ* 266; John Dugard: 'Omar: Support for Wacks' Ideas on the Judicial Process' 3 (1987) *SAJHR* 295; Dyzenhaus (n 24).

<sup>38</sup> For one thing, as Ebrahim noted, 'there is little consensus about when negotiations [to transition from apartheid] began and who initiated them.' Hassen Ebrahim *The Soul of a Nation: Constitution-Making in South Africa* (OUP 1998) 30; See also Klug (n 6); Richard Spitz and Matthew Chaskalson *The Politics of Transition: A Hidden History of South Africa's Negotiated Settlement* (Hart 2000).

1980s the government began to contemplate transitioning from the existing apartheid regime. The two main negotiating parties to the transition to democracy were the National Party, and the largest liberation movement in South Africa, the African National Congress ('the ANC').

In the late 1980s, by distinct processes, both parties came to accept the propriety of judicial rights review.<sup>39</sup> For the ANC, a commitment to rights protection emerged from its internal Constitutional Committee in 1987, under the encouragement of Albie Sachs among others.<sup>40</sup> For the apartheid regime, 'as the country went into a spiral of economic decline and violent confrontation in the mid-1980s',<sup>41</sup> the South African Law Commission was established to inquire into the propriety of incorporating a Bill of Rights into the South African legal order, ultimately issuing a (limited) endorsement.<sup>42</sup>

When formal negotiations began in 1991 then, the main parties shared a commitment to instituting judicial rights review for the first time, if not agreement as to what rights protection would entail.<sup>43</sup> Whereas the National

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<sup>39</sup> As Klug noted, 'in mid-1985, less than ten years before the adoption of the 1993 Constitution, [...] both major political players in the South African context held positions that were inimical to even the notion of a bill of rights and judicial review.'<sup>39</sup> The National Party's resistance to rights has been noted above, whereas the ANC's aversion flowed both naturally from experience of oppression under the National Party's regime, and from a suspicion that a Bill of Rights would be used merely to lock in white advantage and prevent substantive social transformation. *Ibid*, 72.

<sup>40</sup> Albie Sachs *Protecting Rights in a new South Africa* (OUP 1990).

<sup>41</sup> Klug, (n 6) 84.

<sup>42</sup> Cockrell commenting on the National Party's move towards accepting a South African Bill of Rights wrote:

[i]t is difficult to resist the inference that its sudden conversion to the supposed virtues of a Bill of Rights was an explicit attempt to fetter the powers of a future legislature which would, for the first time in 45 years, not be dominated by the National Party. More to the point, the government's abrupt disillusionment with the doctrine of parliamentary sovereignty was predicated on the realisation that it would no longer be the National Party which would soon be pulling the political strings in the exercise of that sovereignty. For, of course, all those tired anti-Bill of Rights arguments which had been recited by government spokespersons a few years earlier remained in place; what had changed in the interim was the situation 'on the ground,' where popular resistance to apartheid could no longer be contained by state repression alone.

Alfred Cockrell, 'The South African Bill of Rights and the Duck/Rabbit' 60 (1997) *MLR* 513, 521; see also Martin Chanock, 'A Post-Calvinist Catechism or a Post-Communist Manifesto? Intersecting Narratives in the South African Bill of Rights Debate' in Phillip Alston (ed) *Promoting Human Rights Through Bills of Rights: Comparative Perspectives* (1999 OUP) 392.

<sup>43</sup> As Ackermann noted:

The two sides then created the Constitutional Court in the hope that their fine-sounding words would have enduring significance. By the 1990s, judicial review had come a long way since the 1940s, when the prevailing British and Continental consensus condemned it as an antidemocratic American novelty. Fifty years onward, successes in



Party proposed rights as a means of negative ‘protection of existing rights against future state action’<sup>44</sup> the ANC-proposed Bill of Rights ‘understood constitutionalism as a way both to enshrine rights and to direct state activity towards the achievement of popular aspirations.’<sup>45</sup>

The negotiated transition took place in two key stages. First, an Interim Constitution was drafted by the Multi-Party Negotiating Process (MPNP). This Constitution would ‘regulate government and society during the ‘transitional period’ which began immediately after the [first non-racial] election of 26 April to 28 April 1994, and was stipulated to be a five-year period of coalition government, ending with the first elections under a Final Constitution.’<sup>46</sup> Second, the parliament elected in the 1994 elections would operate as both legislature and Constituent Assembly, and draft the Final Constitution, thereby giving this later text a greater degree of democratic legitimacy than that of the former, which was drafted between parties not then able to contest elections and a government elected on a racial franchise.

The ANC initially ‘insisted that [the] ‘interim’ Constitution contain only those guarantees necessary to ensure an even political playing field,’ understanding that it would have a greater capacity to secure a rights regime of its preference during the drafting of the Final Constitution, as it expected (correctly) to be the largest party elected in the 1994 elections. However, the other parties to the process, observing that ‘once a formulation had been tabled and accepted in a particular way it was politically awkward to go back and change it’,<sup>47</sup> sought to ‘pre-empt the majoritarianism of an elected constitution-making

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places as different as India and Germany had made supreme courts seem an obvious component in a liberal democracy. But this time around, the legal team gave their new Constitutional Court a precedent-breaking mission.

Bruce Ackermann, *Revolutionary Constitutions: Charismatic Leadership and the Rule of Law* (HUP 2019) 97.

<sup>44</sup> Klug (n 6), 62.

<sup>45</sup> Ibid 91. As Albie Sachs, a key figure in the development of the ANC Bill of Rights wrote during the transition ‘What needs to be done is to turn the Bill of Rights concept from that of a negative, blocking instrument, which would have the effect of perpetuating the divisions and inequalities of apartheid society, into that of a positive, creative mechanism, which would encourage orderly progressive and rapid change.’ Sachs (n 40) 18.

<sup>46</sup> Spitz and Chaskalson (n 38) 3.

<sup>47</sup> Ibid, 260.

body by drafting a comprehensive Bill of Rights from the outset.<sup>48</sup> Thereby, the Interim Constitution ultimately included a Bill of Rights, including civil political rights to human dignity and non-discrimination, and limited social rights to children's healthcare,<sup>49</sup> and education.<sup>50</sup>

The rights provisions, as well as the rest of the content of the Interim Constitution could be rejected by the Constitutional Assembly elected from the first free elections in April 1994,<sup>51</sup> subject to a significant caveat. The Interim Constitution contained a list of 34 'Constitutional Principles' that were agreed to during the MPNP. These Principles ranged from ensuring a separation of powers<sup>52</sup> and the promotion of diverse languages<sup>53</sup> to the participation of minority political parties in the legislative process.<sup>54</sup> For present purposes, most relevantly, the Constitutional Principles included that:

Everyone shall enjoy all universally accepted fundamental rights, freedoms and civil liberties, which shall be provided for and protected by entrenched and justiciable provisions in the Constitution, which shall be drafted after having given due consideration to inter alia the fundamental rights contained in Chapter 3 of this Constitution.<sup>55</sup>

The drafting of the final Constitution by the elected assembly would be limited by the requirement that its provision conform to these 36 principles. It was agreed that conformity would be assessed by a newly created Constitutional Court. The MPNP had accepted that a new superior Court was necessary, given the attachment of the existing senior judiciary to the apartheid system that was being replaced.<sup>56</sup> The ANC conceded that six of the new appointees would

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<sup>48</sup> Ibid, 258.

<sup>49</sup> Constitution of the Republic of South Africa 1993, S30(1)(c).

<sup>50</sup> Constitution of the Republic of South Africa 1993, S32.

<sup>51</sup> As Hassim Ebrahim observed: 'When the People of South Africa voted [in April 1994] that voted to provide their newly elected leaders with two separate and distinct mandates: one, to govern a new democratic society, and two, to draft the final constitution. Ebrahim (n 38) 177.

<sup>52</sup> Constitution of the Republic of South Africa 1993, Constitutional Principle VI.

<sup>53</sup> Constitution of the Republic of South Africa 1993, Constitutional Principle XI.

<sup>54</sup> Constitution of the Republic of South Africa 1993, Constitutional Principle XIV.

<sup>55</sup> Constitution of the Republic of South Africa 1993, Constitutional Principle II.

<sup>56</sup> As de Vos and Freedman commented: it is difficult to imagine that the judiciary would have been entrusted with the enforcement of a supreme Constitution in the absence of a newly created Constitutional Court. The decision to create the Constitutional Court was therefore partly a pragmatic political move and partly a principled move aimed at increasing the

be from those nominated by a Judicial Services Committee, a newly created body dominated two-to-one by lawyers, with the remaining five chosen from the existing bench.<sup>57</sup>

As Roux observed of the eleven appointees, ‘all of the judges, with the possible exception of Ackermann had been adherents of the oppositional tradition’ within the legal community prior to democracy.<sup>58</sup> The reasoning was, by installing this group of human rights lawyers at the top of the legal hierarchy:

[t]he judiciary would be seen as embracing the new values of the constitutional order [and] in turn the Constitution Court, as the apex of the modernised judicial set-up could be perceived to be cleansing - from the top downwards - a judiciary compromised by its general failure to resist the enforcement of apartheid laws.<sup>59</sup>

Not only was judicial review instituted, but sweeping remedial powers were included,<sup>60</sup> which would later be expanded upon in the text of the Final

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legitimacy of the judiciary. Pierre de Vos and Warren Freedman (eds) *South African Constitutional Law in Context* (OUP 2014) 224.

<sup>57</sup> Ackermann, Corbett, Didcott, and Kriegler JJ and Mahomed CJ were the appointees that had been judges prior to the constitutional dispensation. Mahomed CJ was the first non-white judge of the Supreme Court of South Africa in 1991

<sup>58</sup> Theunis Roux, *The Politics of Principle: The First South African Constitutional Court 1995 - 2005* (CUP 2013) 230. At 230, Roux continued:

Some of them (Didcott, Kriegler, and Goldstone) had been among [the human rights tradition’s] leading exponents at the Bench, while others (Chaskalson, Langa, Madala, and Mahomed) had sustained the tradition through their practice at the Bar. Those who had been in legal academe (O’Regan, Sachs, and Mokgoro) had focused on human rights and labour law issues. In Sachs’ case, his commitment to human rights had resulted in his imprisonment, exile, and attempted assassination. The black judges, as one would expect, had all had first-hand experience of law’s instrumental deployment in the service of apartheid, but all had also committed themselves in their practices as lawyers to a nobler vision of law as a force for human emancipation and the advancement of social justice.

<sup>59</sup> Spitz and Chaskalson (n 38) 418. Nevertheless, as Ackermann noted,

It was crucially important for Mandela to reassure moderate whites that the Court would not be dominated by ANC party hacks. The President did a fine job in fulfilling these expectations he not only appointed distinguished jurists, like Arthur Chaskalson and Albie Sachs, who had given their lives to the movement. He also selected judges who, while sympathetic to the ANC, had spent their professional lives within the legal framework of the old regime.

Ackermann (n 43) 102.

<sup>60</sup> Constitution of the Republic of South Africa 1993, S98(2)(a) stated: The Constitutional Court shall have jurisdiction in the Republic as the court of final instance over all matters relating to the interpretation, protection and enforcement of the provisions of this Constitution, including any alleged violation or threatened violation of any fundamental right entrenched in Chapter 3.

Constitution.<sup>61</sup> Coming after a legal history firmly opposed to judicial review,<sup>62</sup> endowing such trust in a Court ‘fundamentally changed the place of the judiciary in South Africa’s constitutional and political order.’<sup>63</sup>

Whilst the content of the Interim Constitution would largely be replicated by the Constituent Assembly elected in 1994,<sup>64</sup> ‘one of the manifest differences between the Bill of Rights in the interim and 1996 Constitutions is the more comprehensive treatment of social and economic rights in the latter.’<sup>65</sup> While inclusion of such rights were - unsuccessfully - opposed politically,<sup>66</sup> academically,<sup>67</sup> and judicially,<sup>68</sup> the Final Constitution thus would contain South Africa’s guarantees of social rights for housing,<sup>69</sup> healthcare,<sup>70</sup> food and water,<sup>71</sup> social security,<sup>72</sup> education,<sup>73</sup> as well as specific children’s rights.<sup>74</sup>

Within these rights, three distinct groups emerge: ‘access rights’, ‘immediately realisable rights,’ and ‘express negative rights.’<sup>75</sup> Access rights, such as the right to adequate housing or healthcare,<sup>76</sup> oblige the state to take ‘reasonable legislative and other measures within its available resources’ to achieve their

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<sup>61</sup> Constitution of the Republic of South Africa 1996, S172(1): When deciding a constitutional matter within its power, a court—(a) must declare that any law or conduct that is inconsistent with the Constitution is invalid to the extent of its inconsistency; and (b) may make any order that is just and equitable, including— (i) an order limiting the retrospective effect of the declaration of invalidity; and (ii) an order suspending the declaration of invalidity for any period and on any conditions, to allow the competent authority to correct the defect.

<sup>62</sup> In perhaps the earthiest rebuke of judicial review, in the 19<sup>th</sup> Century President of the South African Republic Paul Kruger described judicial review as ‘a principle of the devil.’ Heinz Klug, ‘Introducing the Devil: An Institutional Analysis of the Power of Constitutional Review’ (1997) 13 *SAJHR* 185.

<sup>63</sup> Klug (n 6) 139.

<sup>64</sup> ‘One sees very few examples of a substantial departure from the Interim Constitution.’ Spitz and Chaskalson (n 38) 422.

<sup>65</sup> GE Devinish *A Commentary on the South African Constitution* (Butterworths 1998) 72.

<sup>66</sup> Bertus de Villiers, ‘Social and Economic Rights’ in Dawid van Wyk, John Dugard, Bertus de Villiers, Dennis Davis (eds) *Rights and Constitutionalism: The New South African Legal Order* (Clarendon Press: 1995) 599, 599.

<sup>67</sup> Denis Davis, ‘The Case Against the Inclusion of Socioeconomic Demands in a Bill of Rights Except as Directive Principles’ (1992) 8 *SAJHR* 475.

<sup>68</sup> *Certification of the Constitution of the Republic of South Africa 1996* [1996] ZACC 26.

<sup>69</sup> Constitution of the Republic of South Africa 1996, S26.

<sup>70</sup> Constitution of the Republic of South Africa 1996, S27(a).

<sup>71</sup> Constitution of the Republic of South Africa 1996, S27(b).

<sup>72</sup> Constitution of the Republic of South Africa 1996, S27(c).

<sup>73</sup> Constitution of the Republic of South Africa 1996, S30.

<sup>74</sup> Constitution of the Republic of South Africa 1996, S28. Notably, the Irish approach of mostly including social guarantees within Directive Principles was considered in the constitution-making process, before being discarded in favour of justiciable social rights. See Davis (n 67)

<sup>75</sup> de Vos and Freedman (n 56) 668.

<sup>76</sup> Also the rights to access sufficient food and water, and to social security.

progressive realisation. In contrast, the ‘immediately realisable’ rights to education and a child’s right to nutrition and shelter,<sup>77</sup> are not subject to internal limitations, and thus *prima facie* impose immediate obligations upon the State. Finally, ‘express negative rights’ prohibit certain conduct such as arbitrary evictions,<sup>78</sup> or the refusal of emergency medical treatment,<sup>79</sup> rights which are not subject to any qualifications and which are enforceable by imposing exclusively negative duties on the state.

As well as the history of intentional resource deprivation under apartheid,<sup>80</sup> these rights provisions were also directly inspired by international law, particularly the text of the International Covenant of Economic Social and Cultural Rights.<sup>81</sup> Further to this, the Constitution’s rights interpretation clause stated that while the Court ‘may consider foreign law’<sup>82</sup> it ‘must consider international law’ in all rights adjudication.<sup>83</sup> However, in the ICESCR text, the positive rights to housing and healthcare are not internally limited to being rights to *access* these goods, as they are within the Final Constitution - a difference which would prove significant to the relevance of this text within the Court’s jurisprudence.<sup>84</sup>

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<sup>77</sup> But not further education, which is an access right.

<sup>78</sup> Constitution of the Republic of South Africa 1996, S26(3).

<sup>79</sup> Constitution of the Republic of South Africa 1996, S27(3).

<sup>80</sup> As Sunstein noted, The argument [over including social rights] was won by those in favour of including socio-economic rights, primarily because the majority of the people involved in the debate, indeed the majority of South Africans, recognised apartheid’s legacy of gross material inequality, thus making ‘the argument for socio-economic rights irresistible, in large part because [they] seemed an indispensable way of expressing a commitment to overcome the legacy of apartheid. Cass Sunstein *Designing Democracy: What Constitutions Do* (OUP 2001) 224.

<sup>81</sup> Hereinafter ‘the ICESCR’.

<sup>82</sup> Constitution of the Republic of South Africa 1996, S39(1)(c).

<sup>83</sup> Constitution of the Republic of South Africa 1996, S39(1)(b).

<sup>84</sup> ‘Sachs and Chaskalson both participated in the formulation of the ANC’s 1990 Draft Bill of Rights. They had chosen at that time to follow the wording of the ICESCR quite closely, apparently thinking that the international law model provided the best guide to the future constitutional court’s role. The Technical Committee advising the Constitutional Assembly on the drafting of the 1996 Constitution had taken the same view. At some point, however, subtle changes had been introduced to the wording of ss 26 and 27, glossing the rights in such a way as to cast doubt on the legal credibility of the minimum, core approach and to adopt something like [a] rational justification approach instead. Roux (n 58) 286. See also Sandra Liebenberg, ‘The Interpretation of Socioeconomic Rights’ in Matthew Chaskalson, Janet Kentridge, Jonathan Klaaren, and Sandra Liebenberg (eds) *Constitutional Law of South Africa* (2<sup>nd</sup> edn. Juta 2003) 33-3, - 33-4.

More so than the Constitution of Ireland, the South African constitutional texts tie rights protection to a vision of societal transformation *towards* a rights-conscious social order.<sup>85</sup> The impetus to reorient the legal order away from its racist past towards an egalitarian ethic caused a greater emphasis within the text on transformation. Alongside the social rights provisions, in the Final Constitution's first section, the new constitutional order's foundation is declared to be, *inter alia*: 'Human dignity,<sup>86</sup> the achievement of equality and the advancement of human rights and freedoms' the 'supremacy of the Constitution and the rule of law.'<sup>87</sup> In this, in both the Interim<sup>88</sup> and Final Constitutions, rights protection was expressly linked to a transformative agenda of creating a 'new South Africa.'<sup>89</sup> As I will show, this emphasis would substantively inform the South African judiciary's understanding of their role within the constitutional order.

The Bill of Rights is asserted to be 'a cornerstone of democracy in South Africa,' and the state is obliged to 'respect, protect, promote, and fulfil the rights contained within.'<sup>90</sup> In this, positive duties to promote, respect and fulfil are expressly imposed upon all the rights within the Constitution, alongside negative obligations to protect the existence of rights, thereby doing away with the conventional distinction frequently maintained between civil and social rights on remedial grounds, which has proven so vexing in Ireland, despite having less remedial instruction within the text of the Constitution of Ireland.

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<sup>85</sup> Karl Klare, 'Legal Culture and Transformative Constitutionalism' (1998) 13 *SAJHR* 146.

<sup>86</sup> As Klug observed of this particular value: 'There are no less than five specific references to human dignity in the 1996 Constitution. Klug (n 6) 128

<sup>87</sup> Constitution of the Republic of South Africa 1996 S1(a) - (b).

<sup>88</sup> Constitution of the Republic of South Africa 1993: National Unity and Reconciliation: The Interim Constitution described itself as:

a historic bridge between the past of a deeply divided society characterised by strife, conflict, untold suffering and injustice, and a future founded on the recognition of human rights, democracy and peaceful co-existence and development opportunities for all South Africans, irrespective of colour, race, class, belief or sex.

See also Etienne Mureinik, 'A Bridge to Where - Introducing the Interim Bill of Rights' 10 (1994) *SAJHR* 31; *Executive Council of the Western Cape Legislature v President of the Republic of South Africa* [1995] ZACC 8 [37],

<sup>89</sup> Constitution of the Republic of South Africa 1996 Preamble affirms the Constitution is to 'heal the divisions of the past and establish a society based on democratic values, social justice and fundamental human rights.'

<sup>90</sup> Constitution of the Republic of South Africa 1996 S7(1) - (2). See also Henry Shue, *Basic Rights* (Princeton University Press 1980).

By this process, ‘on 11 October 1996, two and a half years after the end of apartheid, South Africa adopted a Constitution that gave the eleven judges of the country’s Constitutional Court the duty to strike down any ‘law or conduct’ they found to be inconsistent with the new supreme law.<sup>91</sup> This amounted to an immense shift in the constitutional structure of South Africa, from one founded upon parliamentary supremacy and the subjugation of non-white South Africans in order to advance white minoritarianism, to one founded on a constitution drafted by representatives of the whole population elected on a universal franchise, declaring the dignity of every individual, and imposing sweeping powers of judicial review upon the elected branches.<sup>92</sup> Under the influence of the ANC, this Constitution contained a basket of social rights, marking a constitutional commitment by the new state to overcome the vast inequalities and racialised resource deprivation that had defined the South African state system to this point, making it a world leader in constitutional enumeration of such rights.

As rhetorically and politically momentous as this transition was, it did little to immediately change the composition of the legal community. As Corder noted, below the Constitutional Court ‘all judges serving at the time of the adoption of the new dispensation in 1994 were entitled to continue in office - and all of them did so.’<sup>93</sup> Now they were expected to adapt to this new constitutional order with its expanded judicial power.

Given the inheritance of a conservative and racially untransformed legal community upon democratisation, there would be reasonable grounds to be sceptical as to the prospects of a culture of strong judicial rights protection - not least social rights protection - developing within South Africa. Nevertheless, such a culture has developed. To understand how this occurred,

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<sup>91</sup> Roux (n 58) 1. Constitution of the Republic of South Africa 1996, S172(1)(a).

<sup>92</sup> As Langa J pronounced in an early case:

The difference between the past and the present is that individual freedom and security no longer fall to be protected solely through the vehicle of common law maxims and presumptions which may be altered or repealed by statute, but are now protected by entrenched constitutional provisions which neither the legislature nor the executive may abridge.

*Coetzee v Government of the Republic of South Africa* [1995] ZACC 7 [35].

<sup>93</sup> Hugh Corder, ‘Judicial Policy in a Transforming Constitution’ in John Morison, Kieran McEvoy and Gordon Anthony (eds) *Judges, Transition, and Human Rights* (OUP 2007) 91, 93.

the crucial cases in the development of the judiciary's power of rights protection, its remedial discretion and its social rights adjudication is reviewed, and explanations as to why the judiciary reasoned these cases in the manner it are canvassed. By this, a greater understanding of how judicial protection of social rights developed within South Africa will be provided, from which possible lessons may be learned for other common law systems with legal communities resistant to substantive engagement with such rights.

#### IV: The Development of Judicial Rights Review in South Africa

To understand how South Africa developed rights, including social rights, protection:

It is necessary to focus on the judiciary's early exercise of the power of constitutional or judicial review, and particularly on those first cases when the Court [struck] down the actions of the highest-democratically elected bodies [...] as the successful emergence of the power of constitutional review in relation to other competing political institutions is a prerequisite and source of strength for the protection of constitutional rights.<sup>94</sup>

The general cultural resistance to judicial review upon the transition to democracy made it unlikely that rights protection would promptly develop. However, in a series of significant early cases, the Court arrogated to itself considerable capacity to adjudicate on constitutional issues, most notably rights cases. This is in noted contrast to the early period of rights jurisprudence in Ireland, where the preponderance of conservative jurists from the preceding legal tradition after independence inhibited the development of substantive judicial rights review.<sup>95</sup>

In the rest of this chapter, I will discuss the three main cases from the first three years of constitutional democracy in which the Constitutional Court

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<sup>94</sup> Klug (n 62) 187.

<sup>95</sup> See Chapter Three of this doctorate.



asserted their authoritative position as arbiters of constitutional rights disputes. Partially resulting from the shorter time frame of constitutional democracy in South Africa compared to Ireland, there appear to be only two discernible waves within the Court's reasoning. The first, spanning the first decade of constitutional democracy, is characterised by general comity between the judicial and elected branches. In this period, the South African judiciary innovated a strong role for itself within the constitutional order. This enabled judicial rights review to be sustained in the second wave, discussed in the next chapters, commencing roughly with the rising to power of Jacob Zuma, during which the judiciary have developed a more antagonistic relationship with the governing ANC.

#### IV(A): *S v Makwanyane*

Unlike the Irish Supreme Court, the first bench of the Constitutional Court of South Africa did not delay in asserting its competence over areas of considerable social controversy. In *S v Makwanyane*, its second ever case, the Constitutional Court engaged with the deeply contentious issue of the propriety of the death penalty, declaring it unconstitutional.<sup>96</sup> Whilst all eleven members of the bench contributed a judgment, all concurred with Chaskalson P's opinion that a constitutional order founded on the value of life and individual human dignity could not tolerate active state extinguishment of human life.<sup>97</sup>

Chaskalson P et al cited extensively from comparative death penalty jurisprudence to support their pronouncement that it is incompatible with the new rights-based constitutional order.<sup>98</sup> Alongside this, the concept of *ubuntu* - the African value of togetherness and of seeing the value of the individual through their relationship to society - referred to in the epilogue to the Interim

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<sup>96</sup> *S v Makwanyane* [1995] ZACC 3. [hereinafter '*Makwanyane*'].

<sup>97</sup> Per Chaskalson P: 'The rights to life and dignity are the most important of all human rights, and the source of all other personal rights in Chapter Three. By committing ourselves to a society founded on the recognition of human rights we are required to value these two rights above all others. And this must be demonstrated by the State in everything that it does including in the way it punishes criminals.' [1995] ZACC 3 [144].

<sup>98</sup> The jurisprudence of the USA, [1995] ZACC 3 [40] - [42], European Court of Human Rights [1995] ZACC 3 [63] - [69], India [1995] ZACC 3 [70] - [79], Canada [1995] ZACC 3 [60] - [62], [105] - [107], Hungary [1995] ZACC 3 [38] and Tanzania [1995] ZACC 3 [113] - [115] were considered by the Court.

Constitution, is repeatedly cited<sup>99</sup> ‘to associate the constitutional value system with a set of ideas whose incompatibility with the death penalty the Court could simply assert.’<sup>100</sup>

Roux has suggested that ‘the normative superiority of the constitutional value system is *the* central premise of [this] judgment.’<sup>101</sup> The judgments largely sought to explain the unconstitutionality of the death penalty by association, with ‘the *content* of the value system either taken to be obvious or asserted without argument.’<sup>102</sup> Whilst thereby thin on discussion of what in the new constitution substantively prohibited capital punishment, in this judgment the judiciary confidently asserted their own authority to resolve such questions. Chaskalson P expressly rejected the relevance of popular sentiment, declaring how ‘the Court must not shrink from this task [of judicial review] otherwise we shall be back to parliamentary sovereignty’ with its attendant connotations of rights abuse.<sup>103</sup> This judgment was given notwithstanding, as Daniels and Brickhill have noted, ‘there was no express constitutional requirement that the court determine the issue [and thus] the public was therefore entitled to input.’<sup>104</sup> In this, the Court demonstrated an early eagerness to engage in judicial rights review, even over matters of profound political controversy, and a willingness to issue judgments contrary to overwhelming popular opinion.

As Roux acutely observed:

[T]he Court’s unanimous decision to strike down the death penalty provided an early indication of its institutional self-confidence. Here was

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<sup>99</sup> Per Langa J, ‘[ubuntu] is a culture which places some emphasis on communality and on the interdependence of the members of a community. It recognises a person’s status as a human being, entitled to unconditional respect, dignity, value and acceptance from the members of the community such person happens to be part of. It also entails the converse, however. The person has a corresponding duty to give the same respect, dignity, value and acceptance to each member of that community. More importantly, it regulates the exercise of rights by the emphasis it lays on sharing and co-responsibility and the mutual enjoyment of rights by all. [1995] ZACC 3, [224]. See also [1995] ZACC 3 [131], [223]-[228], [237] [241] - [245], [250], [307] - [313]. Rosalind English, ‘Ubuntu: The Quest for an Indigenous Jurisprudence’ (1996) 12 *SAJHR* 641.

<sup>100</sup> Roux (n 58) 248.

<sup>101</sup> *Ibid* 245.

<sup>102</sup> *Ibid* 245.

<sup>103</sup> [1995] ZACC 3, [22].

<sup>104</sup> Reynaud N Daniels and Jason Brickhill, ‘The Counter-Majoritarian Difficulty and the South African Constitutional Court’ (2006) 25(2) *Penn State International Law Review* 371, 398.

a Court, everyone agreed, that was certain enough about its mandate to settle a controversial policy question that the constitutional negotiators had been unable to settle and which South Africans as a whole seemed to want to settle in a different way.<sup>105</sup>

Without disputing the moral significance of its decision, the institutional significance of the judgment is of particular importance to the development of judicial rights review. This early judgment signified the emergence of a confident Court, willing to engage in substantive moral reasoning as to the rightness of governmental action. Further, in the government's acquiescence to the court order, this judgment also signalled an acceptance by the other branches of government of the propriety of the judiciary exercising this oversight function.<sup>106</sup>

#### IV(B): *Executive Council, Western Cape v President of the Republic of South Africa*

Shortly after *Makwanyane*, the Constitutional Court again effectively expanded the powers of the judicial branch within the constitutional order. Whereas in *Makwanyane*, the Court struck down an apartheid-era law unpopular within the governing ANC, in *Executive Council, Western Cape v President of the Republic of South Africa*, a proclamation of President Mandela found to encroach upon the constitutionally-devolved powers of Western Cape - a Province still governed by the National Party - was declared unconstitutional.<sup>107</sup>

Unlike with *Makwanyane*, this was not a rights case. However, also unlike *Makwanyane*, it declared unconstitutional legislation passed after the constitutional dispensation. With this, per Klug, 'The Constitutional Court had, for the first time struck down intensely politicised legislation passed by a

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<sup>105</sup> Roux (n 58) 33.

<sup>106</sup> 'Despite what might have been general public support of the death penalty, here the Court was, as a new post-apartheid institution, striking down the practice of the old regime, a practice which had been laden with racial disparity and seen as a tool used against those who fought against apartheid.' Heinz Klug, *Constituting Democracy: Law, Globalism and South Africa's Political Reconstruction* (CUP 2000) 147.

<sup>107</sup> *Executive Council of the Western Cape Legislature v President of the Republic of South Africa* [1995] ZACC 8. [hereinafter '*Executive Council, Western Cape*']

democratically elected Parliament and a highly popular President.’<sup>108</sup> By upholding the ‘the anti-democratic designs of the former apartheid ruling party in the Western Cape’ against the actions of the first freely-elected President in South African history, the Court potentially risked harming its adjudicative capacity by losing the political support necessary to ensure effective compliance with its orders.<sup>109</sup> However, as Cameron and Taylor observed:

Mandela responded magnanimously. He announced on television that he fully accepted the ruling, in line with the Constitution and the rule of law. He turned his defeat into a lesson in civic responsibility and obeisance to the rule of law. It was an unforgettable moment in the building of democracy.<sup>110</sup>

Here again, independent of the merits of the reasoning, by the President assenting to the decision of the Court, the practical power of the Court to referee the separation of powers between the two elected branches, and more relevantly its legitimacy to invalidate popular legislation, was increased substantially. This is comparable to the enabling of judicial review to develop by De Valera acquiescing to the judgment in *State (Burke) v Lennon*.<sup>111</sup> By this, the capacity of the Court to provide a robust rights protection function against state action was furthered.

#### IV(C): The First Certification Case

The most significant judgment for the creation of robust judicial review in South Africa, perhaps the most important decision in the history of the Constitutional Court, is the certification of the Constitution drafted by the Constituent Assembly elected in 1994.<sup>112</sup> In this case, the Constitutional Court

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<sup>108</sup> Klug (n 106) 150.

<sup>109</sup> Ibid 153.

<sup>110</sup> Edwin Cameron and Max Taylor, ‘The Untapped Potential of the Mandela Constitution’ (2017) *Public Law* 382, 390.

<sup>111</sup> *The State (Burke) v Lennon* [1940] IR 136.

<sup>112</sup> *Ex parte Chairperson of the Constitutional Assembly: In re Certification of the Constitution of the Republic of South Africa, 1996* [1996] ZACC 26. [hereinafter the ‘First Certification’ case]. As Chaskalson and Davis noted, in this ‘the Constitutional Court was presented with a task for which there was no judicial precedent in South African or comparative law.’ Matthew Chaskalson and Dennis Davis, ‘Constitutionalism, the Rule of Law, and the *First Certification* Judgment: *Ex parte Chairperson of the Constitutional Assembly in Re: Certification of the Constitution of the Republic of South Africa 1996* 1996 (4) SA 744 (CC)’ (1997) 13 *SAJHR* 430,

were tasked with certifying whether the Final Constitution was compliant with the Constitutional Principles included in the Interim Constitution.

In the *First Certification* case, remarkably, the Court refused to certify the draft constitution. Klug has correctly noted how ‘this was an extraordinary display of the power of judicial review, given that 86% of the democratically elected Constitutional Assembly had adopted the text, after last minute political compromises.’<sup>113</sup>

The grounds on which certification was rejected largely related to ensuring an appropriate balance between executive, local, and provincial government, and are not particularly germane to this doctorate.<sup>114</sup> Throughout its judgment, the Court stressed ‘it has a judicial and not a political mandate’ in making these findings, thereby maintaining a veneer of pragmatically useful if unconvincing impartiality over its decertification decision.<sup>115</sup> However, the very fact that the Court felt sufficiently empowered that it find against the Constituent Assembly is noteworthy. This reflected, per Chaskalson and Davis, ‘not only the institutional confidence gained by the Constitutional Court in its first eighteen months of operation, but also the degree to which constitutionalism and the rule of law had become accepted as part of the South African political landscape by the end of 1996.’<sup>116</sup>

As the constitutional stakes in this case were even greater than in *Makwanyane* or *Executive Council, Western Cape*, it is particularly noteworthy that ‘none of the political parties questioned the legitimacy either of the certification process itself, or of the particular decisions taken by the Constitutional Court in that process.’<sup>117</sup> The reservations of the Court were taken on board and, in

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430. See also Siri Gloppen, *South Africa: The Battle over the Constitution* (Ashgate 1997) 211 - 212.

<sup>113</sup> Klug (n 7) 93.

<sup>114</sup> However, Klug suggested that given these grounds for refusing certification, ‘the significance of the *Certification* judgment thus lies in the degree to which the Constitutional Court was able to assert itself as the protector of constitutional democracy. Ibid, 245.

<sup>115</sup> [1996] ZACC 26 [27]

<sup>116</sup> Chaskalson and Davis, (n 112) 445.

<sup>117</sup> Ibid.

the *Second Certification* case, the amended text was certified without complication.<sup>118</sup>

Thus, by the time the Final Constitution came into operation, the Constitutional Court had asserted a vital role for itself within the emerging constitutional order. In enforcing compliance with the Bill of Rights, even on behalf of unpopular constituencies such as death row inmates, by intervening in a legislative-executive dispute and finding against the more powerful party in favour of the interests of the National Party, and by rejecting the constitution-making efforts of the Constitutional Assembly, the Court demonstrated a willingness to expand into the space the new constitutional order created. And just as importantly, the elected branches - the first in South African history to be elected on a universal franchise - by accepting the dictates of the unelected Constitutional Court in these cases, enabled further acts of judicial assertiveness over their conduct to occur.

After these formative cases, in the first wave the Court extended its remit considerably. Over the coming years, the South African Constitutional Court would secure its position as authoritative interpreter of the Constitution and guardian of the Bill of Rights in a series of landmark cases, concerning issues as controversial as drug policy,<sup>119</sup> the criminalisation of sex work,<sup>120</sup> primogeniture in customary law,<sup>121</sup> and LGBT equality,<sup>122</sup> including the legalisation of same

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<sup>118</sup> *Ex parte Chairperson of the Constitutional Assembly: Certification of the Amended Text of the Constitution of the Republic of South Africa, 1996* [1996] ZACC 24. [hereinafter the ‘*Second Certification*’ case] As Daniels and Brickhill wrote:

The certification judgment raised no objection. The losers, the ANC, remained capable of guiding the debate at the Constitutional Assembly. The opposition parties were pleased with the second chance to negotiate the text. The public understood that the court was merely playing a necessary political role and viewed the decision as credible. Following the judgment, the text was amended by the Constitutional Assembly with little difficulty and resubmitted to the Constitutional Court, who heard the matter and certified the amended text as compliant with the CPs. Thereafter, the amended text was signed into law and became the final constitution.’

Daniels and Brickhill (n 104) 384.

<sup>119</sup> *Prince v President of the Law Society of the Cape of Good Hope* [2002] ZACC 1.

<sup>120</sup> *S v Jordan* [2002] ZACC 22.

<sup>121</sup> *Bhe v Magistrate, Khayelitsha* [2004] ZACC 17.

<sup>122</sup> *National Coalition of Gay and Lesbian Equality v Minister of Justice* [1998] ZACC 15; *National Coalition for Gay and Lesbian Equality v Minister of Home Affairs* [1999] ZACC 17; *Satchwell v President of the Republic of South Africa* [2002] ZACC 18; *Du Toit v Minister of Welfare and Population Development* [2002] ZACC 20.

sex marriage.<sup>123</sup> Rights obligations were found to bind private parties as well as the state,<sup>124</sup> and the Court broadened the limits of its rights protecting function by expanding the list of ground on which discrimination would be unlawful.<sup>125</sup> Areas formerly walled off from judicial oversight, such as the Presidential power of pardon, were adjudicated upon,<sup>126</sup> and as will be seen in Chapter Eleven, in this period the Court also began to engage with the social rights provisions of the Bill of Rights, often beyond what was necessary to resolve the cases at hand.

## V: What Factors Conditioned the Court's Development of Judicial Rights Protection ?

What the above shows is a profound shift in the judiciary's power that occurred in the first wave. How to make sense of this legal revolution? Through understanding how a common law system so rigidly adherent to formalism and parliamentary supremacy could develop a robust rights review capacity - and will be shown in the next chapters, remedial breadth and strong social rights - this will help us understand how other common law legal communities generate a willingness to develop domestic social rights protection.

### V(A): The Creation of the Constitutional Court

First, the legal revolution is incomprehensible without appreciating the impact of the constitution-makers decision to change the judiciary's expected function within the constitutional order. In this, the decision to both create a South African Constitutional Court *and* crucially to populate this Court with jurists drawn from the human rights legal counterculture was the most decisive factor in the emergence of the culture of judicial rights review in South Africa. However, this does not provide a full explanation for why rights adjudication developed. For this, a second dimension of inquiry must be investigated: that

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<sup>123</sup> *Minister of Home Affairs v Fourie* [2005] ZACC 15. An in-depth critical examination of these cases does would not add anything further to my analysis of the development of social rights protection in South Africa, so I will not discuss them further.

<sup>124</sup> *Du Plessis v De Klerk* [1996] ZACC 10.

<sup>125</sup> *Hoffman v South African Airways* [2000] ZACC 17.

<sup>126</sup> *President of the Republic of South Africa v Hugo* [1997] ZACC 4.

is, what factors influenced the judges of the Constitutional Court in their adjudication during this period.

The development of the Court's rights reasoning is explicable when three particularly strong influences upon the Constitutional Court during this period are considered. First, the importance of a conventional understanding within the bench that their job was to assist in the transformation of South African law and, latterly, society. Second, however, in this it must be appreciated how judicial commitment to this transformative agenda was conditioned by the influences of both comparative constitutional law and the common law judicial reasoning in which the members of the bench were accultured. And finally, the bench's understanding of its relationship with the ANC government in this period must be noted, as it is suggested that management of the Court's interactions with the ANC had an abiding impact on their deliberations during this period.

Influences upon the individual members who would compose the first bench of this Court would be of no significance at all were it not for the decision of the constitution-makers to install this Court within the new constitutional order. To understand what led to the development of a legal culture of rights adjudication in South Africa, the catalytic importance of establishing the Constitutional Court must be noted.

The Constitutional Court was created to shift South Africa from a regime of parliamentary supremacy to one that only permitted government power if it supported the rights of rights-bearers. It was believed that trusting the pre-existing judicial hierarchy to action this shift would be a foolhardy endeavour. Not only was this group delegitimated by association with apartheid, their cleavage to a conception of the judicial role as amoral statutory enforcers made them unadvisable adjudicators of rights disputes.<sup>127</sup>

To resolve this impediment, the new Constitutional Court would be composed not of members of the positivist legal hegemony, but instead by judges,

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<sup>127</sup> As de Vos and Freedman noted, 'When the new Constitution came into effect, the judiciary was still largely dominated by white men and tainted by its role in the interpretation and implementation of apartheid legislation.' de Vos and Freedman (n 56) 224.



lawyers, academics, even an ANC member, who firmly believed in the need to restrain parliamentary sovereignty to ensure the protection of individual rights.<sup>128</sup> This institutional decision by the drafters was one of the most consequential acts undertaken during the transition. By this, a formerly marginal and relatively weak strain of legal thought reached apex dominance within a largely white, conservative, rights-sceptical legal community.<sup>129</sup>

Placing at the top of the legal hierarchy a bench with ‘impeccable human rights credentials’, the general legal community’s sense of what constitutes a persuasive argument with a chance of success can be inflected, and pivoted towards a greater human rights consciousness.<sup>130</sup> Spitz and Chaskalson note this intention behind creating the Constitutional Court. By this:

the judiciary would be seen as embracing the new values of the constitutional order [and] in turn the Constitution Court, as the apex of the modernised judicial set-up, could be perceived to be cleansing - from the top downwards - a judiciary compromised by its general failure to resist the enforcement of apartheid laws.<sup>131</sup>

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<sup>128</sup> Writing during the transition in his capacity as a lawyer for the ANC, Albie Sachs cautioned: What would be particularly damaging would be for an almost exclusively ageing white male judiciary, born and bred in apartheid South Africa, to have the final word on the great social processes required to bring about the end of apartheid (and, one hopes, of gender oppression.) [...] Bearing in mind the extreme delicacy and importance of interpreting the new democratic Constitution, and the necessity of the judges involved enjoying the confidence of the whole community, serious thought should be given to the creation of a constitutional court consisting of persons of manifest integrity and wisdom, not all of whom need to have been practicing lawyers.

Sachs (n 40) 95.

<sup>129</sup> As Pierre de Vos and Warren Freedman noted, ‘when South Africa became a democracy in 1994, out of 166 judges, 161 were white men, two were white women, three were black men, and there were no black women at all.’ de Vos and Freedman (n 56) 207.

<sup>130</sup> Per Roux:

‘Most of the judges could thus be described as welfare liberals, with several holding deeply religious views that supported this political philosophy. Only Sachs could be described as a socialist, but this revolutionary idealism had been tempered somewhat by his experience in Mozambique. Sachs was also an outlier in terms of the level of his involvement in the struggle against apartheid. He was the only one of the judges who had been a high-ranking member of the ANC. The others had mostly lived out their opposition to apartheid through their practice as lawyers, although a few had been politically active in civil society organisations as well.’

Roux (n 58) 230.

<sup>131</sup> Spitz and Chaskalson (n 38) 418.

In a legal order built upon a common law commitment to *stare decisis*, this gave the members of this Court considerable power to direct the South African legal community. As Nicolson perceptively predicted prior to the institution of the Constitutional Court, ‘the principles laid down by the Constitutional Court would be constantly brought to the attention of all practising lawyers deciding what advice to give their clients and what arguments to raise in Court.’<sup>132</sup>

The creation of this Court, it bears remembering, was the only immediate change brought about within the judicial branch by the transition. As de Vos and Freedman wrote, ‘when South Africa became a democracy, no judges were relieved of their duties and the courts did not only retain their powers, but were given extended powers far exceeding those they have enjoyed under apartheid.’<sup>133</sup> The only change which came about was the integration of these eleven members as arbiters of constitutionality at the top of the legal structure.<sup>134</sup>

Without this handing over by the government of the primary role in adjudication to a group of individuals formerly maligned by a larger community committed to negating any rights-consciousness from legal reasoning, the remaining part of this inquiry would be otiose. Insofar as a culture of rights protection has emerged in South Africa, it is predictable that, were such a culture to have emerged at all within a legal order whose apex court was populated by members of the dominant positivist school, its development would have been much different and likely more deferential than that which did emerge.<sup>135</sup>

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<sup>132</sup> Donald Nicolson, ‘Ideology and the South African Judicial Process’ (1992) 8 *SAJHR* 50, 67.

<sup>133</sup> De Vos and Freedman (n 56) 224.

<sup>134</sup> However, ‘by late 2003, about one third of the 214 superior court judges were black (compared with one out of 164 judges 10 years earlier).’ Corder (n 93) 94.

<sup>135</sup> Theunis Roux has argued that, by sheer virtue of the incorporation of an entrenched Bill of Rights, ‘the only change *necessarily* entailed by the adoption of the post-apartheid Constitutions [...] was a rejection of the crude positivist view that had prevailed before 1994.’ Roux (n 58) 209. Given the long shadow cast by positivism and parliamentary supremacy upon the Irish constitutional order during the first half of the twentieth century, when the Irish judiciary remained populated overwhelmingly by members trained within the pre-constitutional tradition, the asserted necessity of this change seems doubtful. At the very least, that any change would be instantaneous upon transition were the apex roles within the legal order unchanged, seems open to question.

Whether or not such the legal revolution would have occurred without the ideological shift amongst the members of South Africa's apex court is unknowable. Certainly, the rights jurisprudence of the period under review would have been radically different were it led by jurists not as committed to the judicial protection of rights as the eleven individuals who were selected. Thus, to understand how South Africa developed into the rights regime described in this part of the doctorate, the hinge factor that was the preliminary decision of the constitution-makers to situate the members of the Chaskalson bench at the apex of the new constitutional order must be appreciated.

Flagging the importance of the decision to create this Court and fill the bench with such committed human rights lawyers, however, does not clarify why it was that the members of this bench reasoned as they did in this period. To explain this, the inquiry into how it was that a culture of rights protection took off must proceed to consider what jurisprudential factors influenced the members of this bench in their socioeconomic rights reasoning.

### V(B): Transformative Constitutionalism

Perhaps the most important explicit jurisprudential influence upon the Court's rights jurisprudence in this period came from an understanding amongst the members of the bench that the Court was constitutionally required to help actively transform South African law - and by explicit extension, society - *from* the racist oppression of apartheid *to* a non-racist, dignity-conscious future.<sup>136</sup> This manifested itself by both explicit rejections of apartheid legal thinking,<sup>137</sup>

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<sup>136</sup> This commitment to transformative constitutionalism can be seen in academic commentaries: Mureinik (n 88); Klare (n75); extrajudicial speeches Pius Langa, 'Transformative Constitutionalism' (2006) 17 *Stellenbosch Law Review* 351; Dikgang Moseneke, 'The Fourth Bram Fischer Memorial Lecture - Transformative Adjudication' (2002) 18 *SAJHR* 309; and case law [1995] ZACC 3, [1996] ZACC 26, [2000] ZACC 19. As Madala J expressed in the early case of *Du Plessis v de Klerk*: '[the Constitution] is a document that seeks to transform the *status quo ante* into a new order' *Du Plessis v De Klerk* [1996] ZACC 10 [157].

<sup>137</sup> See the judgment of Sachs J in *Port Elizabeth Municipality v Various Occupiers* [2004] ZACC 7 [33]

and by providing a justification for judicial activism, so as to overcome continued disadvantages caused by apartheid.<sup>138</sup>

The Court relied considerably upon the transformative rhetoric in the Interim and Final Constitutions noted in the previous chapter. It is by developing a strong rights regime founded upon a high evaluation of individual human dignity that the Court has most frequently understood its transformative commitments. As the Court held in *Dawood*, ‘the Constitution asserts dignity to contradict our past [...] it asserts it too to inform the future, to invest in our democracy respect for the intrinsic worth of all human beings.’<sup>139</sup> In this way, ‘the importance attached to the bold judicial defence of rights [...] arises in part from a sense that it was the failure of apartheid that led them to be complicit in apartheid’s injustices.’<sup>140</sup>

Resulting from a rejection of the apolitical, rights-resistant reasoning of the Courts under apartheid, members of the Court have, particularly extrajudicially, highlighted the influence that political and moral reasoning play in their adjudication.<sup>141</sup> In a similar way, the Court’s under-theorised understanding of what the separation of powers within the South African constitutional order looks like appears related to the dominance of transformative constitutionalism.<sup>142</sup> In particular, the history of rigid observance of the separation of powers, and thereby restraint in rights adjudication, likely cautioned the Court against prescribing the division of powers in any way that may limit the potential for rights adjudication.

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<sup>138</sup> Per Mahomed DP: ‘The Constitution [...] retains from the past only what is defensible and represents a radical break from that part of the past that is unacceptable.’ *Shabalala v Attorney General of the Transvaal* 1996 (1) SA 725 [26] Consider also in this regard the reasons for Chaskalson P’s refusal to consider public opinion in *Makwanyane*. [1995] ZACC 3 [22].

<sup>139</sup> *Dawood v Minister of Home Affairs* 2000 (3) SA 936 (CC) [35].

<sup>140</sup> James Fowkes, *Building the Constitution: The Practice of Constitutional Interpretation in Post-Apartheid South Africa* (CUP 2016) 55.

<sup>141</sup> Per Moseneke DCJ, ‘Transformative constitutionalism also openly admits to the political nature of judicial decision-making.’ Moseneke (n 136) 317. Per Langa CJ, ‘there is no longer place for assertions that the law can be kept isolated from politics. While they are not the same, they are inherently and necessarily linked.’ Langa (n 136) 353.

<sup>142</sup> ‘A distinctly South African model of separation of powers should be developed’ *S v Dodo* [2001] ZACC 16 [15]; Timothy Fish Hodgson, ‘The Mysteriously Appearing and Disappearing Doctrine of Separation of Powers: Toward a Distinctly South African Doctrine for a more Radically Transformative Constitution’ (2018) 34 *SAJHR* 57.

By this, an internalisation of a transformative agenda by the Court provided both legitimation for rejecting constitutional structures that restricted adjudication prior to the constitutional dispensation and a justification for positively developing an expansive understanding of rights protection function. In this, it has both legitimated expansions of the Court's power in cases such as *Makwanyane*,<sup>143</sup> and cases such as *Grootboom*<sup>144</sup> and *Jaftha*,<sup>145</sup> considered later, and delegitimated objections to these expansions of the judicial power. This jurisprudential cleavage has provided the dominant motivational force behind the Court's rights revolution in this period.

Noting the dominance of this commitment to transformation, however, begs the question why it was that members of the Constitutional Court were so enamoured with this conception of their role. The answer appears to lie in their commitment to human rights which led to their appointment to the bench in the first place. The members of the Court were chosen due to their desire to cultivate within the South African legal system a robust rights regime.<sup>146</sup> This transformative agenda presupposed and explained their elevation to the bench and guided their adjudication upon ascension.

The influence of transformative constitutionalism alone does not explain the Court's reasoning in this period. A further dominant factor that conditioned the Court's reasoning was the complex institutional relationship of the Court to the

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<sup>143</sup> Per Langa J, 'When the Constitution was enacted, it signaled a dramatic change in the system of governance from one based on rule by parliament to a constitutional state in which the rights of individuals are guaranteed by the Constitution. It also signaled a new dispensation, as it were, where rule by force would be replaced by democratic principles and a governmental system based on the precepts of equality and freedom. [1995] ZACC 3, [220].

<sup>144</sup> *Government of the Republic of South Africa v Grootboom* [2000] ZACC 19 [6].

<sup>145</sup> Per Mokgoro J, 'Section 26 must be seen as making that decisive break from the past. It emphasises the importance of adequate housing and in particular security of tenure in our new constitutional democracy. The indignity suffered as a result of evictions from homes, forced removals and the relocation to land often wholly inadequate for housing needs has to be replaced with a system in which the state must strive to provide access to adequate housing for all and, where that exists, refrain from permitting people to be removed unless it can be justified. *Jaftha v Schoeman* [2004] ZACC 25 [29].

<sup>146</sup> 'In the Court's 'first generation', its judges served terms with compulsory twelve-year limits and delivered careful and almost unanimous judgments in the building of an expected 'homegrown' jurisprudence. This first generation, led by its first President Arthur Chaskalson, was appointed from a pool of lawyers, judges, and legal academics whose (often internationally renowned) reputations were associated with the struggle against apartheid. This generation is held in high regard by the public, and even its unpopular decisions were readily followed and enforced.'

Katherine G. Young *Constituting Economic and Social Rights* (OUP 2012) 181 - 182.

ANC government. Whilst upon first glance, the Court's decisions in cases such as the *First Certification* judgment appear reflective of a Court willing to make radically antagonistic judgments against the ANC, upon further inspection the Court appears in this period to have carefully exercised its power in such a way as to effectively avoid a direct confrontation with the ANC.

### V(C): The Court's Relationship with the ANC

Initially, during the period when the Interim Constitution was in force, the ANC had a vested interest in appearing cordial with the Court. The Constitutional Assembly was drafting the Final Constitution, and the commitment of the ANC to protecting minority interests and following prescribed constitutional standards increased the attractiveness of the party to possible dissentient groups within the negotiation process. It was in these early years that the Court struck down the death penalty,<sup>147</sup> an Act of the President,<sup>148</sup> and ultimately the first draft of the Final Constitution.<sup>149</sup> Thus, 'it was able to assert its constitutionally assigned role immediately and effectively, without triggering any significant political attack.'<sup>150</sup> This was needed as, early on, understandably given the legal system which preceded the transition to democracy and establishment of the Constitutional Court, the bench lacked popular support.<sup>151</sup> The absence of this support left the Court's judgments vulnerable to challenge unless the Court could remain onside with the ANC, ostensibly the elected representatives of the people.

If an overly court-centric conception of South African constitutionalism is taken that does not acknowledge the ballast the ANC played against popular challenges to the Court's authority, our understanding of the conditions under

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<sup>147</sup> [1995] ZACC 3. In *Makwanyane* 'the Court could strongly and publicly emphasise the most critical premise of constitutionalism by asserting the Constitution as supreme over majoritarian politics, while actually strongly respecting the interests of the majority party.' Fowkes (n 140) 14 - 15.

<sup>148</sup> [1995] ZACC 9. Per Roux: 'If the death penalty case showed that the Chaskalson Court had the institutional self-confidence to settle a controversial policy question, the local government transition case showed that the ANC might be prepared to allow the court to perform this role.' Roux (n 58) 34.

<sup>149</sup> [1996] ZACC 26.

<sup>150</sup> Roux (n 58) 283.

<sup>151</sup> James Gibson and Gregory Caldeira, 'Defenders of Democracy? Legitimacy, Popular Acceptance and the South African Constitutional Court' (2003) 65(1) *The Journal of Politics* 1

which the Court's rights jurisprudence developed in this period is impoverished. By understanding the relationship, the cases in which the Court did not exercise its counter-majoritarian prerogative as maximally as it did in *Makwanyane* become explicable *not* as regrettable retrenchments from judicial activism, but rather as consistent with a Court conscious of cultivating its authority by staying on the right side of the ANC.<sup>152</sup>

Whilst the approval of the Court would remain advantageous to the ANC, upon certification of the Final Constitution, the political cachet of the Court's support diminished, and with it the guarantee of stable support the Court could expect from the ANC.<sup>153</sup> Nevertheless, as Ackermann noted, 'Once the ANC had won an overwhelming electoral victory, its political leaders were happy to enlist the Court's aid in filling out the ANC's revolutionary egalitarian principles in particularly controversial cases.'<sup>154</sup> As will be discussed in the next chapters in regards the Court's social rights jurisprudence and expansion of remedial capacity, in this period the Court remained largely onside with the ANC Government, roughly until after the rise to power of Jacob Zuma.

Through considering the impact of these factors, the South African legal revolution can be better understood. The members of the bench were intentionally chosen for their commitment to human rights, so as to encourage the transformation of the legal system away from positivism and towards rights protection. Similarly, the members of the bench acted with intention in developing a transformative jurisprudence.

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<sup>152</sup> Fowkes (n 140).

<sup>153</sup> Perhaps the most notable example of executive-judicial comity under the Final Constitution was the appearance by President Mandela before the High Court in *President of the Republic of South Africa v South African Rugby Football Union* [1999] ZACC 11. As Dikgang Moseneke, writing extrajudicially, noted:

Mr Mandela explained that his act was symbolic and important because it underscored the rule of law and the principle that all are equal before the law. He also explained that it is the Constitution that requires of all of us to obey, respect and support courts, not because judges are important or entitled to some special deference but because the institution they serve in has been chosen by us collectively, in order to protect the very vital interests of all and in particular of those who are likely to fall foul of wielders of public or private power.

Dikgang Moseneke, 'Oliver Schreiner Memorial Lecture: Separation of Powers, Democratic Ethos and Judicial Function' (2008) 24 *SAJHR* 341, 352.

<sup>154</sup> Ackermann (n 43) 103.

The Court's jurisprudence, informed by these influences, nevertheless was further inflected by the need to maintain a positive and constructive relationship with the governing party. That the ANC needed to keep the Constitutional Court onside during the formative early years of the Interim Constitution gave the Court space in which to claim a role for itself within the constitutional order that would allow it to antagonise the government in future cases from a position of institutional legitimacy. That the Court would frequently avoid engaging in such antagonism arose partially from trust in the ANC's commitment to rights in this period and partially from the continuous management of its power with an ANC assured of electoral dominance.

## VI: Conclusion

This chapter has documented how judicial rights review developed in South Africa. Unlike Ireland, in South Africa the Courts acted quickly following the constitutional dispensation to consolidate judicial power. Over the succeeding years, that power within the constitutional order has only grown which, as I will show in the succeeding chapters, has enabled a considerable corpus of social rights adjudication to develop.

The legal revolution in South Africa resulted in considerable part from the elevation of committed human rights lawyers to the Constitutional Court. As this was the only immediate change to the legal system occasioned by the transition to democracy, the influence of this installation of a new apex court appears considerable. By itself however, noting this change does not explain why the Court's rights reasoning in this period took the form that it did. For that, the influence of both a conception of transformative constitutionalism and a close relationship with the ANC must be understood. Through understanding the influence of these key cultural factors - and the impact that changes in the Court's relationship with the ANC has had on its powers - the Court's development of judicial review can be understood.

With this foundation, in the next chapter, the development of positive remedies in South Africa is studied. After this, the Court's considerable social



rights jurisprudence will be discussed, to see how it is that this common law system successfully developed a robust form of social rights protection.

## Chapter Ten: The Development of Positive Remedial Powers in South Africa

The presence of a judiciary occupying the constitutional space necessary to hold the elected branches to account for noncompliance with the bill of rights is necessary for the development of robust social rights protection. However, this alone is insufficient if the judiciary are unwilling to issue orders fashioned to cure the rights breach. This chapter describes the cultural influence upon the development of orders of compulsion for rights breaches within the South African constitutional order, and how such powers have shifted over time coincident with changes within the judiciary. Unlike in Ireland, the courts in South Africa have issued injunctive orders where social rights have been breached, including orders of compulsion. A consequence of this is many of the key cases developing the remedial function in South Africa are also central cases to its social rights jurisprudence and will be studied in particular depth in the following two chapters.

### I: The First Wave 1995 - 2005: Establishing Broad Remedial Powers

In both the Interim and particularly under the Final Constitution, the Court is granted broad remedial discretion to act when it finds rights breaches. S172(1) of the Constitution states a court *must* declare ‘any law or conduct that is inconsistent with the Constitution [...] invalid to the extent of its inconsistency’<sup>1</sup> and that a court ‘*may* make any order that is just and equitable’ including orders limiting retrospectivity of declarations of invalidity, allowing for suspended declarations of invalidity, and a temporary interdict.<sup>2</sup> As with Ireland, considerable latitude is thus given to the courts to be as conservative or active as it sees fit to remedy breaches. However, in South Africa, this latitude is not implied, but express in the text.

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<sup>1</sup> Constitution of the Republic of South Africa 1996, S172(1)(a).

<sup>2</sup> Constitution of the Republic of South Africa, 1996, S172(1)(b) and S172(2)(a).

The Court issued a declaration of unconstitutionality in its first ever case.<sup>3</sup> Along with the relatively swift development of the novel power of judicial review despite having no history of engaging in rights adjudication, the South African judiciary adopted relatively quickly an understanding of their remedial powers. In the early case of *Fose v Minister of Safety and Security*, Ackermann J pronounced on the Court's remedial discretion:

Depending on the circumstances of each particular case the relief may be a declaration of rights, an interdict, a mandamus or such other relief as may be required to ensure that the rights enshrined in the Constitution are protected and enforced. If it is necessary to do so, the courts may even have to *fashion new remedies to secure the protection and enforcement of these all-important rights*.<sup>4</sup>

Comparable to Ó Dálaigh CJ's statement in *The State (Quinn) v Ryan* noted in Part Two of this doctorate,<sup>5</sup> with this the Constitutional Court indicated a strong early willingness to experiment with the possible ambit of its remedial powers within the (constitutionally undefined) separation of powers.<sup>6</sup> In the first wave, the Court subsequently innovated a range of approaches to ensuring rights compliance, including declaratory orders,<sup>7</sup> severing unconstitutional language,<sup>8</sup> invalidating unconstitutional statutes on an as-applied basis,<sup>9</sup> and even reading words into legislation in order to ensure its compliance with the Bill of Rights.<sup>10</sup> Further, when exercising its imperative duty to declare unconstitutional law invalid, the Court allowed its declarations to be suspended

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<sup>3</sup> *S v Zuma* [1995] ZACC 1.

<sup>4</sup> *Fose v Minister of Safety and Security* [1997] ZACC 6 [19].

<sup>5</sup> *The State (Quinn) v Ryan* [1965] IR 70, 122.

<sup>6</sup> As Moseneke DCJ, noted extrajudicially, 'the 1996 Constitution makes no express provision for separation of powers.' Dikgang Moseneke, 'Oliver Schreiner Memorial Lecture: Separation of Powers, Democratic Ethos and Judicial Function' 24 (2008) *SAJHR* 341, 348.

<sup>7</sup> *Rail Commuters Action Group v Transnet Ltd trading as Metrorail* [2004] ZACC 20.

<sup>8</sup> *Case v Minister of Safety and Security, Curtis v Minister of Safety and Security* [1996] ZACC 7.

<sup>9</sup> *Islamic Unity Convention v Independent Broadcasting Authority* [2002] ZACC 3.

<sup>10</sup> *National Coalition of Gay and Lesbian Equality v Minister of Home Affairs* [2004] ZACC 12.

temporarily to balance respect for the autonomy of other branches with upholding rights.<sup>11</sup>

Whilst cautioning that the ‘court should endeavour to be as faithful as possible to the [impugned] legislative scheme within the constraints of the Constitution’ when issuing these remedies, the breadth of remedial possibilities open to the Court demonstrates a significant traverse beyond the rigidly deferential judicial function within the separation of powers that obtained prior to democracy in South Africa.<sup>12</sup> Following the express permission for remedial innovation provided in s172 of the Constitution, these cases reflect a Constitutional Court with an interest in exercising this constitutional mandate to experiment with new remedies in rights cases.

Of particular relevance to social rights adjudication, in this period the Court imposed positive obligations on the State to ensure compliance with the duty on the State to positively promote, respect and fulfil rights.<sup>13</sup> The primary remedies of focus in regards effective social rights protection is ordering mandatory state action to cure rights breaches. In the first wave, the South African judiciary developed two methods of issuing positive orders for rights breaches. The Court would either issue a mandatory order, requiring the State to perform a specified function within an allotted time or risk being found in contempt.<sup>14</sup> Alternatively, the Court could impose a structural interdict, requiring the ‘violator to rectify the breach of fundamental rights under court

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<sup>11</sup> In *Fourie v Minister of Home Affairs*, the Constitutional Court found that the reservation of marriage rights to exclusively heterosexual couples was an unconstitutional violation of the dignity and equality rights of homosexuals. Rather than declare the legislation regulating marriages invalid or update the common law definition of marriage, the Court suspended the order for 12 months in order to enable the law to change legislatively, thereby garnering the change to marriage greater legitimacy. [2005] ZACC 14 [139]. This decision was met with a strong dissent by O’Regan J who viewed protecting the equality rights of homosexuals as a more pressing obligation than respecting a separation of powers. [2005] ZACC 14 [170]. As noted above, this innovation is authorised by s 172(1)(b)(ii) of the Constitution which expressly provides for suspended declarations.

<sup>12</sup> [2004] ZACC 12, [74]

<sup>13</sup> Constitution of the Republic of South Africa 1996, S7(2).

<sup>14</sup> *Premier, Province of Mpumalanga v Executive Committee: Eastern Transvaal* [1998] ZACC 20; *Dawood v Minister of Home Affairs* [2000] ZACC 8; *Minister of Health v Treatment Action Campaign (No 2)* [2002] ZACC 15.

supervision,' however with considerable discretion left to the violator to determine how to cure the breach.<sup>15</sup>

There were two significant early judgments that presaged the Court's social rights reasoning, potentially facilitating its eventual emergence. In *August v Electoral Commission*, the Electoral Commission were found to have violated a prisoner's right to vote.<sup>16</sup> Sachs J, for the Court, noted that:

[T]he right to vote by its very nature imposes positive obligations upon the legislature and the executive. A date for elections has to be promulgated, the secrecy of the ballot secured and the machinery established for managing the process.<sup>17</sup>

In light of the necessary positive duties upon a state to provide voting facilities, the Court issued a structural interdict, ordering the Electoral Commission to rectify the absence by providing such facilities in prisons, and by requiring them to present to the Court within two weeks of judgment a report as an affidavit setting out exactly how they would comply with the order. The Court then inspected this affidavit and would have, if satisfied, made the report an order of the Court, noncompliance with which would have amounted to contempt. As polling stations were subsequently provided and the breach cured, a further mandamus order making the affidavit binding was not necessary.<sup>18</sup> In this way, the right to vote was realised, in an instance in which, in the absence of

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<sup>15</sup> Iain Currie and Johan de Waal, *The Bill of Rights Handbook* (5<sup>th</sup> ed, Juta 2005) 217. Currie and de Waal continue, at 218;

First, the Court declares the respects in which government conduct falls short of its constitutional obligations; second, the court orders the government to comply with the obligations; third, the court orders the government to produce (usually under oath) a report within a specified period of time setting out steps it has taken, what future steps will be taken; four, the applicant is afforded an opportunity to respond to the report; finally, the matter is enrolled for a hearing and, if satisfactory, the report is made an order of the court. A failure to comply with obligations as set out in the court order will then amount to contempt of court.

<sup>16</sup> *August v Electoral Commission* [1999] ZACC 3. [hereinafter 'August'] For an overview of the Court's jurisprudence on prisoner's rights, see Clare Ballard and Frances Hobden, 'Public Interest Litigation and Prisoners' Rights' in Jason Brickhill (ed) *Public Interest Litigation in South Africa* (Juta 2018) 281, 352.

<sup>17</sup> [1999] ZACC 3 [16]

<sup>18</sup> See however *Minister of Home Affairs v National Institute for Crime Prevention and Regulation of Offenders* [2004] ZACC 10.

imposing positive obligations, it is hard to see how that would have been possible.

Whereas in *August* a mandamus order was not imposed, in *Sibiya v DPP*, the Court issued both a mandatory order and a structural interdict to resolve the rights breach.<sup>19</sup> *Sibiya* concerned 62 prisoners who had been sentenced to death prior to the Court's abolitionist judgment in *Makwanyane*. The sentences of *Sibiya* and the other prisoners sentences not yet been substituted. The Court held that the process of substitution had not been satisfactorily swift. As the process had taken so long - almost ten years - the Court deemed it 'inadvisable [...] to assume that the death sentences will be substituted as envisaged.'<sup>20</sup>

Unwilling to defer to the *bona fides* of the DPP to substitute the sentences without oversight, the Constitutional Court ordered it to '*take all the steps that are necessary* to ensure that all sentences of death [...] are set aside and replaced by an appropriate alternative sentence [...] as soon as possible'; and to 'report to this Court concerning all the steps taken to comply with [...] this order' within four months.<sup>21</sup> The former order constitutes a mandamus that was 'principally aimed at ensuring compliance with the order of this Court in *Makwanyane*.'<sup>22</sup> The latter order is a structural interdict similar to *August*, which in this case led to repeated reports being filed with the court documenting the DPP's successful compliance with the order.<sup>23</sup>

By this, the Court arrogated to itself, from within the broadly phrased terms of the Constitution's remedies clause, a sweeping competence to police rights protection. Alongside the other ambitious remedial powers which the Court has utilised, the development of positive orders indicates a Court commitment that 'the remedy that must adapt itself to the right, not the right to the remedy.'<sup>24</sup> Whilst the two positive orders covered here did not relate to social rights, they indicated the potential judicial power to, effectively, make similar orders

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<sup>19</sup> *Sibiya v DPP (Sibiya I)* [2005] ZACC 6. [hereinafter '*Sibiya*'].

<sup>20</sup> [2005] ZACC 6 [61].

<sup>21</sup> [2005] ZACC 6 [64] [emphasis added].

<sup>22</sup> This is confirmed in the later case of *Sibiya v DPP (Sibiya III)* [2006] ZACC 22 [5].

<sup>23</sup> *Sibiya v DPP (Sibiya II)* [2005] ZACC 16; [2006] ZACC 22.

<sup>24</sup> *Bel Porto School Governing Body v Premier, Western Cape* 2002 (3) SA 265 (CC) 181, 186.

against the state where social rights duties were in default. Whilst, as will be shown in the next chapter, the Constitutional Court has often been reluctant to issue positive orders to cure social rights breaches, nevertheless their conceptual openness to exercising an active, mandating role within the separation of powers constructively informed their engagement with such rights.

## II: What Factors Conditioned the Court's Development of the Remedial Power in the First Wave

What explains the breadth of the Court's understanding of its powers? A consequential element appears to be its aforementioned commitment to transformative constitutionalism - to remaking the legal system as a means to transform society to the better. This commitment to transformative constitutionalism provided the motivation for the Court to adopt an expansive conception of its function within the constitutional order, including to the point of testing the conventionally-understood limits to the judicial power. However, the ability of the concept of transformative constitutionalism alone to clarify the Court's rights reasoning in this period is limited by the unlimited license to upend the legal order an attachment to this concept could provide in the abstract. It must therefore be understood how the Constitutional Court's understanding of its transformative capacity was itself cabined by a residual attachment among members of the bench to legal conventions that framed the limits of their transformative imagination.

As Cameron J stated extrajudicially:

Judges do not enter public office as ideological virgins. They ascend to the bench with built-in and strongly held sets of values, preconceptions, opinions and prejudices. These are invariably expressed in the decisions they give, constituting the inarticulate premises in the process of judicial reasoning.<sup>25</sup>

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<sup>25</sup> Edwin Cameron, 'Judicial Accountability in South Africa' (1990) 6 *SAJHR* 251.

In the case of the Constitutional Court, these premises include both a commitment to human rights, but also a heavy influence from framing human rights practise within a common law legal context. As with the Irish Courts (if not all common law judiciaries) the members of the Constitutional Court were influenced by the predominance of legal influences that predated their ascension to the bench and which, perhaps unwittingly, informed their understanding of the limits upon their concurrently expanding powers. Thus, the remedies which were considered to be viable are intellectually prescribed by the culture in which the judges develop.

While the imposition of *mandamus* orders may appear, to Irish lawyers, a distinct departure from conventional common law practise, as Roach and Budlender noted:

South African law in the pre-constitutional era did not limit the power of the Courts to make mandatory orders on government. Such orders were however not common. They were most frequently used as a remedy in administrative law, where they were known as mandatory interdicts.<sup>26</sup>

These orders, then, were, if unusual, not *unknown* to South African law, nor by extension to the Constitutional Court. They can be traced back to the Roman-Dutch law regarding interdicts.<sup>27</sup> Whilst their extension to rights adjudication - and in *Treatment Action Campaign* to social rights - was novel, the Court's development of this remedial power for rights breaches is understandable when regard is taken of their pre-existence within South African law.

Alongside these influences, the Court's remedial adjudication in this period was informed by a recourse to comparative constitutional law. The Constitution states that, in rights cases, the Court may consider foreign law and *must* consider international law.<sup>28</sup> For a new Court embarking on rights adjudication

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<sup>26</sup> Kent Roach and Geoffrey Budlender, 'Mandatory Relief and Supervisory Jurisdiction: When is it Appropriate, Just, and Equitable?' (2005) 122 *SALJ* 325, 328; see also Lawrence Baxter *Administrative Law* (Juta 1984) 696 - 698.

<sup>27</sup> *Durban City Council v Association of Building Societies* 1942 AS 27; *Ex parte Nell* 1961 (1) SA 754 (A); *Ex parte Friedgut* 1983 (2) SA 336 (T). See DV Cowen, 'Vested and Contingent Rights' (1949) 66 *SALJ* 404.

<sup>28</sup> Constitution of the Republic of South Africa 1996, S39(1)(b).



for the first time within a common law system, the attraction of comparative jurisprudence can be considerable, as it was in Ireland. While the introduction of suspended declarations can be seen as resulting in part from the influence of Canadian jurisprudence, with structural interdicts, Mbazira highlighted, the remedies in *August* and *Sibiya* were partially inspired by American jurisprudence, particularly the desegregation cases commenced by *Brown v Board of Education*.<sup>29</sup>

While at first it may seem contradictory that American constitutional law could provide an impetus for remedial expansion in South Africa, given American jurisprudence was also an inspiration for remedial conservatism in Ireland, this paradox is resolved by noting the different strands of American jurisprudence which both Courts relied upon. As Zackin has noted:

In opinions on topics ranging from segregated education to welfare benefits to the definition of state action, the Court has gestured toward the existence of such rights, leading many legal rights advocates to believe that these precedents could be expanded into a more robust statement of government's affirmative constitutional obligations [...] Yet in the 1970s and 1980s, the Court repeatedly denied this possibility, issuing a series of declarations that flatly rejected a positive-rights reading of its earlier opinions and of the US Constitution.<sup>30</sup>

It is in this more fringe, and eventually maligned, strain of American jurisprudence supporting the imposition of positive duties that the South African Court appears to have taken inspiration, rather than the orthodox precedent relied upon by the Irish judiciary.<sup>31</sup> This is suggestive once again of

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<sup>29</sup> *Brown v Board of Education of Topeka* (1954) 347 US 483; Christopher Mbazira, 'From Ambivalence to Certainty: Norms and Principles for the Structural Interdict in Socioeconomic Rights Litigation in South Africa' (2008) 24 *SAJHR* 1, 4.

<sup>30</sup> Emily Zackin, 'Positive Rights' in Mark Tushnet, Mark Graber and Sanford Levinson (eds) *The Oxford Handbook of the U.S. Constitution* (OUP 2015) 717, 730 - 731. See *San Antonio v Rodriguez* 411 U.S. 1(1973); *Maher v Roe* 432 US 464 (1977); *Winnebago County v DeShaney* (1989) 389 US 189.

<sup>31</sup> For commentary on how the promise of *Brown* may have gone unfulfilled, see Michael Klarman *From Jim Crow to Civil Rights: The Supreme Court and the Struggle for Racial Equality* (OUP 2004); Martha Minow *In Brown's Wake: Legacies of America's Educational Landmark* (OUP 2010).

the influence of judicial culture and influences upon the scale of rights protection provided by a common law legal system. The curiosity of issuing positive orders to cure rights breaches in cases such as *Sibiya*, while losing none of its noteworthiness, becomes then more explicable when understood as proceeding from the effect of conducive influences upon the judicial community.

### III: The Second Wave 2005 - 2020: Expanding the Positive Remedial Power

The development of the remedial power in the second wave, particularly in regards orders of compulsion, has almost entirely concerned social rights, and will be looked at in Chapter Twelve. In the past few years, ‘supervisory orders are increasingly commonly granted and in increasingly sophisticated forms.’<sup>32</sup> However, these interdicts largely conform to the model developed in cases such as *August* and *Sibiya* during the first wave and already discussed so will not be addressed.

There has however been one highly noteworthy development outside of the social rights sphere in recent years, with potentially significant implications for remedying breaches of social rights. In 2019, in *Mwelase v Director General for the Department of Rural Development*, the Constitutional Court approved the appointment of a ‘special master’ to oversee land reform, following an unreasonable delay in processing land claims.<sup>33</sup> This ‘special master’ is empowered with plan-drawing and budget projecting powers, notwithstanding not being a member of any branch of government. However, in exercising these powers, the special master acts ‘as an agent of the court, continuingly subject to court control and authority.’<sup>34</sup>

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<sup>32</sup> Georgina Jephson and Osmond Mngomezulu, ‘Constitutional Litigation Procedure’ in Jason Brickhill (ed) *Public Interest Litigation in South Africa* (Juta 2018) 135, 150.

<sup>33</sup> *Mwelase v Director General for the Department of Rural Development* [2019] ZACC 30.

<sup>34</sup> [2019] ZACC 30 [61].

As Cameron J noted, ‘it must be accepted that no court order has done anything quite like this before.’<sup>35</sup> He continued:

In cases that cry out for effective relief, tagging a function as administrative or executive, in contradistinction to judicial, though always important, need not always be decisive. For it is crises in governmental delivery, and not any judicial wish to exercise power, that has required the courts to explore the limits of separation of powers jurisprudence. When egregious infringements have occurred, the courts have had little choice in their duty to provide effective relief [...] If this requires the temporary, supervised oversight of administration where the bureaucracy has been shown to be unable to perform, then there is little choice: it must be done.<sup>36</sup>

This appointment of an overseer on behalf of the Court to ensure compliance with constitutional land reform obligations illustrates the breadth of capacity the Court feels in issuing remedies. Alongside the social rights cases discussed in Chapter Twelve - particularly the cases concerning the right to education and social security - *Mwelase* therefore represents the current height of the Court’s remedial powers.

#### IV: What Factors Conditioned the Court’s Development of the Remedial Power in the Second Wave

Again, in reaching for this extension of the judicial power, the Court relied on comparative jurisprudence, particularly, in regards the device of the Special Master, from the United States. In *Mwelase* Cameron J noted for good measure, ‘we can gain much from considering how what works elsewhere might also work here.’<sup>37</sup> Closing, Cameron J held that the Constitution affords the Courts:

Extensive powers, when deciding a constitutional matter within its power, to “make any order that is just and equitable”. Any order that is

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<sup>35</sup> [2019] ZACC 30 [38]. A possible relative of this order discussed in the next Chapter was the appointment of a claims administrator by the Court in the case of *Linkside v Minister of Basic Education* [2014] ZAECGHC 111.

<sup>36</sup> [2019] ZACC 30 [48] - [49].

<sup>37</sup> [2019] ZACC 30 [55] - [56].

just and equitable! That is no invitation to judicial hubris. It is an injunction to do practical justice, as best and humbly, as the circumstances demand. And it is wrong to understate the breadth of these remedial powers.<sup>38</sup>

Alongside the influence of comparative remedial jurisprudence, it comes across in the tone of the judgment that an additional factor spurring the Court to expand its powers in this case was the lack of trust of the judicial community in the executive to complete their constitutional obligations timeously. This stands in contrast to the comity between the Court and the State which, as noted in the previous chapter, predominated during the first wave. To understand how this lack of trust came about, and so why it was the Court's disposition towards the Government hardened, and thereby the Court's willingness to issue more exacting remedies increased, the circumstances which led to the breakdown of the existing relationship between the Court and the Government must be briefly explained.

The cresting of the second wave of South African rights jurisprudence partially came about in the aftermath of the highly politicised decision in the *Treatment Action Campaign* case, covered in the next chapter;<sup>39</sup> and partially through a political crisis which directly implicated the judicial community. Around 2005, almost coinciding with the retirement of Chaskalson CJ and most of his court, the formerly close relationship between the judiciary and the ANC started to break down. The causes of the crisis are contested but correspond largely to the rise to power of Jacob Zuma.<sup>40</sup> Following the 2006 conviction of then Deputy-President Zuma's financial adviser Schabir Shaik on corruption charges arising from his relationship to Mr Zuma,<sup>41</sup> a wing of the State anti-corruption

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<sup>38</sup> [2019] ZACC 30 [65] See also *Electoral Commission v Mhlope* [2016] ZACC 15.

<sup>39</sup> *Minister of Health v Treatment Action Campaign (No 2)* [2002] ZACC 15.

<sup>40</sup> As O'Regan noted, 'the criminal investigation of former President Zuma in relation to corruption appears to have started in 2001, long before he was elected President in 2009.' 325 Catherine O'Regan, 'Prosecution and Politics in a Constitutional State: Prosecution of Heads of State in Post-Apartheid South Africa' in András Sajó and Renata Uitz (eds) *Critical Essays on Human Rights Criticism* (Boomuitgevers 2020)315, 325. See *Zuma v Democratic Alliance* [2018] ZASCA 146 [6]; Theunis Roux, 'The Langa Court: Its Distinctive Character and Legacy' (2015) *Acta Juridica* 33;

<sup>41</sup> *S v Shaik* [2008] ZACC 7. Mr Shaik was sentenced to fifteen years' imprisonment but was subsequently released on parole due to serious illness. O'Regan (n 40) 326ff.

unit searched the Zuma's premises.<sup>42</sup> The legality of these searches was challenged, ultimately up to the Constitutional Court.<sup>43</sup> Per Roux, during the Constitutional Court case:

In between argument and judgment, two relatively junior members of the Court (Jafta AJ and Nkabinde J) were approached by the Judge President of the Cape High Court, John Hlophe, in what they later claimed was an attempt to influence their decision. Hlophe, it was alleged, not only offered unsolicited advice on the legal merits of the pending case, but also hinted that he had connections to a higher power [Zuma] with an interest in its outcome.<sup>44</sup>

Resulting from this, the members of the Constitutional Court lodged a complaint against Hlophe JP to the Judicial Service Commission, the main oversight body of judges in South Africa, alleging improper influence.<sup>45</sup> Arising from *this*, the Court and government adopted an increasingly oppositional stance to one another, with the Court being declared ‘‘counter-revolutionaries’ and [accused] of standing in the way of true social transformation’ by senior members of the ANC, and with the ANC repeatedly being found in breach of the separation of powers by the Courts.<sup>46</sup>

As O’Regan observed, ‘Given that the charges against Mr Shaik were that he and his companies had made corrupt payments to Mr Zuma, one might expect that both Mr Shaik and Mr Zuma would be charged with the statutory offence of corruption.’<sup>47</sup> This did not occur however, until after Shaik’s conviction, and indeed the prosecution case against Zuma was struck from the roll after a year.<sup>48</sup> Upon being indicted again on the same grounds in 2007, just

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<sup>42</sup> In this period, Jacob Zuma was also charged with rape and acquitted in the High Court. *S v Zuma* (Johannesburg High Court, 8 May 2006).

<sup>43</sup> *Thint (Pty) v National Director of Public Prosecutions; Zuma v National Director of Public Prosecutions* [2008] ZACC 13.

<sup>44</sup> Roux (n 65) 51.

<sup>45</sup> ‘Hlophe is alleged to have told the judges that he would be the next Chief Justice, that he had a ‘mandate’, and that they should consider their futures and rule in favour of Zuma.’ Murray Wesson and Max du Plessis, ‘Fifteen Years On: Central Issues Relating to the Transformation of the South African Judiciary’ (2008) 24 *SAJHR* 187, 205 - 206.

<sup>46</sup> Roux (n 40) 52.

<sup>47</sup> O’Regan (n 40) 326.

<sup>48</sup> *National Director of Public Prosecutions v Zuma* [2009] ZASCA 1 [5]

after he was elected President of the ANC, Zuma challenged the legal basis of the decision of the National Director of Public Prosecution ('NDPP') to indict him.<sup>49</sup> The High Court found in Zuma's favour, and suggested that the indictment was politically motivated<sup>50</sup> - an allegation which hastened the departure of then President Mbeki<sup>51</sup> before, on appeal, being overturned.<sup>52</sup>

By overturning the High Court decision, the indictment remained active. However, followed secret legal representations by Zuma's legal team to the NDPP alleging that they proof of a political campaign within the National Prosecuting Authority to discredit Zuma the NDPP withdrew the charges 'just before Zuma became President of South Africa.'<sup>53</sup> This decision to withdraw, however, was *itself* challenged in the courts, with the Supreme Court of Appeal ultimately overturning the decision to withdraw on rationality grounds in late 2017.<sup>54</sup> Zuma finally appeared in court for the first time in April 2018, two months resigning from the Presidency.<sup>55</sup> The trial is ongoing.

As President, Zuma sought to hasten the dissolution of the Scorpions unit that had investigated his alleged links to Schaik and their replacement with a new unit - the Hawks. This move was also initially frustrated by the Courts on the ground that the Hawks were not sufficiently independent.<sup>56</sup> Beginning with this

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<sup>49</sup> [2009] ZASCA 1 [9]

<sup>50</sup> *Zuma v National Director of Public Prosecutions* [2008] ZAKZHC 71.

<sup>51</sup> Per Corder, 'This decision effectively led to a bloodless coup as far as executive government was concerned, with the 'recall' of President Mbeki by the ANC, and eventually to the formal dropping of charges against Zuma by the Acting National Director of Public Prosecutions in early 2009.' Hugh Corder, 'Principled Calm Amidst a Shameless Storm: Testing the Limits of the Judicial Regulation of Legislative and Executive Power' 2 (2009) *Constitutional Court Review* 239, 241.

<sup>52</sup> *Zuma v National Director of Public Prosecutions* [2009] ZASCA 1.

<sup>53</sup> O'Regan (n 40) 328. *Zuma v Democratic Alliance* [2014] ZASCA 101 [24].

<sup>54</sup> *Zuma v Democratic Alliance* 2018 (1) SA 200 (SCA) [3].

<sup>55</sup> As O'Regan noted, in March 2018, 'in response to a question in Parliament, President Cyril Ramaphosa recently disclosed that a minimum of R15.3 million had been spent by the state on President Zuma's legal fees.' O'Regan (n 40) 330. However, following the judgment in *Democratic Alliance v President of the Republic of South Africa; Economic Freedom Fighters v State Attorney* [2018] ZAGPPHC 836 the State is not liable for the costs incurred by Zuma in his personal capacity in relation to criminal prosecutions instituted against him, or for the costs incurred in civil litigation that is related to those prosecution and it ordered that steps should be taken to recover the funds that had already been spent on former President Zuma's legal defence.

<sup>56</sup> *Glenister v President of the Republic of South Africa* 2011 (3) SA 347 (CC). As a result, the Act was amended by Parliament, however the amended Act was itself found to be invalid in *Helen Suzman Foundation v President of the Republic of South Africa; Glenister v President*

case, the Court made a series of judgments engaging with the separation of powers and limiting the powers of the ANC Executive.<sup>57</sup> Presently, a state inquiry headed by Constitutional Court Judge Zondo is investigating allegations against now-former President Zuma.<sup>58</sup> By this, the Court has dealt more directly with what ‘the South African separation of powers’ means than it had cause to in the previous period.<sup>59</sup> This appears to speak to the Courts increased willingness to antagonise the ANC, arising in part from the elevation of its public standing gained by holding the Government, particularly President Zuma, to account during a period in which the power of other branches to check his proven abuses of power were curtailed.<sup>60</sup>

In the falling away of as close a relationship with the ANC - both strategically and, to a degree, sympathetically - the Court’s calculation of the cost of adventurous adjudication within the constitutional power dynamics also

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*of the Republic of South Africa* [2014] ZACC 32. This did not however prevent the dissolution of the Scorpions which had effectively been authorised by the decision of the Constitutional Court in *Glenister v President of the Republic of South Africa* [2008] ZACC 19.

<sup>57</sup> *Justice Alliance v President of the Republic of South Africa* [2011] ZACC 23 (holding that Parliament had improperly delegated its power to the President to extend the office of the Chief Justice); *Democratic Alliance v President of the Republic of South Africa* [2012] ZACC 24 (overturning the Presidential appointment of the Director of Public Prosecutions because of executive disregard for findings made by a commission of inquiry into the appointee’s reliability as a witness) *Oriani-Ambrosini, MP v Sisulu, MP Speaker of the National Assembly* 2012 (6) SA 588 (CC) (holding that certain parliamentary rules preventing members of minority parties from introducing bills in the lower house were unconstitutional); *Mazibuko v Sisulu* 2013 (6) SA 249 (CC) (declaring parliamentary rules unconstitutional to the extent that they did not provide for the right of minority political parties to have a motion of no confidence in the President scheduled for debate and voted on within a reasonable time); *Economic Freedom Fighters v Speaker of the National Assembly* [2016] ZACC 1 (declaring the power of the Public Protector to take binding remedial action against the President for misuse of office); *Economic Freedom Fighters v President of the Republic of South Africa* [2017] ZACC 47 (enabling commissions of inquiry into allegations within the report of the Public Protector.)

<sup>58</sup> The Judicial Commission of Inquiry into Allegations of State Capture, Corruption and Fraud in the Public Sector including Organs of State <<https://sastatecapture.org.za>> (accessed 8 April 2020)

<sup>59</sup> See Corder (n 51); Heinz Klug, ‘Finding the Constitutional Court’s Place in South Africa’s Democracy: The Interaction of Principle and Institutional Pragmatism in the Court’s Decision Making’ (2010) 3 *Constitutional Court Review* 1; Theunis Roux, ‘The South African Constitutional Court’s Democratic Rights Jurisprudence’ (2014) 5 *Constitutional Court Review* 33; Dennis Davis, ‘Separation of Powers: Juristocracy or Democracy’ (2016) 133 *SALJ* 258; Timothy Fish Hodgson, ‘The Mysteriously Appearing and Disappearing Doctrine of Separation of Powers: Towards a Distinctly South African Doctrine for a More Radically Transformative Constitution’ (2018) 34 *SAJHR* 57.

<sup>60</sup> For critiques of the Court’s separation of powers reasoning in these cases, see Jonathan Lewis, ‘The Constitutional Court of South Africa: An Evaluation’ (2009) 125 *LQR* 440; Michael Tsele ‘Coercing Virtue in the Constitutional Court: Neutral Principles, Rationality and the Nkandla Problem’ (2016) 8 *Constitutional Court Review* 193.

shifted.<sup>61</sup> In this period, as Finn and Brickhill noted, ‘some of the most notable litigation was trenchantly politicised, and often brought by opposition political parties appealing to the courts to hold the line.’<sup>62</sup> Crucially, so strong by then was the norm of following judgments of the Court that the State has obeyed even highly critical decisions.

It is in this context that bold decisions like *Mwelase* become cognisable. As will be seen in Chapter Twelve, in this period of greater antagonism between the executive and judiciary, the frequency of issuing positive orders mandating state action increased markedly. Thus, as well as the availability of instructive comparative jurisdictional examples of ordering special masters to oversee, on behalf of the Court, the completion of constitutionally-prescribed tasks by the Executive, judicial impatience and dissatisfaction with the state administration can play a formative role in the emergence and development of orders of compulsion.

## V: Conclusion

In this chapter, I have provided an overview of the key non-social rights cases in which the remedial capacity of the Court was expanded, and what influences informed this expansion. From a judicial culture which thirty years ago did not include the power to declare laws unconstitutional, this represents a radical

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<sup>61</sup> Roux:

To be sure, the Chaskalson Court had faced the daunting task of getting constitutionalism off the ground, which required it to define and assert the court's role while overseeing a different kind of transition - from the interim to the final Constitution. But the Chaskalson Court was assisted in these matters, first, by Nelson Mandela's outspoken support for judicial review, and then by the fact of having a relatively stable governing coalition with which to interact. The Langa Court had neither of those advantages. Instead, for much of its existence, it was uncertain who its partner in the ANC really was, and what the political future, in that most basic of senses, held. Even this does not capture the whole picture for it was not just the uncertainty of the political context, but the central role played by the courts in the transition from Mbeki to Zuma that marks this period out as different and more challenging.

Roux (n 40) 50.

<sup>62</sup> Jason Brickhill and Meghan Finn, ‘The Ethics and Politics of Public Interest Litigation’ in Jason Brickhill (ed) *Public Interest Litigation in South Africa* (Juta 2018) 93, 98. [2012] ZACC 24; 2012 (6) SA 588 (CC); 2013 (6) SA 249 (CC); [2016] ZACC 1; [2017] ZACC 47. The current Public Protector, appointed by President Zuma, has herself recently been found to have acted unlawfully. *Gordhan v Public Protector* [2019] ZAGPPHC 311; *Public Protector v South African Reserve Bank* [2019] ZACC 29; *President of the Republic of South Africa v Public Protector* [2020] ZAGPPHC 9.



and speedy transformation in the role conception of the judiciary.<sup>63</sup> As Landau noted of structural interdicts:

Structural remedies are expensive, time-consuming, demand a tremendous amount of legal and political skill from the judiciary, and only appear to work well in certain political contexts. On the other hand, they have the potential to correct some of the biases seen in the other devices, and they may be especially promising for targeting lower income groups. The limited comparative experience that exists for these devices supports these hypotheses.<sup>64</sup>

As I show in the next Chapter, the Court are more willing to innovate positive remedies in regards more conventional civil rights, such as the right to vote, and to then use this as a template for its social rights jurisprudence. Nevertheless, they have also become effective adjudicators of social rights claims. To complete my study of the development of social rights in South Africa, it is to those rights in particular that I now turn.

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<sup>63</sup> Note in this regard the discussion of *Harris v Minister of the Interior* 1952 (2) SA 428 (A) and *Collins v Minister of the Interior* 1957 (1) SA 552 (AD) in the preceding Chapter. The Bantustan of Bophuthatswana also contained a Bill of Rights in its Constitution of 1977; as did Namibia under South African rule from 1985 to 1990. See André E.A. M. Thomashausen, 'Human Rights in Southern Africa: The Case of Bophuthatswana' (1984) 101 *SALJ* 467; Eric C. Bjornlund, 'The Devil's Work - Judicial Review under a Bill of Rights in South Africa and Namibia' (1990) 26 *Stanford Journal of International Law* 391. However, as Sachs observed of Bantustan Bills of Rights:

They are regarded as little more than decorative proclamations, certainly not as serious means of preserving fundamental liberties. While torture, assassination, and violence against anti-apartheid activists unfortunately are endemic to the whole country, the Bantustans have manifested an almost unequalled degree of arbitrariness and authoritarian rule. It is almost as if an inverse relationship exists between the adoption of a Bill of Rights and respect for human rights-the more grandiose the language of the Bill, the more likely it is that rights will be abused. An occasional judgement by an occasionally conscientious judge has done little more than emphasise how tangential the courts have been.

Albie Sachs, 'A Bill of Rights for South Africa: Areas of Agreement and Disagreement' (1989) 21 *Columbian Human Rights Law Review* 13, 16.

<sup>64</sup> David Landau, 'The Reality of Social Rights Enforcement, (2012) 53(1) *Harvard International Law Journal* 195, 236.

## Chapter Eleven: The Development of Social Rights in South Africa 1995 - 2005

The final cultural commitment that must predominate within a judicial culture in order to ensure social rights adjudication can emerge is a judicial willingness to treat social rights *as* justiciable. Whilst this may appear *the* essential feature, taken in isolation, without a strong judiciary with broad remedial powers, an openness to engaging in such rights reasoning will be incapable of effectively translating into the development of a robust social rights-protecting regime.<sup>1</sup>

In this chapter, I examine South Africa's social rights jurisprudence during the first wave. From a general willingness to engage with social rights, an increased competence developed over time on the part of the Court, such that social rights have developed an effective capability to be argued in cases of breach in the reasoned expectation of either compensation or a curative state response.

This chapter explains how this occurred. In studying the development of social rights protection in South Africa, the emphases of the preceding chapter - the development of the judicial function and the positive remedial power - are also examined inasmuch as they are elaborated in this case law.

From early on, the Court expressed its view on the justiciability of social rights. In the *First Certification* case, as noted in Chapter Ten, the Constitutional Principles specified that, under any final Constitution, 'Everyone shall enjoy all universally accepted fundamental rights, freedoms and civil liberties, which shall be provided for and protected by entrenched and justiciable provisions in the Constitution.'<sup>2</sup> It was put to the Court that, due to their resource

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<sup>1</sup> See Part Two of this doctorate.

<sup>2</sup> Constitution of the Republic of South Africa 1993, Constitutional Principle II.

implications, social rights were not justiciable, and so should be excluded from any final Constitution. To this, the Court averred that:

many of the civil and political rights entrenched in the [Final Constitution] will give rise to similar budgetary implications without compromising their justiciability. The fact that socio-economic rights will almost inevitably give rise to such implications does not seem to us to be a bar to their justiciability. *At the very minimum*, socio-economic rights can be negatively protected from improper invasion. In the light of these considerations, it is our view that the inclusion of socio-economic rights in the [Constitution] does not result in a breach of the Constitutional Principles.<sup>3</sup>

By commenting on the *bare minimum* that adjudication of such rights could entail, the Court showed a willingness to fashion remedies to protect such rights. This reflected a Court unwilling to pre-emptively limit its social rights protecting capacities. As with the earlier *Makwanyane* decision, while cognisant of and informing itself on comparative and international jurisprudence, here the Court refused to limit its powers with reference to conventional common law conceptions of rights which focused exclusively on civil rights.<sup>4</sup>

### I: *Soobramoney v Minister of Health*

In 1997, the Court engaged with an individuated social rights claim for the first time in *Soobramoney v Minister of Health*.<sup>5</sup> Soobramoney had renal failure, and claimed that he was entitled to provision of dialysis by the State, in accordance with his S27(3) right to emergency medical treatment.<sup>6</sup> The Constitutional Court rejected this claim as his condition, while terminal, was not urgently

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<sup>3</sup> *Ex Parte Chairperson of the Constitutional Assembly: In re Certification of the Constitution of the Republic of South Africa*, 1996 [1996] ZACC 26, [78.] [emphasis added].

<sup>4</sup> See also the early judgment of *Gauteng Provincial Legislature In re: Gauteng School Education Bill of 1995* [1996] ZACC 4, in which the Court stated that the right to basic education 'creates a positive right that basic education be provided for every person and not merely a negative right that such a person should not be obstructed in pursuing his or her basic education. [1996] ZACC 4 [9].

<sup>5</sup> *Soobramoney v Minister of Health* [1997] ZACC 17 [hereinafter '*Soobramoney*'].

<sup>6</sup> Constitution of the Republic of South Africa 1996 S27(3) of the states: 'No one may be refused emergency medical treatment'.

occurring, such as an injury or sudden infection which would engage the right against emergency treatment refusal.<sup>7</sup> He died shortly thereafter.<sup>8</sup>

Having resolved the claim based on the right to emergency medical treatment, ‘the Court did not need to engage in interpreting the main, non-emergency terms of the right to healthcare in S27(1).’<sup>9</sup> Nevertheless, the Court proceeded to provide its interpretation of what the right to access healthcare entailed. Madala J, concurring, observed of the Bill of Rights that:

[S]ome rights in the Constitution are the ideal and something to be strived for. They amount to a promise, in some cases, and an indication of what a democratic society aiming to salvage lost dignity, freedom and equality should embark upon. They are values which the Constitution seeks to provide, nurture and protect for a future South Africa.<sup>10</sup>

The right to healthcare was held to be such a right. Moreover, the Court held that S27(1)(a)’s assertion that ‘everyone has the right to have access to healthcare services [...]’ must be understood in the context of S27(2)’s commitment that ‘the state must take reasonable legislative and other measures, within its available resources, to achieve the progressive realisation’ of the right.’ Where reasonable measures were taken, the right in S27(1) would be satisfied.

Given the complexity of determining a judicious allocation of such limited resources, the Court held that it ‘[would] be slow to interfere with *rational* decisions taken in good faith by the political organs and medical authorities whose responsibility it is to deal with such matters.’<sup>11</sup> Finding the hospital

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<sup>7</sup> Per Chaskalson P: ‘The applicant suffers from chronic renal failure. To be kept alive by dialysis would require such treatment two or three times a week. This is not an emergency which calls for immediate remedial treatment. It is an ongoing state of affairs resulting from a deterioration of the applicant’s renal function which is incurable. In my view S27(3) does not apply to these facts. [1997] ZACC 17 [21].’

<sup>8</sup> Anon. ‘The High Cost of Living’ *Mail and Guardian* (5 December 1997).

<sup>9</sup> James Fowkes *Building the Constitution: The Practice of Constitutional Interpretation in Post-Apartheid South Africa* (CUP 2016) 252. S27(1) of the Constitution of the Republic of South Africa 1996 states: ‘Everyone has the right to have access to healthcare services [...].’

<sup>10</sup> [1997] ZACC 17 [42].

<sup>11</sup> [1997] ZACC 17 [29] Per Sachs J, ‘important though our review functions are, there are areas where institutional incapacity and appropriate constitutional modesty require us to especially cautious. [1997] ZACC 17 [58]. (emphasis added).

policy rational, it was found that Soobramoney would not have had a case under the right to access healthcare either.

This standard of review for access rights breaches would ultimately be increased from rationality to reasonableness in the following social rights case of *Republic of South Africa v Grootboom*.<sup>12</sup> However, a dictum from *Soobramoney* of longer standing has been the reading of S27(1) and (2) complementarily. In this, Fowkes noted, the *Soobramoney* Court:

Set a precedent for approaching socioeconomic rights cases through the internal qualifier - is the state taking reasonable measures to progressively realise the right, given resource constraints? - instead of articulating what concrete things people are entitled to in terms of these rights and *then* asking if the government is doing enough to provide those things.<sup>13</sup>

The content or minimum core of the right to healthcare - the precise interest to which the rights bearer is entitled - is left unclear. The only indicator of what the right protects is that it guarantees reasonableness in state provision within its available resources. Thus, 'the obligations imposed on state by S26 and 27 in regards [access rights] become dependent upon the resources available for such purposes *and* [...] *the corresponding rights themselves are limited by reason of this lack of resources.*'<sup>14</sup>

## II: Government of the Republic of South Africa v Grootboom

*Soobramoney* has become an outlier within the Constitutional Court's socioeconomic rights jurisprudence, in that it is the rare case in which the appellant's case failed. The foundational case of the Court's social rights

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<sup>12</sup> *Government of South Africa v Grootboom* [2000] ZACC 19. [hereinafter '*Grootboom*']. It bears noting that the Irish courts do not seem to distinguish in this way between a rationality and reasonableness standard of rights review, but between a rationality and proportionality standard; as Part III(A) of Chapter Five discussed.

<sup>13</sup> Fowkes (n 9) 253.

<sup>14</sup> Theunis Roux, *The Politics of Principle: The First South African Constitutional Court 1995 - 2005* (Cambridge University Press 2013) 279. (emphasis in text).

jurisprudence would fall to the next case, *Grootboom*: ‘the first case in which the Court began to develop a systematic approach to the justiciability of [social rights], and particularly in respect of [their] positive obligations.’<sup>15</sup>

*Grootboom* was an appeal from a decision of the Cape High Court that had held that the eviction of a group of 900 informal settlers from municipal property without provision of alternative accommodation was an unconstitutional breach of the immediately realisable rights of children to basic shelter.<sup>16</sup> The High Court rejected the additional claim that this eviction breached the right to access adequate housing. Consistent with the reasoning in *Soobramoney*, the High Court held this right did not entitle applicants to a minimal conception of shelter, but merely to increasing access to housing.<sup>17</sup> In regards children’s rights however, the High Court held ‘tents, portable latrines and a regular supply of water (albeit transported) would constitute the bare minimum’ of what the children’s rights entailed.<sup>18</sup>

In *Soobramoney*, as the claim was brought under the right to emergency care, Madala J’s reasoning on access rights did not determine the outcome of the case. In *Grootboom*, however, the Court had to adjudicate an appeal which engaged directly with the prescription of a minimum core by the Cape High Court. Similar to *Soobramoney*, the Court rejected the rights claim, in this case the basic right of children to shelter, holding that ‘the carefully constructed constitutional scheme for progressive realisation of socio-economic rights would make little sense if it could be trumped in every case by the rights of children to get shelter from the state on demand.’<sup>19</sup> The immediately realisable

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<sup>15</sup> Jackie Dugard, ‘Judging the Judges: Towards an Appropriate Role for the Judiciary in South Africa’s Transformation’ 20 (2007) *Leiden Journal of International Law* 965, 976. Per Wesson, ‘it was in *Grootboom* [...] that the Court laid the foundations for its future adjudication of socioeconomic rights.’ Murray Wesson, ‘*Grootboom* and Beyond: Reassessing the Socioeconomic Jurisprudence of the South African Constitutional Court,’ (2004) 20 *SAJHR* 284, 285.

<sup>16</sup> Constitution of the Republic of South Africa 1996 S28(1)(c): ‘Every child has the right to [...] shelter [...]’ The population of the respondent group were 510 children and 390 adults. [2000] ZACC 19 [ff2].

<sup>17</sup> [2000] ZACC 19 [14].

<sup>18</sup> *Grootboom v Oostenburg Municipality* 2000 (3) BCLR 277 (C) 293A.

<sup>19</sup> [2000] ZACC 19 [71] The Court continued *ibid*: ‘Moreover, there is an obvious danger. Children could become stepping stones to housing for their parents instead of being valued for who they are.’

right of children to shelter was thereby interpreted in light of the preceding clause, recognising their right to ‘family or parental care,’ such that, unless families or parents were in default of providing shelter, the state’s duty was not engaged.<sup>20</sup> By this, the discretely recognised, immediately enforceable rights of children to shelter was construed weakly, releasing the state from the obligations found by the High Court.<sup>21</sup>

Again like *Soobramoney*, this could have dispensed with the matter. However, again the Court elected to further expand upon what obligations are imposed by the Constitution’s social rights provisions.<sup>22</sup> This reflects the Court’s openness to social rights reasoning in this period - even when not strictly required to resolve the case.

The Court took exception to the suggestion that the minimum core is judicially definable. Per Yacoob J, ‘the needs in the context of access to adequate housing are diverse: there are those who need land; others need both land and houses; yet others need financial assistance.’<sup>23</sup> To declare a minimum core right is thus to risk being both over- and under-inclusive. Whilst the concept of the minimum core was taken from international human rights law - a source that both influenced the text of S26,<sup>24</sup> and which the Court was mandated to consider when engaging in rights reasoning<sup>25</sup> - the Court held that, as the

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<sup>20</sup> [2000] ZACC 19 [76] - [77] S28(1)(b) of the Constitution of the Republic of South Africa 1996 states: ‘Every child has the right to family care or parental care [...]’

<sup>21</sup> The *Grootboom* judgment left space to explore the possibility that children’s socioeconomic rights would be directly and immediately enforceable (and not subject to progressive realisation) if they were ‘lacking parental care.’ Sandra Liebenberg, ‘Taking Stock: The Jurisprudence on Children’s Socioeconomic Rights and its Implications for Government Policy’ (2004) 5 *ESR Review* 2.

<sup>22</sup> Fowkes noted that *Grootboom*, as in *Soobramoney*, the Court could have avoided theorising as to how socioeconomic rights claims under the Constitution would be reasoned. Just before the appeal, the Municipality made an offer of concrete goods to the *Grootboom* community which the Court could have found to be satisfactory. Further, at the Constitutional Court, the case was argued ostensibly on the ground of the right of children to shelter, not the right to access adequate shelter which had been unsuccessful in the High Court, so the Court could have cabined its reasoning to that right. Thus, per Fowkes, ‘the Court’s decision to say much more than it could have reflects a desire to speak on socioeconomic rights, in light of their extraordinary public relevance.’ Fowkes (n 9) 245. However, it bears noting that *amici* including the South African Human Rights Commission, sought the broader discussion on social rights, and the broadening of the issues before the Court was not opposed by the parties to the proceeding.

<sup>23</sup> [2000] ZACC 19 [33].

<sup>24</sup> Roux (n 14) 286.

<sup>25</sup> Constitution of the Republic of South Africa 1996, S39(1)(c).

constitutional right was of ‘access to adequate housing’ rather than a right to adequate housing simpliciter, as it was in the ICESCR, the Convention and the reasoning of the CESCR could not contribute much to adjudicating the rights claim.<sup>26</sup>

In any event, Yacoob J held that determining the minimum core was not of immediate concern, as the right engaged is to *access* adequate housing. Thus the focus should be on the accessibility issue, which was viewed as previous to any determination of how adequate the housing must be. For this, similar to *Soobramoney* in regards the right to healthcare, the Court held that ‘subsections (1) and (2) are related and must be read together.’<sup>27</sup> However, in *Grootboom* the test to determine whether efforts at increasing access to the good the right seeks to provide was held to be one of *reasonableness*, not rationality.<sup>28</sup>

Reasonableness is a standard more onerous than mere rationality. Moreover, whilst derived in part from the similar test in administrative law, reasonableness in this context was given a more expansive definition. ‘Reasonableness’ was to be construed in light of the Bill of Rights as a whole, and thus:

A society must seek to ensure that the basic necessities of life are provided to all if it is to be a society based on human dignity, freedom and equality. To be reasonable, measures cannot leave out of account the degree and extent of the denial of the right they endeavour to realise. Those whose needs are the most urgent and whose ability to enjoy all rights therefore is most in peril, must not be ignored by the measures aimed at achieving realisation of the right [...] If the measures, though statistically successful,

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<sup>26</sup> [2000] ZACC 19 [35].

<sup>27</sup> [2000] ZACC 19 [34].

<sup>28</sup> Per Wilson and Dugard: Consistent with its approach in *Soobramoney*, the Court rejected the contention [in *Grootboom* paragraphs [34] - [46]] - at least for the purposes of that case - that the right to housing in S26(1) had any interpretative content independently of the duty to take reasonable measures under S26(2) of the Constitution. Stuart Wilson and Jackie Dugard. ‘Constitutional Jurisprudence: The First and Second Waves’ in Malcolm Langford, Ben Cousins, Jackie Dugard, Tshepo Madlingozi, (eds) *Socio-Economic Rights in South Africa: Symbols of Substance* (2014 Cambridge) 35, 40.



fail to respond to the needs of those most desperate, they may not pass the test.<sup>29</sup>

Thus, to be a rights-bearer under S26(1) is to have the right that the state will, in its housing policy, take account of your housing need, seek to advance your accessibility of housing, and will not act to negatively encroach upon your existing housing provision without securing alternative accommodation. Where the state has failed to have due regard for housing interests, a rights-bearer is empowered to go to court and to challenge this policy. As Wilson and Dugard noted, ‘on their own [...] these criteria are insufficient to define a reasonable housing policy, as they do not state what the ends of such a policy are.’<sup>30</sup> This, instead, will depend on the context in which the policy is taken.

Notwithstanding that the appeal was initially brought under S28 and not S26, the Court found that, in its eviction of the informal settlers, the municipality ‘fell short of the obligations imposed upon the state by section 26(2) in that it failed to provide for any form of relief to those desperately in need of access to housing.’<sup>31</sup> This group ‘are not to be ignored in the interests of an overall programme focused on medium and long-term objectives.’<sup>32</sup> As a result, and for the first time, the Court declared a state programme an unconstitutional breach of the right to housing access, as it did not seek to progressively realise the social rights of the respondents.<sup>33</sup>

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<sup>29</sup> [2000] ZACC 19 [44] The Court held severally that for a state policy to be reasonable it must, *inter alia*, 1) be comprehensive, coherent and effective [40]; 2) have sufficient regard for the social economic and historical context of widespread deprivation [43]; 3) make short-, medium-, and long-term provision for housing needs [43]; 4) give special attention to the needs of the poorest and most vulnerable [42]; 5) respond with care and concern to the needs of the most desperate [44]; and, 6) achieve more than a statistical advance in the numbers of people accessing housing, by demonstrating that the needs of the most vulnerable are catered for. [44]

<sup>30</sup> Wilson and Dugard (n 28) 40.

<sup>31</sup> [2000] ZACC 19 [95].

<sup>32</sup> [2000] ZACC 19 [66].

<sup>33</sup> As Wilson and Dugard observed:

Although the Court had shied away from the idea that S26 could give rise to a right to housing on demand, its focus on the need for the State to alleviate the plight of those in desperate circumstances suggested that, in certain situations, S26 could ground a fairly immediate claim for shelter. Because of this *Grootboom* is arguably the farthest reaching of the Court’s socioeconomic rights decisions. It has resulted in the adoption of a national emergency housing policy. It has also led to a line of decisions in which poor people have successfully resisted evictions that would lead to their homelessness

The Court elected not to mandate the government to provide housing, nor impose a structural interdict to draw up a plan by which to cure the rights breach of the respondents, as in *Sibiya*.<sup>34</sup> Instead, on the expectation of swift action to cure the rights breach, declaratory relief was all that was provided, obliging but not interdicting the State to devise, fund, implement and supervise measures to provide relief to those in desperate need.<sup>35</sup> Declaratory relief would prove ineffective however,<sup>36</sup> and *Grootboom* ultimately died without provision of adequate housing.<sup>37</sup>

It has been argued that *Grootboom* ‘sucked the marrow out of social and economic rights by defining them in terms of highly abstract criteria’ such as reasonableness.<sup>38</sup> Whilst this critique has some force, ‘[the Court’s] emphasis on the need for state policy to respond reasonably to the needs of the most desperate was to have a significant impact on eviction cases.’<sup>39</sup> If *Grootboom* reasonableness is an imperfect test for compliance with social rights, it must nevertheless be understood to have enabled the development of a viable social rights jurisprudence, by which the judiciary were able to critique and invalidate government policy which failed to take sufficiently reasonable regard for the interests of rights-bearers, as expected of them as a rights protecting institution.

*Grootboom* showed the Court’s willingness to declare government policies invalid for failure to sufficiently have regard for the social access rights of

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and have claimed alternative shelter from the State. In our view, it represents the high-water mark of the Court’s socioeconomic rights jurisprudence.

Wilson and Dugard (n 28) 41.

<sup>34</sup> *Sibiya v DPP (Sibiya I)* [2005] ZACC 6.

<sup>35</sup> [2000] ZACC 19 [96].

<sup>36</sup> See *City of Cape Town v Rudolph* 2003 (3) SA 517 (C), in which Selikowitz J granted a structural interdict ordering the City to deliver a report stating steps that it would take to cure rights breach.

<sup>37</sup> ‘As Justice Kriegler has poignantly remarked: ‘*Grootboom* was terribly important for lawyers, but not for people. Mrs Grootboom never got a house’. Doron Isaacs, ‘Realising the Right to Education in South Africa: Lessons from the United States of America’ (2010) 26 *SAJHR* 356, 360. However, it bears noting that two housing policies were - eventually - put in place, in 2003 and 2004, in response to *Grootboom*.

<sup>38</sup> Stuart Wilson, ‘Breaking the Tie: Evictions from Private Land, Homelessness, and a New Normality’ (2009) 126 *SALJ* 270, 275. As Young noted, ‘the open-ended and deferential remedy arguably lacked the hook required for monitoring and implementation to occur, leading to the charge of judicial abdication.’ Katherine G Young *Constituting Economic and Social Rights* (OUP 2012) 146.

<sup>39</sup> Wilson (n 37) 275.

vulnerable rights-bearers. As important as this judgment was, *Minister of Health v Treatment Action Campaign (No 2)*, the next major social rights decision, would overshadow this judgment both in terms of factual impact, and in the scale of its challenge to a key facet of governmental socioeconomic policy.<sup>40</sup>

### III: *Minister of Health v Treatment Action Campaign (No 2)*

In *Treatment Action Campaign*, the Court were tasked with assessing the constitutionality of a state policy that refused to make the antiretroviral [ARV] drug nevirapine, designed to prevent mother to child transmission of HIV-AIDS, widely available.<sup>41</sup> The manufacturers of the drug had offered to make the drug available to the South African government free of charge for five years.<sup>42</sup> In this, scarcity issues that usually arise with social rights claims were overcome. At the time, President Mbeki's government had adopted a sceptical stance towards the ability of ARVs to treat HIV-AIDS.<sup>43</sup> As a result, the government permitted the drug only at eighteen sites, two per province, making the drug unavailable at every other medical facility in South Africa. In this case, the reasonableness of the Government's policy in regards this limited roll-out was challenged.<sup>44</sup>

As the policy of confining treatment to select limited locations failed to address the need to provide access to health care services to mothers and children who

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<sup>40</sup> *Minister of Health v Treatment Action Campaign (No 2)* [2002] ZACC 15 [hereinafter '*Treatment Action Campaign*'].

<sup>41</sup> For a discussion of the social movement which led to the hearing of this case, see Young (n 38).

<sup>42</sup> [2002] ZACC 15 [19].

<sup>43</sup> Edwin Cameron, *Witness to AIDS* (Tauris 2005); Pieter Fourie, *The Politics of AIDS Denialism: South Africa's Failure to Respond* (Ashgate 2010).

<sup>44</sup> Per Roux:

The issue in *TAC* could not have been more explosive: an allegation by the constitutional claimant - a well-connected and politically credible social movement - that the Department of Health's refusal to support the distribution of a drug capable of preventing the mother to child transmission of HIV was causing hundreds of preventable infant deaths every month. Not just that, but the subtext of the case was that this policy decision - rather than a function of mistaken priorities - was the direct result of President Mbeki's own misguided views on the toxicity of ARV drugs. If true, these charges would clearly be devastating to the President's personal reputation. But they would also be virtually impossible for the Court to ignore. *TAC*, in short, seemed destined to present the Court with an irreconcilable choice between principle and politics.

Roux, (n 14) 293.

could not access the sites, the Court concluded the policy was unreasonable, and thus the State failed to comply with its obligations under the right to access healthcare.<sup>45</sup> Here again, the Court asserted that ‘all that is possible, indeed all that can be expected of the state, is that it act reasonably to provide access to the socioeconomic rights identified in sections 26 and 27 on a progressive basis.’<sup>46</sup> However, ‘a policy of waiting for a protracted period before taking a decision on the use of nevirapine beyond the research and training sites is also not reasonable within the meaning of S27(2) of the Constitution.’<sup>47</sup>

In a significant development, the Court affirmed that ‘where a breach of any right has taken place, *including a socioeconomic right*, a court is under a duty to ensure that effective relief is granted’ and ‘where necessary this may include both the issuing of a *mandamus* order and the exercise of supervisory jurisdiction.’<sup>48</sup> The High Court had issued a structural interdict, requiring the Government to revise its policy and then demonstrate to the Court substantive compliance with the Constitution. The Constitutional Court refused to affirm this order, noting that ‘the Government has always respected and executed orders of this Court [so] there is no reason that it will not do so in the present case.’<sup>49</sup> Whilst not upholding the interdict, the Court did indicate its *prima facie* willingness to use this remedy in social rights cases where the *bona fides* of the state offer to rectify the breach without an order are not accepted.

While rejecting the structural interdict, the Court ordered the State without delay to ‘take reasonable measures to extend the testing and counselling facilities at hospitals and clinics throughout the public health sector to facilitate and expedite the use of Nevirapine for the purpose of reducing the risk of mother-to-child transmission of HIV.’<sup>50</sup> This was not merely a declaration

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<sup>45</sup> [2002] ZACC 15 [67]

<sup>46</sup> [2002] ZACC 15 [35]

<sup>47</sup> [2005] ZACC 15 [81]

<sup>48</sup> [2002] ZACC 15 [106] (emphasis added) Per Swart, ‘A positive feature of the decision is that the Constitutional Court rejected the argument that, in the field of socio-economic rights, the only competent order a court can make is to issue a declaration of rights[...] The Court did not, however, take up this challenge and the conception as well as the implementation of the remedy has been disappointing.’ Mia Swart, ‘Left out in the Cold - Crafting Constitutional Remedies for the Poorest of the Poor’ 21 (2005) *SAJHR* 215, 222.

<sup>49</sup> [2002] ZACC 15 [129]

<sup>50</sup> [2002] ZACC 15 [135].

that a right was breached, but an order mandating action to prevent further breach. In issuing a mandamus, the Court rejected the thesis that a strict distinction exists between the remedial options available in cases of social and civil rights breach. As Lenta noted, ‘in *TAC* the Court issued a mandatory order that is much more specific than its order in *Grootboom*, probably because its concern that the government would drag its heels in providing nevirapine outside of test cases outweighed the need to permit the government flexibility in determining policy, and because providing HIV-positive mothers with Nevirapine would, unlike in *Grootboom*, have only minor cost implications.’<sup>51</sup>

In this:

*Treatment Action Campaign* illustrates that constitutional courts, even those that work in a fairly formalist legal culture, do possess some measure of agency. As much as it depended on the skill of the social movement in question, the litigation strategy pursued by the TAC was facilitated by the Court’s decision in *Grootboom*. In particular, the reasonableness review standard adopted in that case, which many commentators at the time, myself included, thought was overly deferential, was the very review standard that the TAC was able to exploit.’<sup>52</sup>

Given the ostensible rebuke which this decision posed to Mbeki’s government, the beneficial extent of the relief which the finding caused, and the mandamus order handed down, the *Treatment Action Campaign* judgment arguably remains the high water mark of the Court’s powers in social rights vindication. Per Cameron and Taylor, after *TAC* ‘South Africa’s [HIV/AIDS] programme became the largest publicly provided AIDS treatment programme in the world. Hundreds and thousands, perhaps millions, of lives have been saved.’<sup>53</sup> Operating within the procedural, reasonableness based approach which the Court developed for its access rights jurisprudence, it was thus able to fashion

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<sup>51</sup> Patrick Lenta, ‘Judicial Restraint and Overreach’ (2004) 20 *SAJHR* 544, 573.

<sup>52</sup> Roux (n 14) 67

<sup>53</sup> Edwin Cameron and Max Taylor, ‘The Untapped Potential of the Mandela Constitution’ (2017) *Public Law* 382, 395.

a remedy that cured a systematic rights breach that would not have been possible with a more modest judicial order.

#### IV: *Khosa v Minister of Social Development*

Two less consequential but nevertheless jurisprudentially significant cases from the first wave also merit noting. In *Khosa v Minister of Social Development*, the Court held that the blanket exclusion of permanent resident non-South Africans from the scheme of social assistance was neither reasonable nor justifiable within the meaning of S36 or 27(1)(c).<sup>54</sup> In *Khosa* the Court engaged, for a change, in ‘a cursory analysis of [...] the importance of social security’ as a right,<sup>55</sup> before proceeding to delimit it according to the internal limitation at S27(2).<sup>56</sup>

By ‘having regard to the purpose served by social security,’<sup>57</sup> the Court found that this right was:

entrenched because as a society we value human beings and want to ensure that people are afforded their basic needs. A society must seek to ensure that the basic necessities of life are accessible to all if it is to be a society in which human dignity, freedom and equality are foundational.<sup>58</sup>

Where these foundational values are engaged, the Court affirmed that, ‘they have to be taken into account along with the availability of human and financial resources in determining whether the state has complied with the constitutional standard of reasonableness.’<sup>59</sup> Finding that the adverse impact upon the dignity of non-South African permanent residents of not receiving

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<sup>54</sup> *Khosa v Minister of Social Development* [2004] ZACC 11 [hereinafter ‘*Khosa*’] The Constitution of the Republic of South Africa 1996 S27(1)(c): ‘Everyone has the right to have access to social security, including if they are unable to support themselves and their dependents, appropriate social assistance.’

<sup>55</sup> Cameron McConnachie and Chris McConnachie, ‘Concretising the Right to a Basic Education’ (2012) 129 *SALJ* 554, 579.

<sup>56</sup> In this context, the Constitution of the Republic of South Africa 1996 S27(2) states: ‘The state must take reasonable legislative and other measures, within its available resources, to achieve the progressive realization of [the right to have access to social security.]’

<sup>57</sup> [2004] ZACC 11 [49].

<sup>58</sup> [2004] ZACC 11 [52].

<sup>59</sup> [2004] ZACC 11 [44].

social security ‘far outweighed the financial and immigration considerations on which the state [relied]’ in supporting the ban, the Court read into the impugned social security legislation inclusion of permanent residents.<sup>60</sup> By this, the Court expanded the recipients of social security by an estimated 260,000.<sup>61</sup> Whilst reading-in is a comparatively less interventionist remedy than issuing positive orders, and thus ordering it expends less judicial capital, this case still demonstrates the considerable extent to which the Court would intervene in social rights matters with significant resource implications.

### V: *Jaftha v Schoeman*

The final social rights case from this period to consider is *Jaftha v Schoeman*.<sup>62</sup> *Jaftha* challenged the constitutionality of legislation that allowed for the houses of indigent debtors to be seized in execution of a debt without court oversight. In *Jaftha*, the Court held that, alongside the positive right to have access to adequate housing, S26(1) also contained a negatively enforceable right to restrain the loss of *existing access* to adequate housing, that was not subject to the internal limitation in S26(2).<sup>63</sup> It was found to be an unconstitutional incursion into the right to adequate housing to permit sale of the house to pay off debts where this would lead the debtors to be homeless. ‘Relative to homelessness,’ the Court held, ‘to have a home one calls one’s own, even under the most basic circumstances, can be a most empowering and dignifying human experience.’<sup>64</sup> Thus, for such an execution to be justifiable it had to be authorised by a judge taking into account the risk of destitution.<sup>65</sup>

In this case, the Court expanded its social rights protecting function, by engaging with its S7 duty to negatively ‘protect’ as well as positively ‘respect, promote, and fulfil’ these rights. By the end of its first ten years then, there

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<sup>60</sup> [2004] ZACC 11 [82]. In this, the Court construed s27 consistent with the guarantee of equality in s9, holding: ‘where the right to social assistance is conferred by the Constitution on “everyone” and permanent residents are denied access to this right, the equality rights entrenched in section 9 are directly implicated.’ [2004] ZACC 11 [49].

<sup>61</sup> [2004] ZACC 11 [61].

<sup>62</sup> *Jaftha v Schoeman* [2004] ZACC 25 [hereinafter ‘*Jaftha*’].

<sup>63</sup> ‘At the very least, any measure which permits a person to be deprived of existing access to adequate housing, limits the right protected in S26(1). [2004] ZACC 25 [34].

<sup>64</sup> [2004] ZACC 25 [39].

<sup>65</sup> [2004] ZACC 25 [61].

were two tests for assessing compliance with social rights. Where an access right is engaged, the test is whether the state policy is reasonable, having regard for the rights contained within the Bill of Rights and the duty to consider individuals affected by state policy. Meanwhile, per the decision in *Jaftha*, ‘where a claimant already has access to the socioeconomic resources and there is a threat of a measure to deprive them of the enjoyment of that resource, the claimant must institute his socioeconomic rights claim as a negative obligation.’<sup>66</sup>

## VI: What Factors Conditioned the Court’s Social Rights Jurisprudence in the First Wave

What is observable from the above is that a profound shift in the judiciary’s power occurred during the first wave. In a legal community dominated by formalism and a strict adherence to parliamentary sovereignty, within ten years of provision of constitutional rights, key governmental platforms in deeply controversial areas such as healthcare provision were being declared unconstitutional by the judiciary. A legal system previously oppositional to rights fostered some of the most innovative rights adjudication in the common law world, providing for more robust judicial protection of social rights than perhaps any other common law jurisdiction.<sup>67</sup>

The Court’s social rights jurisprudence has been treated to favourable reviews internationally,<sup>68</sup> and increasing criticism domestically,<sup>69</sup> particularly due to

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<sup>66</sup> Michael Dafeel, ‘The Negative Obligation of the Housing Right: An Analysis of the Duties to Respect and Protect’ 29 (2013) *SAJHR* 591, 600.

<sup>67</sup> While India also has a long history of social rights protection, the *ad hoc* development of social rights in India, compared to the rigorous articulation of social rights obligations in South Africa, presents the South African case law as the paradigm. See Arun K Thiruvengadam, *The Constitution of India: A Contextual Analysis* (OUP 2017). See also Sujit Choudhry, Madhav Khosla and Pratap Bhanu Mehta (eds) *The Oxford Handbook of the Indian Constitution* (OUP 2012).

<sup>68</sup> As Landau noted, ‘The theoretical debate, however, has focused almost entirely on a single country (and largely on a single case) [*Grootboom*].’ David Landau, ‘The Reality of Social Rights Enforcement,’ (2012) 53(1) *Harvard International Law Journal* 195, 197; Karl Klare, ‘Legal Culture and Transformative Constitutionalism’ (1998) 13 *SAJHR* 146; Cass Sunstein, ‘Social and Economic Rights - Lessons from South Africa’ (1999) 11(4) *Constitutional Forum* 123; Mark Tushnet *Weak Courts, Strong Rights: Judicial Review and Welfare Rights in Comparative Constitutional Law* (Princeton 2009).

<sup>69</sup> David Bilchitz, *Poverty and Fundamental Rights: The Justification and Enforcement of Socioeconomic Rights* (OUP 2007); Swart (n 48) 239; Sandra Liebenberg, ‘South Africa’s Evolving



the Court's resistance to determining a minimum core content of socioeconomic rights. However, it bears reasserting that, even if in a suboptimal form, the South African Constitutional Court has constructed a rights regime in which social rights are justiciable and repeatedly adjudicated upon, following defined and reliable standards, and with the same remedial potential as civil rights. This is a profound and interesting achievement, particularly given that the legal community which effected this change was accultured within a jurisdiction antagonistic to both rights protection and judicial review.

This is by any measurement a significant development in making social rights practically enforceable, even if more advanced conceptions are plausible.<sup>70</sup> The Court's approach in this regard can be usefully understood in light of the cultural factors informing the judiciary's understanding of its powers. To criticise the Court for not going as far as they could have, whilst providing compelling arguments why the judiciary *ought to* expand their understanding of their social rights protecting function, can be to ignore the cultural constraints on the limits of the judiciary's understanding of its powers, and can miss whether the preferred alternative is possible within the *judicial community's* understanding of what is legally doable.

By understanding how it was that a common law system so rigidly adherent to formalism and parliamentary supremacy could develop an articulated jurisprudence of social rights, it is hoped that indicators can be found that may be useful to considering how to generate within other common law legal communities a willingness to develop their own domestic culture of social rights adjudication.

The importance of a conventional understanding within the bench that their job was to assist in the transformation of South African law and thereby society was expressly cited to legitimate expansions of the Court's power in

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Jurisprudence on Socioeconomic Rights: An Effective Tool in Challenging Poverty? (2002) 6 *Law, Democracy and Development* 159; Marius Pieterse, 'Coming to Terms with Judicial Enforcement of Socioeconomic Rights' (2004) 20 *SAJHR* 383; Dugard (n 15).

<sup>70</sup> Bilchitz *ibid.*

*Soobramoney*,<sup>71</sup> *Grootboom*,<sup>72</sup> and *Jaftha*.<sup>73</sup> As the influence of transformative constitutionalism has been discussed in Chapter Nine it will not be discussed here at length.

## VI(A): The influence of the common law and comparative jurisprudence

The Court's reliance upon a reasonableness standard to assess compliance with the constitutional obligation to provide access to healthcare and housing has been criticised as reflecting a judicial unwillingness to engage with the prior question of what constitutes the content or minimum core of the substantive right which is considered regrettable.<sup>74</sup> It is argued that, 'if one believes in judges as vindicators of a socially progressive Constitution, one should expect judges to be activist and creative in the formulation of constitutional remedies.'<sup>75</sup> The thrust of domestic academic commentary in this vein has repeatedly called for the Court to ground its social rights adjudication in definitions of the substantive content of the rights interest in play, and to then assess whether it is reasonably been delimited.<sup>76</sup>

Insofar as the approaches suggested by these critics have the potential to advance the judiciary's transformative function, by providing more substantive protection for social rights, one likely explanation for the Court's resistance to

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<sup>71</sup> [1997] ZACC 17 [8].

<sup>72</sup> [2000] ZACC 19 [6].

<sup>73</sup> Per Mokgoro J, 'Section 26 must be seen as making that decisive break from the past. It emphasises the importance of adequate housing and in particular security of tenure in our new constitutional democracy. The indignity suffered as a result of evictions from homes, forced removals and the relocation to land often wholly inadequate for housing needs has to be replaced with a system in which the state must strive to provide access to adequate housing for all and, where that exists, refrain from permitting people to be removed unless it can be justified. [2004] ZACC 25 [29]

<sup>74</sup> As Davis commented:

The record of adjudicating these rights over the first decade since the advent of democracy in South Africa reveals both a judicial and academic retreat into administrative law and the occasional, mechanistic application of international law. Disappointingly, there has not even been a suggestion of the development of a new legal method which could assist in the implementation of the promise entailed in the inclusion of social and economic rights in the constitutional text.

Denis Davis, 'Adjudicating the Socioeconomic Rights in the South African Constitution: Towards Deference Lite' (2006) 22 *SAJHR* 301. See also Denis Davis, 'Transformation: The Constitutional Promise and Reality' (2010) 26 *SAJHR* 85, 97.

<sup>75</sup> Swart, (n 48) 239.

<sup>76</sup> *Ibid*, Liebenberg (n 69) Pieterse (n 69) Dugard (n 15).

engaging in the form of reasoning which is advocated appears to be the stubborn dominance of pre-existing, tried and tested remedial approaches. The reasonableness standard which was relied upon in these cases would be familiar to members of the bench from the reasonableness test in administrative law.<sup>77</sup> *Grootboom* reasonableness then can be understood as a social rights variation on an existing legal text. Unlike assessing the concept of the minimum core content of a social right, and then delimiting whether the state's actions constituted reasonable limitations of the realisation of this content, the test adopted is much more familiar to the members of the Court. Not only had the Constitutional Court no prior experience in the latter task, there were very few comparative examples from other common law jurisdictions to refer to.<sup>78</sup>

In the *First Certification case*, the Court rejected the argument that the general non-recognition social rights internationally meant they should be non-justiciable in South Africa. Here, however, the influence of comparative constitutional inexperience in social rights adjudication may have influenced the Court's interpretation of social rights. As so few comparative jurisdictions have developed minimum core conceptions of social rights, there were not many comparative case studies to inform the Court's reasoning.

As I noted in the preceding chapter, in issuing of positive orders for rights breaches, the Court drew in part on a common law tradition which was much

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<sup>77</sup> Further, textual legitimation for this approach is found in s26(2) (and s27(2)) of the Constitution of South Africa. For a critique of the comparability of *Wednesbury* reasonableness and *Grootboom* reasonableness, see Carol Steinberg, 'Can Reasonableness Protect the Poor - A Review of South Africa's Socioeconomic Rights Jurisprudence' (2006) 124 SALJ 264.

<sup>78</sup> As Pierre de Vos argued

The apparent scarcity of precedent in the form of comparable foreign case law that might facilitate the interpretation of directly enforceable economic and social rights in the South African Constitution, is potentially a major stumbling block to the effective enforcement of these rights by South African courts. The ability of domestic courts effectively to enforce social and economic rights will be a matter of will and experience. The more our courts adjudicate on these matters, the more clearly legal principles and precedents will emerge. The problem is how to get the courts to engage with the sometimes difficult conceptual and practical questions posed by the incorporation of directly enforceable social and economic rights.

Pierre de Vos, 'Pious Wishes or Directly Enforceable Human Rights: Social and Economic Rights in South Africa's 1996 Constitution' 13 (1997) SAJHR 67, 75. Note however India's jurisprudence (n 67).

more accommodating to such orders than in Ireland.<sup>79</sup> These orders, then, were also not unknown to South African law, nor by extension to the bench. Whilst their extension to rights adjudication - and in *Treatment Action Campaign* to social rights adjudication in particular - was novel, the Court's development of this remedial power for rights breaches becomes more understandable when regard is taken of their pre-existence within South African law. By noting the influence of legal remedies which existed in South Africa prior to 1995 (if not for rights cases) a greater understanding is reached of why it was the Court in its social adjudication did not engage in as substantive and innovative an approach as many academics, committed to the transformative agenda, would have wanted.<sup>80</sup> As Klare has argued:

Legal culture has a powerful steering or filtering effect on interpretative practices, therefore on adjudication, and therefore on substantive legal development (at least in societies in which adjudication is a significant source of law-making). Un-self-conscious and unreflective reliance on the culturally available intellectual tools and instincts handed down from earlier times may exercise a drag on constitutional interpretation, weighing it down and limiting its ambition and achievements in democratic transformation.<sup>81</sup>

In this way, the Court's jurisprudence may not be as adventurous as possible, but the limits on its adventurousness are understandable as the Court working out within the dominant conventional understandings of the limits of their remedial authority. This of itself is no reason to believe that such understandings of their remedial limitations will predominate amongst later generations of the Constitutional Court.<sup>82</sup> Indeed, as the next chapter will

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<sup>79</sup> Kent Roach and Geoffrey Budlender, 'Mandatory Relief and Supervisory Jurisdiction: When is it Appropriate, Just, and Equitable?' 122 (2005) *SALJ* 325; Lawrence Baxter *Administrative Law* (Juta 1984) 696 - 698.

<sup>80</sup> For example, 'Disappointingly, there has not even been a suggestion of the development of a new legal method which could assist in the implementation of the promise entailed in the inclusion of social and economic rights in the constitutional text.' Davis (n 74) 304.

<sup>81</sup> Klare (n 68) 168.

<sup>82</sup> See the discussion of changing attitude towards rights in Part One of this doctorate.

show, in the ensuing fifteen years the Court has further expanded its capacity to remedy social rights breaches.

### VI(B): The Court's Management of its Powers in Light of the Dominance of the ANC

The Court's desire to manage its relationship with the ANC provides the final key factor explaining the approach taken towards social rights in the first wave, particularly the avoidance of the minimum core and the adoption of a reasonableness approach.<sup>83</sup> Roux contends that, 'from the Court's perspective, the inherent danger of the minimum core approach was that it threatened to tie the Court down to a standard of review that was both too interventionist and too inflexible. Given the political sensitivity of its role, this was something the Court understandably wanted to avoid.'<sup>84</sup> Against this, the breadth of the judgment in *Treatment Action Campaign* appears indicative of a willingness for the Court to directly challenge state policy. However, when contextualised, the audaciousness of this challenge to the ANC becomes reduced.

Two weeks prior to the first hearing in the Constitutional Court (and partly due to earlier successes of the litigation), the ANC reversed course and announced a universal roll-out of nevirapine.<sup>85</sup> Thereafter, per Roux:

'the handing down of a principled decision in favour of the TAC was President Mbeki's best hope of political salvation. Completely isolated, both domestically and internationally, Mbeki's only chance of saving

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<sup>83</sup> De Vos and Freedman note the possible institutional costs for adoption an ambitious remedy for socioeconomic rights breaches:

Although the Court's failure particularly in *Grootboom* to use a supervisory interdict certainly trenched on the effectiveness of its order, it is understandable that the Court is circumspect in the use of these remedies. Structural interdicts have to be very carefully crafted to be effective. More importantly, structural interdicts have the potential to erode the legitimacy of the Court, both because they directly and on an ongoing basis place the Court in confrontation with the Executive, and because they can involve the Court in the day-to-day management of public institutions, something at which it is almost bound to fail.

Pierre de Vos and Warren Freedman, *South African Constitutional Law in Context* (Oxford University Press 2014) 722.

<sup>84</sup> Roux (n 14) 264.

<sup>85</sup> *Ibid*, 299.

face lay in the issuing of a court order that would force him to do what he was in any case politically compelled to do.<sup>86</sup>

Thus, even in this ostensibly antagonistic interaction between the ANC and the Court, in context the risks arising from making a broad order against the Government were comparably low. This case therefore fits within the broader trend within the Court's rights cases in this period of making ambitious rights-affirming decisions in contexts wherein the likelihood of challenge by the ANC is reduced.

This provides a rational explanation for the Court's adoption of a frequently deferential position, not least in the social rights context. Compatible with this explanation, the Court may have been validly deferring to the Executive out of a collaborative desire to 'bring the democratic organs of government into the decision-making process.'<sup>87</sup> This 'constitution-making' thesis suggests that instances where Court under-theorised the content of these rights provisions or deferred substantially are profitably understandable not as mistaken oversights, but rather a decision to defer might really be a determination that 'the Court does not *need* to intervene because the other branches are doing important constitutional work, and might be doing it better than the Court could.'<sup>88</sup>

Given the ideological commitment of all three branches of government in this period to social transformation, that the Court would factor into its rights reasoning a trust in the rights-promoting capacities of the other branches thus seems likely. Sachs, writing extrajudicially, stressed his belief that 'the South African Constitution envisages the legislature, the executive and the judiciary as all being involved in *a common constitutionally-defined project* to improve the lives of the people and to protect human dignity, equality and freedom.'<sup>89</sup> Not only does this explain why the Court would defer the content of social rights to the other branches, it provides a compelling explanation for why the court was cautious to impose structural interdicts in cases like *Grootboom* as,

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<sup>86</sup> Ibid.

<sup>87</sup> Heinz Klug *The Constitution of South Africa: A Contextual Analysis* (2010 OUP) 149 - 150.

<sup>88</sup> Fowkes (n 9) 4.

<sup>89</sup> Albie Sachs, *The Strange Alchemy of Life and Law* (2011 OUP) 147. (emphasis added)

per Fowkes, with such interdicts, ‘the default premise [is] one of distrust in relation to the other actors involved.’<sup>90</sup>

By factoring into the discussion of the Court’s social rights adjudication in this period an awareness of the importance of maintaining a relationship of comity between the ANC and the Courts, the influences impacting the Court in its jurisprudence from this period can be better understood. The under-theorisation of the content of social rights and deference towards government is understandable not as an oversight or mistake, but as a way of maximising both the Court’s own power within the constitutional order by not antagonising unduly the ANC, and also the government’s commitment to rights protection by expressly deferring, partially, to their determinations. This institutional relationship then conditioned the Court’s reasoning but did not lead to a rejection of social rights. While it may have led to the rights receiving a less substantive definition than they are capable of containing, this balancing of the Court’s powers with that of the ANC did not lead to their full relegation either.

## VII: Conclusion

In this period, South Africa innovated a jurisprudence of enforceable social rights. At the end of the period covered in this Chapter, social rights still had a considerable distance to travel to become fully internalised rights claims within the legal culture capable of providing direct relief to claimants proving breach. Nevertheless, a branch of rights adjudication was fostered in this period that placed duties upon the state to follow through on its constitutional obligation to increase access to adequate housing, healthcare, and social security. Given the paucity of common law legal systems with socioeconomic rights protection, this is a noteworthy development to occur within ten years of instituting judicial review. That a judicial culture can make such a quantum leap in such a short period of time is reflective of the capacities within common law judiciaries to undergo significant, sustained change, in response to shifts within the general judicial culture.

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<sup>90</sup> Fowkes (n 9) 268.

## Chapter Twelve: The Development of Social Rights in South Africa 2005 - 2020

I have already noted how the Court's relationship to the governing ANC changed during the second half of the 2000s from one of concord to one of greater contestation.<sup>1</sup> The rights implications of this shift are most visible in regards the Court's social rights jurisprudence. It was in this period that the Court significantly increased its remedial capacity in cases of breach. In this chapter I discuss these developments in the right to housing, education, and social security. I further note how additional rights, particularly the rights to water and electricity, were less strongly protected. By understanding why the Court reasoned as it did on social rights in this period, valuable lessons can be gained both on the breadth of social rights protection which a common law judiciary can provide, and how such a judiciary can be induced to expand its social rights protecting functions.

### I: The Right to Housing

The Court increased the capacity of rights-bearers to protect their directly affected housing interests by providing individuated remedies for claimants who prove breach. This has been furthered by the incorporation into the Court's reasonableness assessments of a duty on both parties to *meaningfully engage* with one another to resolve the matter in a rights-compliant manner. This elevates the interests of the socioeconomically disadvantaged party to a position of greater power within the rights dispute thereby providing greater protection for their socioeconomic interests in the process without considerably expanding the Court's remedial functions.

#### I(A): *President of the Republic of South Africa v Modderklip Boerdery*

The first significant case after *Grootboom* for positive duties to provide access to adequate housing was *President of the Republic of South Africa v Modderklip*

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<sup>1</sup> See Chapter Ten of this doctorate.



*Boerdery*.<sup>2</sup> The *Modderklip* case arose from the construction on Modderklip's property of an informal settlement where roughly 40,000 people lived.<sup>3</sup> Modderklip obtained an eviction order, however given the size of the population, execution of the order would have been prohibitively expensive and would have deprived 40,000 people of housing. As Langa ACJ noted:

It was not a case of one or two or even ten evictions where a routine eviction order would have sufficed. To execute this particular court order and evict tens of thousands of people with nowhere to go would cause unimaginable social chaos and misery and untold disruption.<sup>4</sup>

Given this, Modderklip sought state expropriation of the land on which the site was constructed, or damages for deprivation of the right to enjoyment their own property.<sup>5</sup>

The Constitutional Court did not engage in balancing the property rights of Modderklip against the housing rights of the population of the settlement.<sup>6</sup> Instead, as Modderklip's inability to possibly protect their property without state intervention interfered with their right of access to the Court, the Constitutional Court decided the case on that basis. This avoided having to determine the constitutional relationship between housing and property rights. Nevertheless, the Court proceeded to determine that, given the negating effects homelessness has upon the rights to access adequate housing protected by S26, government housing policy *must* include short term planning for

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<sup>2</sup> *President of the Republic of South Africa v Modderklip Boerdery* [2005] ZACC 5 [hereinafter '*Modderklip*'].

<sup>3</sup> For this statistic, see Kent Roach and Geoffrey Budlender, 'Mandatory Relief and Supervisory Jurisdiction: When is it Appropriate, Just, and Equitable' (2005) 122 *South African Law Journal* 325, 330.

<sup>4</sup> [2005] ZACC 5 [47].

<sup>5</sup> Constitution of the Republic of South Africa 1996, S25.

<sup>6</sup> This was the approach previously taken by the Supreme Court of Appeal. *Modderfontein Squatters, Greater Benoni City Council v Modderklip Boerdery* 2004 (6) SA 40 (SCA).

emergency accommodation, to deal with the effects of eviction.<sup>7</sup> Without this, an eviction would be unconstitutional.<sup>8</sup>

As no short term housing plan was in place, the municipality's housing programme was not reasonable, and the occupiers were permitted to remain on Modderklip's land until suitable alternative accommodation could be provided.<sup>9</sup> In turn, Modderklip was entitled to constitutional damages from the government for its failure to ensure his right to access to the courts, itself a positive remedy of sorts.<sup>10</sup> In the end, the 'the unlawful occupiers were simply left where they were, the state bought the land they had occupied, and a low-cost housing development was eventually constructed on it.'<sup>11</sup>

Whilst deciding the case in this way avoided the Court having to umpire a competition between housing rights and private property rights, the Court did expand both the duties upon the state to resolve housing disputes by implicating the state's housing programme within private land disputes; and increased the housing rights protection of unlawful occupiers. Thereby, by avoiding the thornier rights dispute, the Court expanded the duty government owes to comply with S26 and expanded the Court's competence to adjudicate housing disputes to include relationships between private parties.

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<sup>7</sup> Per Langa ACJ: 'The fact that poverty and homelessness still plague many South Africans is a painful reminder of the chasm that still needs to be bridged before the constitutional ideal to establish a society based on social justice and improved quality of life for all citizens is fully achieved. [2005] ZACC 5 [36].

<sup>8</sup> 'The state is under an obligation progressively to ensure access to housing or land for the homeless.' [2005] ZACC 5 [49] See also Mia Swart, 'Left Out in the Cold - Crafting Constitutional Remedies for the Poorest of the Poor' (2005) 21 *South African Journal on Human Rights* 215.

<sup>9</sup> AJ van der Walt, 'The State's Duty to Protect Owners v the State's Duty to Provide Housing: Thoughts on the *Modderklip* Case' (2005) 21 *SAJHR* 144, 156.

<sup>10</sup> As Davis noted, 'In *Modderklip*, the Court imposed a positive duty on the state, being payment to a land owner on whose land squatters had settled in circumstances where the Court considered the state to have a duty to provide land to these squatters. The obligation was based on s 34 of the Constitution, the right of access to courts.' Dennis Davis, 'Adjudicating the Socioeconomic Rights in the South African Constitution: Towards Deference Lite' 22 (2006) *SAJHR* 301, 321.

<sup>11</sup> Stuart Wilson, 'Making Space for Social Change: Pro-Poor Property Rights Litigation in Post-Apartheid South Africa' in Jason Brickhill (ed) *Public Interest Litigation in South Africa* (Juta 2018) 159, 176.

### I(B): *Occupiers of 51 Olivia Road v City of Johannesburg*

The Court's approach of simultaneously advancing the rights of access to adequate housing whilst also restraining actions that would lead to homelessness was expanded upon substantively in *Occupiers of 51 Olivia Road v City of Johannesburg*.<sup>12</sup> In *Olivia Road*, the City was seeking to evict more than 400 unlawful occupiers of two buildings in the centre of Johannesburg, in pursuit of a policy of evicting the occupiers of potentially unsafe buildings. Unlike *Modderklip*, this case did not concern the mediation of the rights of two private parties, but rather the direct impact of state policy upon the housing of rights-bearers.

The Court held that the City policy was unconstitutionally unreasonable per S26 of the Constitution, for two main reasons. First, there was no provision of alternative accommodation to those who would be evicted from these buildings. Thereby, the occupiers would be rendered homeless, contra *Jaftha* and *Modderklip*. Second and most innovatively, the Court held that the City was under an obligation to 'meaningfully engage' with the occupiers prior to seeking eviction, to determine the possible impact eviction would have on the rights of the occupiers.<sup>13</sup> The duty to do so, the Court held is 'squarely grounded in Section 26(2) of the Constitution' - the obligation to take reasonable measures to achieve the progressive realisation of the right of access to adequate housing.'<sup>14</sup>

From this finding of unconstitutionality, the Court made two notable orders. First, the City was ordered to render the occupied buildings 'safe and as conducive to health as is reasonably practicable' for the duration of time until

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<sup>12</sup> *Occupiers of 51 Olivia Road, Berea Township and 197 Main Street Johannesburg v City of Johannesburg* [2008] ZACC 1 [hereinafter '*Olivia Road*'].

<sup>13</sup> Per Yacoob J:

'Some of the objectives of engagement in the context of a city wishing to evict people who might be rendered homeless consequent upon the eviction would be to determine— (a) what the consequences of the eviction might be; (b) whether the city could help in alleviating those dire consequences; (c) whether it was possible to render the buildings concerned relatively safe and conducive to health for an interim period; (d) whether the city had any obligations to the occupiers in the prevailing circumstances; and (e) when and how the city could or would fulfil these obligations.'

[2008] ZACC 1 [14].

<sup>14</sup> [2008] ZACC 1 [27].

alternative accommodation is available.<sup>15</sup> Second, the City was ordered to provide the occupiers with secure, waterproof, sanitary temporary accommodation.<sup>16</sup> In the performance of both these orders, the City was mandated to meaningfully engage with the occupiers, in order to tailor the renovations and removals to the discrete demands of each individual occupier.<sup>17</sup> In the absence of the private property dimension present in *Modderklip*, the Court was then inclined to define the rights obligations that flow directly from a breach of S26. This provides immediate and direct protection for those whose homes face removal by injuncting eviction pending demonstrated provision of state-provided alternative temporary accommodation.

Whilst the idea of meaningful engagement was raised in a previous Constitutional Court judgement,<sup>18</sup> this was the first time the absence of meaningful engagement was deemed relevant to determining the reasonableness of the State action. It also was the first case which mandated such engagement as part of its remedial order.

In part, meaningful engagement conforms with an observed willingness of the Court to defer the substantiation of programmes to remedy the breach of access rights to other parties - in some cases to the state,<sup>19</sup> here to both parties to the dispute. This has led to the criticism that meaningful engagement has been another means of 'proceduralising' access rights, facilitating the Court's avoidance of engaging with what minimum core interest these rights are meant to protect.<sup>20</sup>

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<sup>15</sup> [2008] ZACC 1 [5].

<sup>16</sup> [2008] ZACC 1 [1].

<sup>17</sup> [2008] ZACC 1 [5].

<sup>18</sup> *Port Elizabeth Municipality v Various Occupiers* [2004] ZACC 7.

<sup>19</sup> [2000] ZACC 19; [2002] ZACC 15.

<sup>20</sup> Per McLean, 'The language of meaningful engagement masks a deferential retreat to procedural fairness considerations, to use the language of administrative law.' Kirsty McLean, 'Meaningful Engagement: One Step Forward or Two Back: Some Thoughts on *Joe Slovo*' 3 (2010) *Constitutional Court Review* 223, 238; Brian Ray, 'Proceduralisation's Triumph and Engagement's Promise in Socioeconomic Rights Litigation' 27 (2011) *SAJHR* 107; Marius Pieterse, 'Procedural Relief, Constitutional Citizenship and Socioeconomic Rights as Legitimate Expectations' 28 (2012) *SAJHR* 359.

Whilst this criticism has credence, the emergence in *Olivia Road* of meaningful engagement as a component of the Court's social adjudication *does* effect an expansion in the scope of protection court orders can provide for social rights interests.<sup>21</sup> As Ray noted, 'under this new engagement requirement, local governments seeking to evict residents *for any reason* must now develop a process for consulting these residents.'<sup>22</sup> Further, 'the standard of justification for evicting the inner-city poor from bad buildings has been raised so high that it seems unlikely that the City will ever be able to reach it without providing alternative housing to those it seeks to evict. It is unlikely that the conveyor-belt of inner-city evictions will restart soon.'<sup>23</sup> This 'put the entire inner-city eviction programme on hold',<sup>24</sup> protecting the housing interests of '(in theory) 67,000 similarly-situated inner-city dwellers.'<sup>25</sup> Consistent with under-theorising the content of the right, and leaving the resolution of the state's specific obligations in evictions largely up to a mediation between the parties involved, the Court thereby substantially expanded the constitutional protections afforded to those in especial need of housing provision: precarious unlawful occupants.<sup>26</sup>

### I(C): Residents of Joe Slovo Community v Thubelisha Homes

The exacting potential of the duty on the State to meaningfully engage with rights-bearers where their policy risks homelessness was diminished in the succeeding judgment of *Residents of Joe Slovo Community v Thubelisha*

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<sup>21</sup> As Fowkes argued, 'engagement represents a more proactive version of the by-now familiar constitution-building move to defer to another mechanism instead of engaging in bold judicial articulation.' James Fowkes, *Building the Constitution: The Practice of Constitutional Interpretation in Post-Apartheid South Africa* (Cambridge University Press 2016) 334.

<sup>22</sup> Brian Ray, 'Occupiers of Olivia Road v City of Johannesburg: Enforcing the Right to Adequate Housing through Engagement' 8 (2008) *Human Rights Law Review* 703, 709.

<sup>23</sup> Stuart Wilson, 'Litigating Housing Rights in Johannesburg's Inner City: 2004 - 2008' 27 (2011) *SAJHR* 127, 149.

<sup>24</sup> Ray (n 22) 705.

<sup>25</sup> Theunis Roux, 'The Langa Court: Its Distinctive Character and Legacy' (2015) *Acta Juridica* 33, 63.

<sup>26</sup> Per Chenwi, 'meaningful engagement surmounts concerns around the separation of powers and issues of polycentricity in socioeconomic adjudication, giving the government some leeway in policy decision-making, while embracing transparency and accountability. Lilian Chenwi, 'A New Approach to Remedies in Socioeconomic Rights Adjudication: *Occupiers of 51 Olivia Road and Others. City of Johannesburg and Others*' (2009) 2 *Constitutional Court Review* 371, 373.

*Homes*.<sup>27</sup> Whereas *Olivia Road* concerned an eviction of 400 occupiers of two buildings, *Joe Slovo* related to the eviction of 20,000 residents of the Joe Slovo informal settlement in Cape Town, to a location 15km away in order to construct improved social housing at the Joe Slovo site.<sup>28</sup> Prior to judgment, the respondent made superficial efforts to engage with the residents, by informing them of the proposed move and the place to which they were being relocated. The Court held that this did not constitute meaningful engagement, as the concerns of the residents were not taken into consideration in preparations to carry out the eviction. However, notwithstanding the prior failure to meaningfully engage, which in *Olivia Road* had been considered a constitutionally-prescribed prerequisite for any eviction to be deemed *Grootboom* reasonable, the Court granted the eviction order - 'the largest judicially sanctioned eviction in post-apartheid history.'<sup>29</sup>

In making this order, balanced against the failure to engage, the Court imposed several substantial positive obligations upon the government. First that the majority - 70% - of all houses built on what was the Joe Slovo settlement would be provided to the evictees.<sup>30</sup> Further, 'the order specifies the quality of the temporary accommodation in which the occupiers will be housed after the

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<sup>27</sup> *Residents of Joe Slovo Community v Thubelisha Homes* [2009] ZACC 16. [hereinafter '*Joe Slovo*']

<sup>28</sup> The conditions at the Joe Slovo informal settlement are described by Yacoob J:

People in Joe Slovo settlement live in overcrowded conditions, in makeshift accommodation built of insubstantial material. The conditions of life are unhygienic. There is no water-borne sewerage. Moreover, the area is unsafe particularly because the makeshift structures are fire prone in the extreme. I have already spoken of one fire and will describe another particularly devastating one later. It is no exaggeration to say that fires in the settlement have claimed lives and destroyed property at least every summer. The applicants live in deplorable circumstances unfit for reasonable human habitation. This, despite the improvements brought about by the City.

[2009] ZACC 16 [24].

<sup>29</sup> Legal Resources Centre, quoted in Brian Ray, '*Residents of Joe Slovo Community v Thubelisha Homes: The Two Faces of Engagement*' (2010) 10 *Human Rights Law Review* 360, 366.

<sup>30</sup> As Ngcobo J stated:

The government has arranged temporary accommodation for them at Delft from where some will return to Joe Slovo after it has been developed. Those who cannot be accommodated in Joe Slovo will be provided with permanent houses in Delft. In doing this, the government is fulfilling its constitutional obligation to facilitate the right of access to adequate housing. It should not be obstructed in carrying out its duties.

[2009] ZACC 16 [260]. However, as Wilson Dugard and Clark noted, this meant that within a population of 20,000 'only 1,500 housing opportunities were guaranteed to be available to the residents.' Stuart Wilson, Jackie Dugard and Michael Clark, '*Conflict Management in an Era of Urbanisation: 20 Years of Housing Rights in the South African Constitutional Court*' (2015) 31 *SAJHR* 472, 501.

eviction.’<sup>31</sup> Thirdly, the Court’s order required ‘an ongoing process of engagement between the residents and the respondents concerning the relocation process.’<sup>32</sup> By this, residents were to be given the capacity to control the time and context of their required relocations which, per Ray ‘creates considerable leverage for the residents to negotiate a process that is attentive to their constitutional rights on both a group and an individual level.’<sup>33</sup>

In reality, the failure to meaningfully engage prior to approving the eviction would prove to be largely a mistake, and delays in executing the eviction would cause the Court to ultimately reverse its order and order renovation *in situ* as had been the demand of the residents in the first place.<sup>34</sup> Irrespective of this eventual outcome, *Joe Slovo* demonstrated a marked willingness by the Court to intervene in large-scale social policy to secure the social rights of large, disenfranchised and disadvantaged groups. Again, the Court asserted that:

Government may not evict landless people from its land and render them homeless. [...] It owes a duty to landless people to provide them with access to adequate housing. It is this duty which prevents government from evicting landless people from its land and rendering them homeless. As long as this duty operates, the landless may not be evicted until alternative accommodation is found.<sup>35</sup>

Through this litigation, greater concessions were granted to the residents of Joe Slovo than previously offered, on foot of the strength of their rights to

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<sup>31</sup> ‘The temporary residential accommodation unit must: 10.1 be at least 24m<sup>2</sup> in extent; 10.2 be serviced with tarred roads; 10.3 be individually numbered for purposes of identification; 10.4 have walls constructed with a substance called Nutec; 10.5 have a galvanised iron roof; 10.6 be supplied with electricity through a pre-paid electricity meter; 10.7 be situated within reasonable proximity of a communal ablution facility; 10.8 make reasonable provision (which may be communal) for toilet facilities with water-borne sewerage; and 10.9 make reasonable provision (which may be communal) for fresh water.’ [2009] ZACC 16 [10].

<sup>32</sup> [2009] ZACC 16 [5].

<sup>33</sup> Ray (n 29) 369. McLean however noted:

the order requires all of the occupiers in the community to leave their homes, but for the parties to engage meaningfully *one week prior to the relocation*, on the names and details of those affected, the time of the relocation, transport requirements, the provision of transport to amenities, and the ‘prospect’ of allocation of permanent housing. One would imagine that such limited engagement, with so little bargaining power and an eviction a *fait accompli*, would be cold comfort for those facing eviction.

McLean (n 20) 240.

<sup>34</sup> *Residents of Joe Slovo Community v Thubelisha Homes* [2011] ZACC 8.

<sup>35</sup> [2009] ZACC 16 [214].

access adequate housing, before ultimately, through failures to engage meaningfully, the policy was augmented to suit their ultimate interest in remaining *in situ*. In scale and in the ambition of the remedy ordered, if not in the practical outcome of the order or the commitment to meaningful engagement,<sup>36</sup> *Joe Slovo* then is a noteworthy instance of judicial intervention in policy to best protect the discrete social interests of members of a marginalised and disempowered community.

### I(D): *City of Johannesburg v Blue Moonlight*

In the case of *City of Johannesburg v Blue Moonlight*, the power of housing rights to resist eviction and compel State action to ameliorate the risk of homelessness was expanded from the public law context in *Olivia Road* and *Joe Slovo*, in which the rights-bearers were challenging eviction by the government, to include also evictions by private parties.<sup>37</sup> While in *Modderklip* the scale of the occupation of the demands of the property owner meant the Court was able to sidestep the conundrum of trying to resolve the seemingly-conflicting property rights of private landowners and housing rights of unlawful occupiers on their property, in this case the issue was addressed.

*Blue Moonlight* involved the eviction of 86 occupiers from a building in Johannesburg by its new owner. At the time, the City maintained a policy of ignoring the consequences of private eviction, thereby enabling the protections afforded in *Olivia Road* to not obtain to unlawful occupiers evicted by private parties. It was held in *Blue Moonlight* that ‘those evicted by private landowners receive the same constitutional protections and benefits as those evicted by the state.’<sup>38</sup> As eviction orders must be judicially approved, *Blue Moonlight*

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<sup>36</sup> To McLean, *Joe Slovo* ‘undermines the gains won in *Olivia Road* [...] provided the government policy is found to be sufficiently laudable, it is permissible for the state to ride roughshod over the requirement of meaningful engagement.’ McLean (n 20) 237.

<sup>37</sup> *City of Johannesburg Metropolitan Municipality v Blue Moonlight Properties* [2011] ZACC 33 [hereinafter ‘*Blue Moonlight*’].

<sup>38</sup> Gerald S Dickinson, ‘The *Blue Moonlight* Remedy: Formulating the Voucher Scheme into a New Emergency Housing Remedy in South Africa’ (2013) 130 *SALJ* 554, 554. Per Wilson:

Ruling that the municipality has a general constitutional duty to provide accommodation to people facing homelessness on eviction, the *Blue Moonlight* Court held that it does not matter who or what causes someone to be deprived of their home. The municipality bears the primary responsibility for addressing the housing needs of those persons who, after an eviction, are unable to find accommodation on their own.



ruled approval would be granted only where the municipality can rehouse the prospective evictees.<sup>39</sup>

The *Blue Moonlight* judgment led to a series of cases refining the relationship between private landowner and occupier. The Court subsequently held it could order the Municipality to provide information to the Court on its ability to provide alternative temporary accommodation, in order to assess the necessity of delaying eviction; and further that, where homelessness will result from an eviction, the City *must* be joined to the litigation, even if initially between two private parties.<sup>40</sup> The conditions of the temporary accommodation provided to evictees must *itself* sufficiently guarantee the rights to dignity, privacy, and security of the person.<sup>41</sup> Additionally, the urgency with which the landowner requires the property will be assessed to determine the durations for which eviction order can be delayed.<sup>42</sup>

These dicta cause a significant limitation on the property rights of private landowners, albeit whilst placing the responsibility for resolving the limitation on the government, not on the rights bearers unlawfully occupying their

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Stuart Wilson, 'Curing the Poor: State Housing Policy in Johannesburg after *Blue Moonlight* (2014) 5 *Constitutional Court Review* 280, 283.

<sup>39</sup> As van der Westhuizen held, for the Court:

To the extent that it is the owner of the property and the occupation is unlawful, *Blue Moonlight* is entitled to an eviction order. All relevant circumstances must be taken into account though to determine whether, under which conditions and by which date, eviction would be just and equitable. The availability of alternative housing for the Occupiers is one of the circumstances. [...] The City is obliged to provide temporary accommodation. The finding of the Supreme Court of Appeal that the City has not persuaded the Court that it lacks resources to do so has not been shown to be incorrect and must stand.

[2009 ZACC 16 [96].

<sup>40</sup> *Sailing Queen Investments v the Occupants La Colleen Court* [2008] ZAGPHC 15; See also Wallis JA in *City of Johannesburg v Changing Tides*:

Whenever the circumstances alleged by an applicant for an eviction order raise the possibility that the grant of that order may trigger constitutional obligations on the part of a local authority to provide emergency accommodation, the local authority will be a necessary party to the litigation and must be joined.

[2012] ZASCA 116 [38]; Stuart Wilson, 'Breaking the Tie: Evictions from Private Land, Homelessness, and a New Normality' (2009) 126 *SALJ* 270; Wilson, Dugard and Clark (n 30); *Occupiers of Portion R25 of the Farm Mooiplats v Golden Thread* 2012 (2) SA 337 (CC) [13].

<sup>41</sup> *Dladla v City of Johannesburg* [2017] ZACC 42. The applicants from this judgment were persons evicted as a result of the judgment in *Blue Moonlight*. The Court held that while the temporary accommodation provided offended the rights to dignity, privacy, and security of the person of the applicants, the right to access adequate housing was not engaged.

<sup>42</sup> 2012 (2) SA 337 (CC) [18]; *Occupiers of Skurweplaas v PPC Aggregate Quarries* 2012 (4) BCLR 382 (CC) [12].

premises. The *Blue Moonlight* jurisprudence reflects the expansiveness of South Africa's housing rights jurisprudence. Without engaging directly with the minimum core content of what the adequate house which the right of access seeks to progressively realise should look like, the Court has developed considerable safeguards for those in need of adequate housing. The Court has even demonstrated a willingness to implicate the government within ostensibly private disputes to increase the remit of activity protected by the right.<sup>43</sup>

By protecting the integrity of the housing structures of unlawful occupiers from state or private destruction,<sup>44</sup> by policing engagement between rights-bearers and parties threatening their housing rights, and then importantly by tying the destruction of these structures and eviction of their residents to the provision of adequate facilities, the Court in these cases constructed a jurisprudence that both provides negative protection for groups at risk of homelessness, and positively incentivises state action to hasten their provision of adequate housing.<sup>45</sup> From the abstract foundation of the right in *Grootboom*, which contained no direct protection to litigants affected by state policy,<sup>46</sup> this is a considerable tightening-up of the protection afforded by the right.

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<sup>43</sup> See also in this regard the relatively recent case of *Daniels v Scribante* in which the Court has held that insecure tenants cannot be prevented from making renovations to their dwellings, even against the wishes of the landlord, where those renovations are accepted as necessary to ensure the dwellings are consonant with human dignity. Further, it was held by the majority that there was nothing *per se* unconstitutional about imposing positive obligations upon private parties to vindicate access rights. [2017] ZACC 13.

<sup>44</sup> In *Tswelopele Non-Profit Organisation v City of Tshwane*, the Supreme Court of Appeal even ordered the police, after destroying a group of informal dwellings, to re-erect the dwellings from the improvised materials used in the first place, which they had unlawfully torn down, so that the residents could remain in their dwellings pending lawful eviction and state provision of temporary housing. 2007 (6) SA 511 (SCA). See also *Motswagae v Rustenberg Local Municipality*. [2013] ZACC 1 [12].

<sup>45</sup> 'The court in the *Blue Moonlight* case implicitly recognises that it is possible for the court to question the state about how it spent (or spends) its budget and, where it finds its explanations wanting, to order proper spending (or budgetary allocation) so that it can realise a constitutional right.' Helen Kruuse, 'The Art of the Possible in Realising Socioeconomic Rights: The SCA Decision in *City of Johannesburg Metropolitan Municipality v Blue Moonlight Properties*' 128 (2011) SALJ 620, 624.

<sup>46</sup> As Wilson and Dugard commented:

The returns to effort for the individual claimant in the first wave were relatively low. As the Court itself held in *TAC*, a socioeconomic right does not 'give rise to a self-standing and independent positive right' enforceable independently of whether the State's policies to give effect to that right in question are reasonable [39]. This inevitably means that the prospects for an individual litigant approaching the court to claim specific benefits are particularly bleak, and the incentive to litigate is relatively low.

## II: The Right to a Basic Education

As significant as the development of housing rights has been in the second wave, the expansion of education rights protection is even more noteworthy. As Brickhill and van Leeve noted, ‘after a period of relative quiet in relation to education rights litigation in 1994, the last decade has seen S29 of the Constitution spring to life.’<sup>47</sup> Unlike the access rights, this right is provided without any internal limitation requiring the State to make reasonable legislative efforts to achieve the progressive realisation of this right. Rather, the right is immediately enforceable, subject to the general possibility of limiting rights where ‘reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom.’<sup>48</sup> Also unlike with access rights, the Court has adopted a substantial interpretative competence regarding the essential content of the right to basic education, making affirmative declarations as to what the content of the right is, and imposing exacting orders on the State to remedy breach.

Before 2009, the Court’s education rights jurisprudence was virtually non-existent.<sup>49</sup> Indeed, immediately enforceable socioeconomic rights generally had been ignored by the Courts. An exception proving the rule in this regard is *Grootboom*, in which, as noted already, the immediately enforceable rights of children to shelter were read to only obtain to children who could not be ensured of shelter through their parents or guardians.<sup>50</sup> By this, those rights became insignificant to the Court’s reasoning of the case, and little indication

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Stuart Wilson and Jackie Dugard. ‘Constitutional Jurisprudence: The First and Second Waves’ in Malcolm Langford, Ben Cousins, Jackie Dugard, Tshepo Madlingozi, (eds) *Socio-Economic Rights in South Africa: Symbols of Substance* (2014 Cambridge) 35, 44.

<sup>47</sup> Jason Brickhill and Janet van Leeve, ‘From the Classroom to the Courtroom: Litigating Education Rights in South Africa’ in Sandra Fredman, Meghan Campbell, and Helen Taylor (eds) *Human Rights and Equality in Education: Comparative Perspectives on the Right to Education for Minorities and Disadvantaged Groups* (Policy Press 2018) 143, 165.

<sup>48</sup> Constitution of the Republic of South Africa 1996, S36.

<sup>49</sup> Two noteworthy outliers in this period were *Gauteng Provincial Legislature In re: Gauteng School Education Bill of 1995* [1996] ZACC 4; and *Premier, Province of Mpumalanga v Executive Committee: Eastern Transvaal* [1998] ZACC 20.

<sup>50</sup> [2000] ZACC 19; See Linda Stewart, ‘Interpreting and Limiting the Basic Socioeconomic Rights of Children in Cases Where They Overlap with the Socioeconomic Rights of Others’ (2008) 24 *SAJHR* 472.

was provided as to the Court's understanding of the obligations flowing from such immediately enforceable socioeconomic rights.

Case law on the right to basic education is divisible into two categories. First are those cases in which the Court regulates which bodies decide school policies.<sup>51</sup> These cases will not be considered in this chapter in depth, as these judgments turn on questions of institutional competences of various branches of decision-making institutions, and not on substantive engagements with basic education rights of the learners whose interests the disputing institutions seek to advance.<sup>52</sup>

### II(A): The Juma Masjid Primary School Case

The second group of education cases are those in which the Court adjudicates claims that resources essential to providing a basic education are not being provided. The 'watershed moment'<sup>53</sup> for this strain of education rights jurisprudence was the Constitutional Court's judgment in the *Juma Masjid Primary School* case.<sup>54</sup> The case was an appeal against the eviction of a public school by a private landowner on whose property the school was situated. The Constitutional Court held that the eviction had been approved with insufficient regard being taken for the education rights of the children attending the school. The private property owners, while not under any positive obligation to provide facilities that enable the realisation of the right to basic education,

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<sup>51</sup> *Head of Department, Mpumalanga Department of Education v Hoërskool Ermelo* [2009] ZACC 32; *Head of Department, Free State Province v Welkom High School* [2013] ZACC 25; See also *MEC for Education Gauteng Province v Governing Body of Rivonia Primary School* [2013] ZACC 34; *University of the Free State v Afriforum* [2017] ZASCA 32; Sandra Fredman, 'Procedure or Principle: The Role of Adjudication in Achieving the Right to Education' (2013) 6 *Constitutional Court Review* 165; Yana van Leeve, 'Executive Heavy Handedness and the Right to Basic Education: A Reply to Sandra Fredman' (2013) 6 *Constitutional Court Review* 199, 211.

<sup>52</sup> Most notably, in a case concerning the constitutionality of a high school policy banning pregnant learners from school for the duration of their pregnancy, the Court elected not to find against the policy, not out of any dispute that the policy contravened the rights of pregnant minors - one of the most disadvantaged groups in society - but rather due to a desire to preserve the autonomy of school governing bodies from executive overreach. [2013] ZACC 25. Note however Zondo J's dissent, finding that the governing bodies' learner pregnancy policies were unconstitutional in that the exclusion of a pregnant learner from school unjustifiably infringes the right to a basic education.

<sup>53</sup> Faranaaz Veriava and Ann Skelton, 'The Right to Basic Education: A Comparative Study of the United States, India and Brazil' 35 (2019) *SAJHR* 1, 2.

<sup>54</sup> *Governing Body of the Juma Masjid Primary School v MEC for Education, KwaZulu-Natal* [2011] ZACC 13.

were found to be under a negative obligation not to impair the education rights of learners.<sup>55</sup> Thus, the Court ordered the property owner to engage meaningfully with the Department to attempt to secure the maintenance of the school or, failing that, to secure alternative placement for learners. Upon relocation of the learners, the eviction was approved.<sup>56</sup>

The significance of *Juma Masjid* lies not with its ruling as much as it does with its reasoning.<sup>57</sup> Nkabinde J, for the Court, observed how, ‘unlike some of the other socio-economic rights, this right is immediately realisable. There is no internal limitation requiring that the right be ‘progressively realised’ within ‘available resources’ subject to ‘reasonable legislative measures.’<sup>58</sup> It was noted that ‘basic education is an important socio-economic right directed, among other things, at promoting and developing a child’s personality, talents and mental and physical abilities to his or her fullest potential.’<sup>59</sup> Thereby, ‘basic education also provides a foundation for a child’s lifetime learning and work opportunities [and] to this end, access to school - an important component of the right to a basic education guaranteed to everyone by s29(1)(a) of the Constitution - is a necessary condition for the achievement of this right.’<sup>60</sup>

This, as Nkatha Murungi noted, ‘was the first time the Constitutional Court considered the content of the right to education in the light of the principle of the best interests of the child.’<sup>61</sup> A unanimous Constitutional Court both defined the content of the right to basic education - its function, what its value

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<sup>55</sup> [2011] ZACC 13 [60].

<sup>56</sup> Per Skelton, ‘although the [meaningful] engagement was not fruitful, it was a significant indication that the Courts wanted the parties to find their own solution to the problem if at all possible.’ Ann Skelton, ‘The Role of the Courts in Ensuring the Right to a Basic Education in a Democratic South Africa: A Critical Evaluation of Recent Education Case Law’ (2013) 46 *De Jure* 1, 7.

<sup>57</sup> Per Veriava and Skelton, ‘While the *Juma Masjid* case was not about the parties obligations in respect of the rights to basic education, but rather the obligation of the private property owner who sought to evict a public school established on its property, the Court nevertheless seized the opportunity to distinguish the unqualified right to basic education from qualified socioeconomic rights. Veriava and Skelton, (n 53) 2.

<sup>58</sup> [2011] ZACC [37].

<sup>59</sup> [2011] ZACC [43].

<sup>60</sup> [2011] ZACC [43].

<sup>61</sup> Lucyline Nkatha Murungi, ‘Inclusive Basic Education in South Africa: Issues in its Conceptualisation and Implementation’ (2015) 18 *Potchefstroom Electronic Law Journal* 3160, 3164.

and purpose is - *and* identified a conditional aspect of this right: access to school. As self-evident as it may appear to observe that the ability to access school is a minimal requirement for the provision of a basic education, this decision is deeply significant within the Court's social rights jurisprudence. Whilst no positive obligations were imposed save for an order to engage meaningfully, this judgment suggested that 'a basic education requires an education with a substantive content, not merely a place in school for a prescribed period of time.'<sup>62</sup> Through repeated citation, this had a considerable impact upon the development of positive obligations to ensure a right to basic education.<sup>63</sup>

## II(B): Recent Education Cases at the High Court and Supreme Court of Appeal

Following *Juma Musjid*, in a series of cases originating in Limpopo and the Eastern Cape, the two poorest provinces in South Africa with the worst record of education provision,<sup>64</sup> the right to education was given further judicial definition. As Brickhill and van Leeve noted, 'the approach of the court in these cases has been to focus on the *impact* of the absence of the specific 'input' that was at issue - such as teachers and textbooks.'<sup>65</sup> Alongside the right entailing access to education per *Juma Musjid*, it includes an entitlement to

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<sup>62</sup> Cameron McConnachie and Chris McConnachie, 'Concretising the Right to a Basic Education' (2012) 129 *South African Law Journal* 554, 556.

<sup>63</sup> Cameron McConnachie and Samantha Brener 'Litigating the Right to Basic Education' in Jason Brickhill (ed) *Public Interest Litigation in South Africa* (Juta 2018) 281.

<sup>64</sup> For illustration, note McConnachie and McConnachie's description how:

There are at least 395 'mud schools' in the Eastern Cape alone. While the plight of these schools grabs headlines, the conditions in other state schools are often little better: 3544 have no electricity; 2402 have no access to water while a further 2611 have an unreliable water supply; close to 1000 schools have no toilet facilities, while over 11 000 rely on pit latrines. Only seven per cent of schools have stocked and functioning libraries; five per cent have functioning laboratories and only ten per cent have working computer facilities.

McConnachie and McConnachie (n 62) 555. Similarly, in regards Limpopo Province, Paterson observed how the province was in default of 793, 567 textbooks to learners in 2014. Kate Paterson, 'Constitutional Adjudication on the Right to Basic Education: Are we Asking the State to do the Impossible' (2018) 34 *SAJHR* 112, 114.

<sup>65</sup> Brickhill and van Leeve (n 47) 160.

adequate school furniture,<sup>66</sup> teachers,<sup>67</sup> transport,<sup>68</sup> school buildings,<sup>69</sup> linguistic bursaries,<sup>70</sup> adequate toilets,<sup>71</sup> and textbooks.<sup>72</sup> This extends to all learners, including non-nationals and undocumented children.<sup>73</sup> Further, drawing directly on the Irish case of *O'Donoghue v Minister for Health*,<sup>74</sup> it has been accepted that the education rights of learners with special needs may place discrete immediate obligations upon the state.<sup>75</sup>

None of these cases have reached the Constitutional Court, with only the textbook challenge reaching the Supreme Court of Appeal.<sup>76</sup> Whilst with other socioeconomic rights the Constitutional Court has overturned more ambitious orders of lower courts,<sup>77</sup> this case law not only follows from the *obiter* commentary in *Juma Musjid*, but also has been approved of extrajudicially by

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<sup>66</sup> *Madzodzo v Minister of Basic Education*. Per Goosen J, 'Inadequate resources in the form of insufficient or inappropriate desks and chairs in the classrooms in public schools across the province profoundly undermines the right of access to basic education' [2014] ZAECMHC 5, [20].

<sup>67</sup> *Centre for Child Law v Minister of Basic Education* [2012] ZAECGHC 60; *Linkside v Minister of Basic Education* [2014] ZAECGHC 111. See James Rooney, 'Class Actions and Public Interest Standing in South Africa: Practical and Participatory Perspectives' (2017) 33 *SAJHR* 406.

<sup>68</sup> *Tripartite Steering Committee v Minister of Basic Education*. Per Plasket J, 'in instances where scholars' access to schools is hindered by distance and an inability to afford the costs of transport, the State is obliged to provide transport to them in order to meet its obligations, in terms of s7(2) of the Constitution, to promote and fulfil the right to basic education.' 2015 (5) SA 107 (ECG) [19]. See also *Agri Eastern Cape v MEC for the Department of Road and Public Works* [2017] ZAECGHC 2 [33]; Sue-Mari Viljoen and Saul Porsche Makama, 'Structural Relief - a Context-Sensitive Approach' 32 (2018) *SAJHR* 209.

<sup>69</sup> *Centre of Child Law v Government of the Eastern Cape Province and Others* unreported case no 504/10 of 2011. See McConnachie and McConnachie (n 62) 555.

<sup>70</sup> *Solidariteit v Minister of Basic Education* (Pretoria High Court) 19 June 2017.

<sup>71</sup> *Komape v Minister of Basic Education* [2018] ZALMPPHC 18 [63].

<sup>72</sup> *Section 27 v Minister of Education*. Per Tuchten J: 'If there is one learner who is not timeously provided with her textbooks, her right has been infringed. It is of no moment at this level of the enquiry that all the other learners have been given their books. 2013 (2) SA 40 (GNP) [55] See Paterson (n 64).

<sup>73</sup> *The School Governing Body of Phakamisa High School v Minister of Basic Education* [2019] ZAECGHC 126 [90]

<sup>74</sup> *O'Donoghue v Minister for Health* [1996] 2 IR 20.

<sup>75</sup> *Western Cape Forum for Intellectual Disability v Government of the Republic of South Africa* [2010] ZAWCHC 544; See Charles Ngwena and Loot Pretorius, 'Substantive Equality for Disabled Learners in State Provisions of Basic Education: A Commentary on *Western Cape Forum for Intellectual Disability v Government of the Republic of South Africa*' (2012) 28 *SAJHR* 81; Nkatha Murungi (n 61).

<sup>76</sup> *Minister of Basic Education v Basic Education for All* 2016 (4) SA 63 (SCA).

<sup>77</sup> *Grootboom v Oostenburg Municipality* 2000 (3) BCLR 277 (C) 293A; *City of Cape Town v Rudolph* 2003 (11) BCLR 1236 (C); *City of Johannesburg v Mazibuko* 2009 (3) SA 592 (SCA).

members of the Constitutional Court bench, suggesting a greater probability of acquiescence by the apex Court as well.<sup>78</sup>

In the housing adjudication cases, save for the risk of homelessness, the impact of relocation or eviction for the individuals concerned was largely relegated to secondary status in assessing the reasonableness of the government's policy.<sup>79</sup> In contrast, the provision of school textbooks was held to be 'inextricably linked to the fulfilment of the right [to basic education]' with the High Court stating in *Section 27 v Minister for Education* that, 'in fact, it is difficult to conceive, even with the best of intentions, how the right to basic education can be given effect to in the absence of text books.'<sup>80</sup> This shows a more expanded judicial understanding of its own capacities when it comes to this positive obligations-imposing right. As Paterson perceptively noted in this vein, 'the obligations created by the right to basic education are similar to what was expected for the minimum core of other socioeconomic rights before the minimum core was rejected by the Constitutional Court.'<sup>81</sup>

What is significant about this case law is not just that it shows a judicial willingness to identify the substantive elements which make up the content of a basic education, but also the breadth of remedial discretion that the Court is willing to employ to make the state perform these rights obligations.<sup>82</sup> These remedies have included:

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<sup>78</sup> As Edwin Cameron extrajudicially commented (with Max Taylor):

'The Court held that the right to basic education entitles every learner at public schools in Limpopo to be provided with every textbook prescribed for his or her grade before each course starts. The state is obliged to fulfil this right by providing the textbooks. Its failure to do so was therefore a constitutional breach. The judgment was unambiguous. Government, happily, decided not to appeal. [...] The Constitutional Court has shown sensitivity to the plight of struggling schools in a series of important decisions concerning education. But it is yet to give much substantive content to the right to basic education. The SCA's textbooks decision shows that this could continue to be a productive area of activism that could change many children's lives, and their futures.'

Edwin Cameron and Max Taylor, 'The Untapped Potential of the Mandela Constitution' (2017) *Public Law* 382, 400.

<sup>79</sup> Stuart Wilson and Jackie Dugard, 'Taking Poverty Seriously: The South African Constitutional Court and Socioeconomic Rights' (2011) *22 Stellenbosch Law Review* 664.

<sup>80</sup> 2013 (2) SA 40 (GNP) [25].

<sup>81</sup> Paterson (n 64) 119.

<sup>82</sup> 'The most important lessons learned while litigating the right to basic education have been related to the need for creative remedies for rights enforcement and effective implementation after judgment. The need to develop innovative remedies arose for several reasons, including



Structural interdicts imposing reporting and court supervision,<sup>83</sup> an audit of needs,<sup>84</sup> the appointment of independent bodies to verify needs and to administer claims,<sup>85</sup> ‘deeming’ orders to enable teacher appointments, and the use of a class action<sup>86</sup> to secure relief for a large number of schools.<sup>87</sup>

Alongside these, and consistent with them, in *Tripartite Steering Committee*, the Eastern Cape High Court issued an order of *mandamus* requiring school transport for 26 scholars previously who were walking 5km to and from school each day.<sup>88</sup>

Compliance with these orders has not always been immediate or forthcoming, and the class action referred to followed the failure of the state to comply with a preceding public interests suit.<sup>89</sup> In *Linkside*, the Court instituted a claims administrator to ‘manage all of the paperwork, verify the claims, and submit the amounts to the department, which were then paid to the claims administrator who then paid these out to the school.’<sup>90</sup> Further, the Court declared salaries were debts in terms of the State Liability Act,<sup>91</sup> meaning:

attorneys could immediately take steps to attach state property and have it sold at sales in execution to realise money owed. For example, steps were taken to attach the motor vehicle of the Minister of Basic Education and the debts for teachers’ salaries was immediately paid.<sup>92</sup>

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the state’s non-compliance with court orders, its failure to plan effectively and the need to monitor implementation.’ *McConnachie and Brener* (n 63) 299.

<sup>83</sup> [2014] ZAECMHC 5; 2013 (2) SA 40 (GNP); [2010] ZAWCHC 544.

<sup>84</sup> [2014] ZAECMHC 5; 2013 (2) SA 40 (GNP).

<sup>85</sup> [2014] ZAECMHC 5; [2014] ZAECGHC 111.

<sup>86</sup> [2014] ZAECGHC 111.

<sup>87</sup> *Brickhill and van Leeve* (n 47) 165.

<sup>88</sup> As *Plasket J* held:

The distance requirement of five kilometres from the school is arbitrary, but understandably and unavoidably so: a distance had to be settled upon and it could just as easily have been four or six kilometres. This element of arbitrariness is one reason why the policy has to be applied flexibly. [...] In its application, it must be borne in mind that the policy is not an end in itself but a means to the department’s end of meeting its obligations in terms of s29 of the Constitution.

2015 (5) SA 107 (ECG) [57]; *Veriava and Skelton* (n 53) 3 - 4.

<sup>89</sup> *Rooney* (n 67) 417.

<sup>90</sup> [2015] ZAECGHC 36; *McConnachie and Brener* (n 63) 301.

<sup>91</sup> State Liability Act 20 of 1957.

<sup>92</sup> *McConnachie and Brener* (n 63) 299.

Thus, ‘although a measure of last resort, attachment was an effective method of securing compliance in that particular case.’<sup>93</sup> This case illustrates how in relation to this right the South African judiciary are taking a considerably more muscular and interventionist stance to ensuring state compliance with social rights obligations than they have felt it necessary to ensure for other social rights.

In the round, these orders have had a largely positive impact in correcting breaches of the right to education. As the Supreme Court of Appeal observed, ‘it is undisputed that the delivery of textbooks only started taking place after the grant of an order by [...] the High Court.’<sup>94</sup> Thus, whilst ‘compliance remains imperfect, on their own terms these cases reveal that hundreds of thousands of students have been provided with these components of a basic education in the Eastern Cape and Limpopo provinces.’<sup>95</sup>

This represents the hardest edge of South African social rights protection. Whilst there have been issues with enforcement, given the impact of prior non-enforcement, arguments that lesser intervention would lead to greater protection of these immediately realisable rights appear unsustainable.

### III: The Right to Social Assistance

The second wave also saw a series of remarkable decisions concerning the obligations that flow from the right to access social assistance. In 2012, the South African Social Security Agency (‘SASSA’) concluded a contract with a private company, Cash Paymaster Services (CPS), for CPS to provide services for the payment of social grants to the fifteen million recipients of social assistance for a period of five years. In 2013, the Constitutional Court found this contract unconstitutional and invalid, as in its tendering process, SASSA had failed to ensure the empowerment credentials of CPS were objectively confirmed.<sup>96</sup> Given the potential ramifications of voiding a contract that was

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<sup>93</sup> Jason Brickhill and Meghan Finn, ‘The Ethics and Politics of Public Interest Litigation’ in Jason Brickhill (ed) *Public Interest Litigation in South Africa* (Juta 2018) 93, 103

<sup>94</sup> [2015] ZASCA 198 [13].

<sup>95</sup> Brickhill and van Leeve (n 47) 165.

<sup>96</sup> *AllPay Consolidated Investment Holdings v Chief Executive Officer of the South African Social Security Agency* [2013] ZACC 42. [72] [hereinafter ‘AllPay’].

necessary to ensure access to social assistance, the Court delayed in issuing a remedy for the breach.

In 2014, the Court adjudicated upon the remedy.<sup>97</sup> In *AllPay Remedy*, the Court issued a suspended declaration of invalidity and ordered the tender process had to be re-run. As continuation of the CPS contract was essential to the vindication of the rights of fifteen million people to access social assistance, the Court held that, notwithstanding the invalidity of the contract, that contract had to remain in force in light of CPS' (voluntarily assumed) constitutional and contractual obligations to maintain a workable payment system.<sup>98</sup> In this, as Finn noted:

a unanimous judgment by Froneman J found that when an entity - even a private one - performs a function that is fundamentally public in nature, it can be regarded as an organ of state and thus is unable to 'walk away' from its constitutional duties.<sup>99</sup>

The suspension of invalidity was based on the premise that either a new five-year tender would be awarded after a proper procurement process, or SASSA would itself take over the payment of social grants when the suspended contract with CPS came to an end on 31 March 2017. In November 2015, SASSA reported that it had decided not to award a new tender. Instead, it reported that it would take over itself the payment of social grants by 31 March 2017.<sup>100</sup>

However, from April 2016 on, SASSA knew it could not comply with this undertaking but did not inform the Court.<sup>101</sup> In 2017, SASSA informed the Court that CPS - a company whose contract had been declared unconstitutional four years earlier- was now the *only* entity capable of paying grants for the

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<sup>97</sup> *AllPay Consolidated Investment Holdings v Chief Executive Officer of the South African Social Security Agency (No 2)* [2014] ZACC 12. [hereinafter '*AllPay Remedy*'].

<sup>98</sup> [2014] ZACC 12 [66].

<sup>99</sup> Meghan Finn, '*AllPay Remedy*: Dissecting the Constitutional Court's Approach to Organs of State' (2013) 6 *Constitutional Court Review* 258, 258.

<sup>100</sup> *Black Sash v Minister of Social Development (No 1)* [2017] ZACC 8 [3] [hereinafter '*Black Sash*']

<sup>101</sup> [2017] ZACC 8 [6]

foreseeable future after 31 March 2017.<sup>102</sup> As the Court in *Black Sash v Minister of Social Development* noted:

This Court and the country as a whole are now confronted with a situation where the executive arm of government admits that it is not able to fulfil its constitutional and statutory obligations to provide for the social assistance of its people. And, in the deepest and most shaming of ironies, it now seeks to rely on a private corporate entity, with no discernible commitment to transformative empowerment in its own management structures, to get it out of this predicament.<sup>103</sup>

As a result, the Court were compelled to order CPS ‘to ensure payment of social grants to grant beneficiaries from 1 April 2017 until an entity other than CPS is able to do so,’ and extended the suspension of invalidity by another 12 months.<sup>104</sup> In its cost order, the Court joined the Minister in her personal capacity so that she was held to account,<sup>105</sup> and ultimately, imposed a 20% costs order on her personally, due to the presence of bad faith.<sup>106</sup>

In this saga, the Court found itself willing to, one, find a private agency to be bound as if it was an organ of state; two, maintain the effect of an invalid contract twice in order to vindicate the right to access social assistance; and three, find the Minister liable personally for the crisis despite separation of powers objections to the contrary.<sup>107</sup> This case then is indicative of both the breadth of the current Court’s remedial capacity, and the maladministration in which this expansion of the Court’s powers has occurred.<sup>108</sup>

Alongside the novel reasoning in these cases, to properly understand the Court’s social rights jurisprudence in the second wave, instances of ‘judicious avoidance’ by the Court of engaging in broad rights reasoning need to be

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<sup>102</sup> [2017] ZACC 8 [7]

<sup>103</sup> [2017] ZACC 8 [8]

<sup>104</sup> [2017] ZACC 8 [76]

<sup>105</sup> *Black Sash v Minister of Social Development (No 2)* [2017] ZACC 20

<sup>106</sup> *Black Sash v Minister of Social Development (No 3)* [2018] ZACC 36 [18]

<sup>107</sup> [2018] ZACC 36 [7]

<sup>108</sup> Alongside *Mwelase v Director General for the Department of Rural Development* [2019] ZACC 30, *Black Sash* represents the high points of the Court’s remedial breadth to date.

considered.<sup>109</sup> The decisions relate to one textually enumerated right - the right to access water; one successful claim of an unenumerated right - the right to electricity provision; and one unsuccessful claim - that there was a right to sanitation.

#### IV: The Right to Water

*Mazibuko v City of Johannesburg* was ‘the first case to reach the South African Constitutional Court respecting access to water as an affirmative right.’<sup>110</sup> The case concerned a challenge to both the imposition of pre-paid water meters in a township in Soweto, and the provision of only 6 kilolitres of free water monthly under the scheme. The Constitutional Court dismissed an order from the Supreme Court of Appeal prescribing a minimum threshold amount of water due to each individual rights-bearer, repeating the argument from *Grootboom* that it was not within the competence of the Courts to determine the minimum threshold entitlements arising from access rights.<sup>111</sup> Whilst it was uncontested that dismissing the order on appeal would restrict access to water, meaningful engagement between the township and the City was not ordered.

*Mazibuko* contains the most articulated expression by the Court of its opposition to discerning a minimum core for access rights. The Court’s refusal to engage with this, O’Regan J argued, results from both democracy-based and efficiency-based arguments. In both regards, the court argued the elected branches were better suited than the judiciary to determine the appropriate content.<sup>112</sup> Access rights litigation, per O’Regan J, ‘fosters a form of participative democracy that holds government accountable and requires it to

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<sup>109</sup> Iain Currie, ‘Judicious Avoidance’ (1999) 15 *SAJHR* 138; see also Stu Woolman, ‘The Amazing, Vanishing Bill of Rights’ (2007) 124 *SALJ* 762; Jackie Dugard, ‘Courts and the Poor in South Africa: A Critique of Systemic Judicial Failures to Advance Transformative Justice’ (2008) 24 *SAJHR* 214.

<sup>110</sup> *Mazibuko v City of Johannesburg* [2009] ZACC 28. [hereinafter ‘*Mazibuko*’]; Lucy A Williams, ‘The Role of the Courts in the Quantitative-Implementation of Social and Economic Rights: A Comparative Study’ (2010) 3 *Constitutional Court Review* 141, 160.

<sup>111</sup> This was only the second socioeconomic rights case to be unsuccessful at the Constitutional Court, the other being *Soobramoney v Minister of Health* [1997] ZACC 17.

<sup>112</sup> [2009] ZACC 28 [57]; See Heinz Klug, ‘Finding the Constitutional Court’s Place in South Africa’s Democracy: The Interaction of Principle and Institutional Pragmatism in the Court’s Decision Making’ (2010) 3 *Constitutional Court Review* 1.

account between elections over specific aspects of government policy,' thereby indirectly ensuring protection of socioeconomic interests.<sup>113</sup>

This noted, as Fish Hodgson wrote, 'what [also] often escapes the scrutiny of critics of the *Mazibuko* judgment is that [...] the Court seemed to open the way for a judicially enforceable minimum core which is determined by the legislature and the executive.'<sup>114</sup> This is supported by the 2019 High Court judgment in *Zabalaza Mshengu v Msunduzi Local Municipality*.<sup>115</sup> There, the High Court issued a structural interdict *requiring* the municipality to identify all farm occupiers and assessing their water needs. Then subject to the compliance with this interdict, the Court mandated the 'installation of water connections to supply a minimum quantity of potable water of 25 litres per person per day or 6 kilolitres per household per month to farm occupiers and labour tenants residing within areas of their jurisdiction.'<sup>116</sup> This mandating of a minimum core provision was ordered so as to make the Municipality comply with ministerial regulations and legislation that gives expression to the right to water access.<sup>117</sup> Per Mnguni J:

The applicants are not asking the court to set the proper standard for the provision of water or sanitation. [The Ministerial regulation] has already determined the basic content of that obligation. What the applicants seek is to enforce the standard imposed by the legislative and executive branches.<sup>118</sup>

This recent case then suggests that Fish Hodgson is correct that *Mazibuko* is consistent with the judicial enforcement of minimum core obligations *where already prescribed by the elected branches*.<sup>119</sup>

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<sup>113</sup> [2009] ZACC [160].

<sup>114</sup> Timothy Fish Hodgson, 'The Mysteriously Appearing and Disappearing Doctrine of Separation of Powers: toward a Distinctly South African Doctrine for a More Radically Transformative Constitution' 34 (2018) *SAJHR* 57, 81.

<sup>115</sup> *Zabalaza Mshengu v Msunduzi Local Municipality* [2019] ZAKZPHC 52.

<sup>116</sup> [2019] ZAKZPHC 52 [2.1].

<sup>117</sup> Regulations Relating to Compulsory National Standards and Measures to Conserve Water GNR 509 of 8 June 2001; see also Water Services Act 108 of 1997.

<sup>118</sup> [2019] ZAKZPHC 52 [69].

<sup>119</sup> Fish Hodgson (n 114).

If *Mazibuko* was merely a restatement of the *Grootboom* reasoning in regards to engagement with the minimum core, the judgment would be of less significance. However, the *manner* in which the Court assessed reasonableness in this case is also relevant. Whilst noting the adverse effects arising out of lack of water access,<sup>120</sup> the Court proceeded to take as read the *bona fides* of the City's policy without searching scrutiny.<sup>121</sup> As Roithmayer observed, 'without much discussion at all, the Court finds it constitutional to ration access to water based on the ability to pay, even for the country's poorest black residents'.<sup>122</sup> In its wilfulness to accept the City's submissions, this can be criticised, even while accepting the propriety of the Court avoiding engaging in minimum core reasoning. In this, it presents a notable counterpoint to the judicial engagements with social rights discussed already in this chapter.

## V: Electricity Rights

The other two cases which deserve note both concern claims of rights ancillary to the right to adequate housing in S27 of the Constitution. In the first case, *Nokotyana v Ekurhuleni*,<sup>123</sup> applicants sought provision of sanitation facilities, refuse removal and high-mast lighting for their settlement.<sup>124</sup> These entitlements, they claimed, related to the adequacy of the housing to which they were constitutionally entitled. Despite expressly noting the necessity for provision of such amenities in the settlement, the Court avoided considering the claim that these rights may be owed under S26 entirely, through ruling that the applicants challenged the incorrect legislation to justify a constitutional challenge - a degree of formalism distinguishable from the Court's willingness

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<sup>120</sup> The achievement of equality, one of the founding values of our Constitution, will not be accomplished while water is abundantly available to the wealthy, but not to the poor. [2009] ZACC 28 [2].

<sup>121</sup> 'In effect, the Court gave presumptive validity to the City's data and calculation methods, thereby failing to hold the City accountable in any meaningful way - as the Court says it is the purpose of public interest litigation to do. The Court provided minimal direction for the elected branches in setting standards and minimal guidance to future litigants and the public about what criteria and inquiries will ultimately comprise reasonableness review in cases involving social and economic rights.' Williams (n 110) 189.

<sup>122</sup> Daria Roithmayer, 'Lessons from *Mazibuko*: Persistent Inequality and the Commons' (2010) 3 *Constitutional Court Review* 317, 324. As Fowkes observed of *Mazibuko*, 'The Court confronted a policy that had been the subject of plausible, demonstrated constitutional concerns, and still decided to do nothing.' Fowkes (n 21) 287.

<sup>123</sup> *Nokotyana v Ekurhuleni Metropolitan Municipality* [2009] ZACC 33 [hereinafter '*Nokotyana*']

<sup>124</sup> [2009] ZACC 33 (3).

to engage in rights reasoning even when sections of the Constitution were found to be incorrectly cited in *Grootboom* and *Soobramoney*.<sup>125</sup>

Again, as it sought to substantiate the content of ‘adequate housing’ within the access right, something the Court has set its face against, the claim appeared always to be unlikely to succeed.<sup>126</sup> Even accepting this however, the decision to avoid the rights claim altogether rather than to reject it for entertaining a conception of the judicial role which includes substantiating the content of access rights ‘appears to be an abrogation of the Constitutional Court’s most basic duty to interpret the constitutional provisions of the Bill of Rights.’<sup>127</sup>

Finally, in *Joseph v City of Johannesburg*, the Court, only for the second time,<sup>128</sup> found an unenumerated right, namely a right to basic municipal services, including to electricity.<sup>129</sup> As in *Nokotyana*, the claim raised by applicants was that the right to electricity flowed from the right to access adequate housing in S26. Instead however, the Court held that the right flowed from the right of administrative justice and to fair procedures,<sup>130</sup> such that

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<sup>125</sup>Per Edward Kapindu

In *Nokotyana*, the Court adopted an overly legalistic approach in placing undue weight on procedural technicalities, instead of putting the substantive concerns of the poor applicants at the core. [...] The decision represents a further retreat by the court from its duty to define and develop the content of the socio-economic rights guaranteed under the Constitution. In *Nokotyana*, the socio-economic rights claims of desperately poor litigants for the provision of the basic necessities of life seem to have been shipwrecked.

Redson Edward Kapindu, ‘The Desperate Left in Desperation: A Court in Retreat: *Nokotyana v Ekurhuleni Metropolitan Municipality Revisited*’ 3 (2010) *Constitutional Court Review* 201, 221 - 222.

<sup>126</sup> ‘More decisive action in *Nokotyana*, for example, would have required putting concrete figures to what ‘sanitary conditions’ and ‘access to [...] toilets and running water entails’; everyone involved accepted that the government had a basic obligation to provide these things. It is hard to see what difference, if any, an interpretation of the relevant rights in the form of this sort of broad conceptual standard would have made in the case. Fowkes (n 21) 267.

<sup>127</sup> David Bilchitz, ‘Is the Constitutional Court Wasting Away the Rights of the Poor - *Nokotyana v Ekurhuleni Metropolitan Municipality* 127 (2010) SALJ 591, 597. Note however *Beja v Premier of the Western Cape* [2011] ZAWCHC 97, where Erasmus J found the unenclosed toilets to be ‘reprehensible’ and that they failed to ‘afford any regard to the dignity of poor people.’ Having found that the unenclosed toilets violated the residents S10 right to human dignity, he ordered the municipality to enclose the 1316 toilets.

<sup>128</sup> The other case being the right to participation in *Doctors for Life International v Speaker of the National Assembly* [2006] ZACC 11.

<sup>129</sup> *Joseph v City of Johannesburg* [2009] ZACC 30. [hereinafter ‘*Joseph*’]

<sup>130</sup> Per Skweyiya J, ‘The applicants relied principally on the right of access to adequate housing in section 26(1) of the Constitution. [...] In the view I take of the matter it is not necessary to address this contention.’ [2009] ZACC 30 [32].



individuals do not have a right to electricity, but *do* have a right to notice of when electricity may be unplugged.<sup>131</sup> As Bilchitz noted:

it is confusing why in *the Joseph* case the court preferred to find a whole new basis for the right to electricity, rather than developing the content of an express fundamental right in the Constitution. If it did not wish to find that s 26 includes the right to electricity or sanitation, then it should have explained why the normative content of the right to adequate housing does not include these goods. In *Joseph*, it simply bypassed the fundamental right and created a new right: we are left wondering why this was in fact necessary.<sup>132</sup>

‘The manner in which judges decide cases matters.’<sup>133</sup> Electing to avoid the stated ground, that of electricity being related to housing rights, and to ground a right in a provision not pled reflects a desire to avoid overly substantiating access rights. This scans with the Court’s approach in *Mazibuko* and *Nokotyana* as well. Thus, alongside noting the progressions in the Court’s socioeconomic rights jurisprudence in regards housing and education rights, avoidance practices noted in the first ten years also subsist.

A critique of the Court’s access rights jurisprudence generally, perhaps particularly salient in these cases, is an unwillingness of the Court to factor into its review the specific situation of disadvantage of the claimants in the discrete case. As shown above, this criticism is less germane in relation to the Court’s education and social security rights case law. In regards housing rights however, it can be seen in the almost-exclusive focus on avoiding homelessness.<sup>134</sup> As noted by McConnachie and McConnachie, in *Blue Moonlight*, ‘discussion of the factual situation of the occupiers was relegated

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<sup>131</sup> ‘Somewhat surprisingly, the Court did not base its decision on linking electricity to the right to housing, as the applicant had argued. Instead, the Court essentially created a new socioeconomic right - the right to basic municipal services (including the right to electricity.)’ Jackie Dugard, ‘Urban Basic Services: Rights, Reality and Resistance in Malcolm Langford, Ben Cousins, Jackie Dugard, Tshepo Madlingozi, (eds) *Socio-Economic Rights in South Africa: Symbols of Substance* (2014 Cambridge) 275, 298.

<sup>132</sup> Bilchitz (n 127) 597.

<sup>133</sup> Pieterse (n 20) 360.

<sup>134</sup> Wilson and Dugard argue that: ‘the Court has developed the reasonableness test in an acontextual manner, which takes little account of the lived experience of poverty.’ Wilson and Dugard (n 46) 37.

to a footnote.<sup>135</sup> By overlooking the absence of meaningful engagement prior to the approval of the order in *Joe Slovo*, in a similar way the assessment of the reasonableness of the municipality's order was conducted without noting the objections of the residents.<sup>136</sup> Viewing reasonableness review as process not outcome-orientated is understandable, and meaningful engagement is an attempt to factor into the process a focus on the effect the outcome will have on the affected rights-bearers. Whilst true, by eliding the effects of not finding for Mazibuko for instance, judicial silence leaves the Court's assessment of the propriety of its orders suboptimal.<sup>137</sup>

## VI: What Factors Conditioned the Court's Social Rights Jurisprudence in the Second Wave?

I will now evaluate and explain the influences upon the Court's idiosyncratic and largely positive social rights reasoning during the second wave. By this, it is hoped that a greater understanding of how judicial practices of socioeconomic rights protection develop within common law systems.

From what has been discussed, four trends can be discerned. First, the right to housing has undergone considerable development from the foundations laid in the *Grootboom* and *Jaftha* cases.<sup>138</sup> Without reversing the Court's resistance to engaging in substantive evaluations of the content of an adequate house, through increased 'proceduralisation' of evictions and relocations, and constructing binding duties of meaningful engagement, the ability for the S26 right to have a direct impact on rights bearers at risk of being deprived of access to housing has been strengthened.

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<sup>135</sup> *McConnachie and McConnachie* (n 62) 579.

<sup>136</sup> *McLean* (n 20) 240.

<sup>137</sup> That noted, in *Mazibuko*, the residents ultimately got what they wanted politically. As Dugard and Lanford noted, 'as a direct result of the politicization surrounding the litigation, the City raised the amount of free basic water it provides to the poorest households to 50 litres per person per day [the amount the applicants had asked for.]' Jackie Dugard and Malcolm Langford 'Art or Science? Synthesising Lessons from Public Interest Litigation and the Dangers of Legal Determinism' (2011) 27 *SAJHR* 39, 45.

<sup>138</sup> In a particularly linear development of the *Jaftha* jurisprudence, in *Gundwana v Steko* the Court extended the protection against eviction to mortgagors who will lose their property. [2011] ZACC 14.

Second, the hitherto under-adjudicated immediately enforceable right to a basic education was engaged with substantively by the Courts. Taking their cue from the Constitutional Court judgment in *Juma Masjid*, the High Court and Supreme Court of Appeal have further elaborated upon what make up the substantive content of this right, and moreover have been unafraid to issue wide-ranging mandatory orders upon the state to effect compliance with their obligations.

Third, the Court has shown a willingness to strongly protect the right to access social security benefits. This has seen the Court experiment with the extent of its remedial powers to the extent of binding private parties that exercise public functions in perpetuity to vindicate the right. Finally, outside of these areas of general expansion in judicial protection of socioeconomic rights however, there have been several significant cases in which the Court has appeared to wilfully ignore the social rights provisions pleaded by applicants to decide cases with significant implications for socioeconomically disadvantaged litigants. While this conforms to a general pattern of avoiding engagement with the minimum core, these cases are avoidance at its most brazen: avoidance to the point of rejecting that a right is engaged *at all*.

What explains the variant development of socioeconomic rights in this period? There are three dominant factors operating within the South African judicial community in this period which, understood together, provide a clarified understanding of why the Court reasoned as they did. Two of these factors are continuations of sorts with two of the factors discussed already - a commitment to transformative constitutionalism and a cleavage to common law principles, particularly from administrative law. The third, it is suggested, is partially temporal, and provides an explanation for the Court's education rights case law. Alongside these, the diminution of the final factor argued to have conditioned the Court's reasoning in the previous period - a desire to maintain a good working relationship with the ANC - has played a role. In recognising these factors, a clearer understanding should emerge for how the South African judicial community developed its social rights jurisprudence over the past fifteen, and indeed twenty-five, years.

## VI(A): Transformative Constitutionalism

The Court's rights reasoning in this period is again informed in considerable part by two of the main influences highlighted already: namely a judicial commitment to transformative constitutionalism; and the common law legal framework in which members of the South African judiciary were immersed. Commencing with transformative constitutionalism, the judiciary in this period still understand their rights-adjudicative function as being informed by a need to transform the South African legal order away from its discriminatory, rights-negating past.<sup>139</sup> When discussing endemic problems of homelessness,<sup>140</sup> evictions,<sup>141</sup> and education supply shortages,<sup>142</sup> the Courts made explicit their understanding of the precedent from which they trying to shift South Africa's

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<sup>139</sup> Per Ngcobo J in *Joe Slovo*:

What apartheid bequeathed to the new democratic government was poverty, landlessness, inadequate housing with resultant overcrowding and the mushrooming of informal settlements. These are the conditions that prevailed on the eve of our constitutional democracy. Our Constitution was adopted, amongst other things, to address these conditions. The inclusion of justiciable socio-economic rights in the Constitution is a manifestation of the commitment to addressing these conditions.

[2009] ZACC 16 [197].

<sup>140</sup> Langa ACJ in *Modderklip*:

The problem of homelessness is particularly acute in our society. It is a direct consequence of apartheid urban planning which sought to exclude African people from urban areas, and enforced this vision through policies regulating access to land and housing which meant that far too little land and too few houses were supplied to African people. The painful consequences of these policies are still with us eleven years into our new democracy, despite government's attempts to remedy them.

[2005] ZACC 5 [36]; See also the judgment of Froneman J in *Daniels v Scribante* [2017] ZACC 13.

<sup>141</sup> Sachs J in *Port Elizabeth Municipality v Various Occupiers*:

For all black people, and for Africans in particular, dispossession was nine-tenths of the law. Residential segregation was the cornerstone of the apartheid policy. This policy was aimed at creating separate "countries" for Africans within South Africa [...] Through a combination of spatial apartheid, permit systems and the creation of criminal offences the Act strictly controlled the limited rights that Africans had to reside in urban areas.

[2004] ZACC 7 [9]; See also *Blue Moonlight* [2009 ZACC 16 [2].

<sup>142</sup> Khampepe J in *Head of Department of Education, Free State Province v Welkom High School*:

The entrenchment of the right to education as a fundamental right of all people in South Africa represents a remarkable and ambitious break with the past, occurring as it does in the wake of the apartheid regime's policy of racially-segregated, disproportionately-resourced schooling and the very real legacy of that noxious system with which we are still faced today.

[2013] ZACC 25 [34]; see also *Federation of Governing Bodies of South African Schools v MEC Gauteng Province* [2016] ZACC 14 [3].

legal order, and the necessity of strong rights protection to completing this transformation.<sup>143</sup>

The development of meaningful engagement as a remedy is understandable in this context, as a means by which the intrinsic dignity of hitherto excluded groups can be elevated within legal relations to a position of parity with the state or more socioeconomically powerful private individuals. Thus, it appears that a relevant driver of the Court's reasoning in this period is the continued presence of an internalised sense of obligation to assist in the transition by revising South African legal concepts to elevate the individuated interests of rights-bearers who hitherto were treated by the law not as autonomous persons deserving of moral consideration, but as objects.<sup>144</sup>

#### VI(B): The influence of the common law and comparative jurisprudence

As with the jurisprudence of the preceding decade, in the fifteen years under review the influence of common law concepts informing the Court's understanding of its role remain dominant. The retention of reasonableness as the test of state performance of its duties of access remains understandable in part as the working-out of an influence of administrative law influences, if admittedly the test for reasonableness set out in cases such as *Mazibuko* is (at least facially, in that case) considerably more searching than scrutiny of administrative actions.<sup>145</sup>

Continuing the theme, it has been compellingly argued that the development of meaningful engagement as a precondition to evictions is akin to the natural

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<sup>143</sup> As the Supreme Court of Appeal noted in *Minister of Basic Education v Basic Education for All* basic education is not only an end in itself, but also 'a primary driver of transformation in South Africa.' *Minister of Basic Education v Basic Education for All* 2016 (4) SA 63 (SCA) [40].

<sup>144</sup> Per Chenwi, 'Engagement creates a voice and forum for the marginalised and impoverished in resisting their exclusion from processes that affect them. Lilian Chenwi, 'Democratising the Socioeconomic Rights-enforcement process' in Helena Alviar García, Karl Klare, and Lucy A. Williams (eds) *Social and Economic Rights in Theory and Practice* (Routledge 2015) 178, 192.

<sup>145</sup> *Bato Star Fishing v Minister of Environmental Affairs* [2004] ZACC 15; see Carol Steinberg, 'Can Reasonableness Protect the Poor - A Review of South Africa's Socioeconomic Rights Jurisprudence' (2006) 124 *South African Law Journal* 264.

justice principle of *audi alteram partem*.<sup>146</sup> By enforcing a duty on the State to hear the submissions of the parties whose rights will be limited by their actions as a prerequisite for approving an action, this does share some features with this principle. As with the relationship between *Grootboom* and *Wednesbury* reasonableness, in social rights adjudication this duty is considerably boosted.<sup>147</sup> Indeed, by being used as both a sword and a shield - in both the absence of meaningful engagement rendering an action unconstitutional, *and* meaningful engagement being remedially ordered, subject to supervision by the Courts, as a means to advance the rights of the less-powerful party - this doctrine also appears to owe something to the administrative law doctrine of legitimate expectations.<sup>148</sup> As the occupiers of Olivia Road had the right to expect to be consulted prior to their eviction, meaningful consultation was ordered. Further, going beyond the public law sphere of administrative law, in a further expansion, the Court held this duty to meaningfully engage can even be imposed on private parties, as in the *Juma Masjid Primary School case*.

As with the jurisprudence from the previous Chapter, the explanation posited for the provenance of administrative law reasoning within the Court's social rights adjudication is, in part, a familiarity with the logic of administrative law gleaned from experience of adjudication within that field and an internalisation of its principles during legal education and practise. It makes sense that the Court would rely upon cognate areas of existing law in this way in their social rights adjudication, especially considering the paucity of comparative social rights case law, which could have provided further direction to the Court on how to go develop social rights.<sup>149</sup>

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<sup>146</sup> McLean, (n 20) 223. Wilson and Dugard (n 46) 46. See also Shanelle van der Berg, 'Meaningful Engagement: Proceduralising Socioeconomic Rights Further or Infusing Administrative Law with Substance' (2013) 29 *SAJHR* 376.

<sup>147</sup> "Meaningful engagement" in *Olivia Road and Joe Slovo* approximated (though, admittedly, went further than) the administrative law stalwart of *audi alteram partem*.' Pieterse (n 20) 363.

<sup>148</sup> *Ibid.*

<sup>149</sup> Notwithstanding this, McConnachie and Brener note that, with the installation of claims administrators to ensure teacher payment to vindicate the right to basic education:

The idea was conceived of drawing on the experience of the United States of America, Australia and Canada who had all made use of claims administrators in class actions. The purpose of the claims administrator is to assist the court in notifying members of the class and assisting with dispersal of amounts.

## VI(C): Time and Experience

A further reason why the Court expanded its adjudicative capacity in access rights cases beyond *Grootboom* to include duties to meaningfully engage is, at least in part, the result of a bedding-in of social rights adjudication within the South African legal community. The threshold issue of determining how to broadly adjudicate this form of rights disputes was overcome in the first wave. Here, the Court are experimenting with the limits of their powers within the *Grootboom*-prescribed limits. In this way, time and judicial experience appear to play a strong conditioning role in the development of the Court's housing rights jurisprudence in this period.

Timing is also one factor in explaining why the Court in this period developed the right to basic education so substantively. The trend of education rights adjudication began in earnest in 2009, and *Juma Masjid* was not decided until 2011. By then, the South African legal order had been operating under a Bill of Rights for fifteen years and, as noted in the previous chapters, the judiciary had expanded its competence significantly both in rights reasoning and in remedial capacity. Thus, when confronted with a relatively untouched right, in this context with this greater experience and comfort with social rights protection, the Court demonstrated a greater willingness to strike a more substantive path than it trod when conceptualising the rights to healthcare and housing in the previous period.

Alongside this, the textual distinctiveness of this right, not just compared with the access rights but to other immediately enforceable social rights that have been adjudicated upon, such as the right of children to shelter considered in *Grootboom*, appears relevant. Whereas with *Grootboom*, the Court was able to interpret it in a minimalist fashion by limiting its applicability to children in extreme poverty without parental support, the absence of a similar qualifier for S29(1) restricted the Court's interpretative latitude to read the right conservatively. This then provides an explanation why the chance to, for the first time, properly adjudicate upon this enumerated right was received so

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McConnachie and Brener (n 63) 301.

favourably. In *Mazibuko*, a hitherto unadjudicated-upon access right was engaged with in a fashion similar to other similar access rights.

Nevertheless, the Court could have adopted an age-related determination of what basic education requires or could have adopted a deferential stance whereby whatever base level the government asserted to be appropriate was adopted unless plainly unreasonable.<sup>150</sup> Instead, the judiciary seized the opportunity to substantively engage with the content of this socioeconomic right imposing positive obligations upon the state, first by reasoning in *Juma Musjid* in a fashion considerably more expansively than strictly required by the limits of the case.<sup>151</sup> This then appears to support the contention that the influence of increased judicial comfort with socioeconomic rights adjudication by the time the opportunity of substantiating this right came along was a consequential factor. Through understanding how the South African judicial community developed such a relatively expansive competence to engage in social rights adjudication, greater clarity will be provided as to what factors must obtain within the legal communities of other common law jurisdictions so that a culture of social rights adjudication can develop.

#### VI(D): The Court's Management of its Powers in Light of the Dominance of the ANC

Finally, a subsisting factor throughout this period was the growing animus between the judiciary and the ANC noted in Chapter Ten. Earlier, it was suggested the Court's social rights reasoning in the first ten years was inflected in part by the maintenance of a relationship to the ANC. The maintenance of this relationship was sympathetic (the Court understood the ANC to share its

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<sup>150</sup> 'While the case was not about the positive obligations in respect of the rights to basic education, but rather the obligations of a private property owner who sought to evict a public school established on its property, the Court nevertheless seized the opportunity to distinguish the unqualified right to basic education from the qualified socioeconomic rights. It also appears to have laid the foundation for a substantive approach to the interpretation of the right to basic education.'

Veriava and Skelton (n 53) 2.

<sup>151</sup> Per Brickhill and van Leeve, 'The courts do *not* accept that formal enrolment and attendance are sufficient. Instead, as they consider whether certain inputs or resources form part of the content of the right, they require that the actual substance of education serve the purpose of effective learning and teaching to empower students to participate in society as active citizens and access opportunities after completing their schooling.' Brickhill and van Leeve (n 47) 161.



transformational agenda) and tactical (the ANC had public support, the Court did not, and so relied on the acquiescence, if not enthusiasm, of the Government to have their judgments enforced.)<sup>152</sup>

Whilst it is difficult to confidently determine how much of a causative factor this proved to be in the hardening of social rights obligations,<sup>153</sup> it nevertheless presents itself as a likely conditioner of the Court's understanding of its powers in this period, and thus of its capacity to engage in social rights reasoning that imposed positive burdens upon the State. As Brickhill and Finn noted, the *AllPay/Black Sash* interdict 'is an indication of 'the times': the courts in the Mandela and Mbeki eras were far more reticent to impose such interdicts on government, trusting the state to comply with its orders.'<sup>154</sup>

Alongside the transformative necessity of expanding education rights - not lost on the courts - the impact of time and the textual specificity of the right appear to have also then contributed to the Court's wider-than-usual interpretation of this right. As well as this, here also the scale of the deficit in provision of education resources by the provinces in question appears relevant to explaining the Court's reasoning. Whereas in most social rights cases in which positive action is expected of the state, a policy is in place which, if reasonable but suboptimal, can be accepted, the scale of non-provision in Limpopo and the Eastern Cape may have left the Court feeling in no other position than to issue complex positive orders to mandate action.<sup>155</sup>

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<sup>152</sup> As Hubner Mendes noted:

A constitutional court needs, in sum, enough political ammunition to make itself respected. If that is not the case, it should back off, to an acceptable measure, from its ideal conclusions of principle. Such considerations do not only explain the successful political role played by the South African Constitutional Court,<sup>13</sup> but should inspire more realistic normative theory.

Conrado Hubner Mendes, 'Fighting for Their Place: Constitutional Courts as Political Actors: A Reply to Heinz Klug,' (2010) 3 *Constitutional Court Review* 33, 41.

<sup>153</sup> For one, Roux suggested that the rise of meaningful engagement can be understood as partially the Court developing a new source of legitimate partners in its socioeconomic rights agenda:

As the ANC increasingly turned to populist rhetoric to shore up its legitimacy, the [Chief Justice] Langa Court was able successfully to seek out new partnerships with committed officials at the local and regional level - to show that the Constitution was not an obstacle to, but a vehicle for, concrete social change.

Roux (n 25) 63 - 64.

<sup>154</sup> Brickhill and Finn (n 93) 101.

<sup>155</sup> See McConnachie and McConnachie (n 62).

State mismanagement and judicial distrust of the Government's commitments to rights thus bear recognition alongside the more direct causative factors as having led the Court to adopt a stronger stance on social rights adjudication in this period. Through understanding the impact this has had upon judicial reasoning, we can better appreciate the process whereby a legal community unsuited to rights adjudication can traverse a considerable distance, to a point in which both the content of positive obligations can be determined by courts, and enforceable orders be issued against the state to provide compliance with these determinations. This is a profoundly significant development, from which much can be learned.

## VII: Conclusion

In the first wave, the Court developed a standard of reasonableness review to assess constitutional compliance with positive obligations arising from social rights, and supplemented this with a jurisprudence *restraining* actions which unjustly interfered with the people's enjoyment of these rights. As Young has noted:

While the Court adopted deference as a key posture when developing an appropriate role in adjudicating economic and social rights, it became less appropriate as it grew in confidence. The Court developed more interventionist postures, such as managerial and peremptory review.<sup>156</sup>

This chapter has analysed the second wave of South Africa's social rights adjudication. In the second wave, the Court supplemented reasonableness with greater procedural checks, such as duties to meaningfully engage. A legal system previously oppositional to rights has fostered some of the most innovative rights adjudication in the common law world, providing for more robust judicial protection of social rights than perhaps any other common law jurisdiction.

In this period, the benefits of the right to access adequate housing gained greater individuated benefit for rights-bearers. The entitlement was not just

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<sup>156</sup> Katherine G. Young, *Constituting Economic and Social Rights* (OUP 2012) 181.

for state provision of goods in a manner that furthered their socioeconomic interests, now also these rights could be used as positive shields against both public and private actions that would lead to homelessness. By this, both temporary and informal settlements were secured, and greater duties were imposed upon the state for occupants if it wished to upgrade these settlements.

The accessibility of this litigation within this system can be fairly critiqued,<sup>157</sup> as can the rate of legal transformation.<sup>158</sup> Moreover, the scale of socioeconomic inequality in South Africa has not substantially shrunk as a result of this jurisprudence (and indeed may have grown).<sup>159</sup> Nevertheless, through the presence of a bench affirmatively committed to transforming the South African legal order into a fundamentally rights-based order, in a manner framed conceptually by dominant common law adjudicative principles, an unprecedented shift has occurred within the judicial community of this common law legal system, and a form of rights adjudication considered unfeasible in other comparable jurisdictions has become standardised.<sup>160</sup> Much can be learned from studying this development.

In this part of the doctorate, I have shown how a transformation within a previously highly formalist judiciary came about. Unlike Ireland, the South African judicial community has internalised a role conception that permits

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<sup>157</sup> Roithmayer (n 122); Jackie Dugard, 'Courts of First Instance - Towards a Pro-Poor Jurisdiction for the South African Constitutional Court' (2006) 22 *SAJHR* 261, Sandra Liebenberg, 'South Africa's Evolving Jurisprudence on Socioeconomic Rights: An Effective Tool in Challenging Poverty?' (2002) 6 *Law, Democracy and Development* 159; Rooney (n 67); Tshepo Madlingozi, 'The Constitutional Court, Court Watchers, and the Commons: A Reply to Professor Michelman on Constitutional Dialogue, Interpretative Charity, and the Citizenry as Sangomas' (2008) 1 *Constitutional Court Review* 63.

<sup>158</sup> Geo Quinot 'Transformative Legal Education' (2012) 129 *SALJ* 411; Thandiwe Matthews and Charmika Samaradiwakera-Wijesundara, 'The Fiction of Transformation: An Analysis of the Relationship between Law, Society, and the Legal Profession in South Africa' 31 (2015) *SAJHR* 553; As Joel Modiri noted, 'It is of sociological significance that the primary architects and proponents of 'post'-apartheid constitutionalism in the legal academy and in civil society are white leftists and liberal progressives who tend to place much emphasis on litigation and the judiciary as sites of democratic social change. Joel Modiri, 'Conquest and Constitutionalism: First Thoughts on an Alternative Jurisprudence' (2018) 34 *SAJHR* 300, 310.

<sup>159</sup> Stuart Wilson has observed, 'In South Africa, the adoption and enforcement of socioeconomic rights may have coincided with greater income inequality. Wilson (n 11) 160.

<sup>160</sup> Per Landau: 'The critics were wrong to suggest that social rights enforcement would not occur; in reality, courts have found a variety of ways to give content to these rights.' David Landau, 'The Reality of Social Rights Enforcement, (2012) 53(1) *Harvard International Law Journal* 195, 199.

social rights claims to be adjudicated and remedies issued to cure the breach. As Liebenberg wrote:

The caution of sceptics that social rights adjudication would cast the courts in an inappropriate and unmanageable role has proven to be unfounded. The courts have proved themselves quite capable of developing a sophisticated and nuanced model for adjudicating social rights claims. This has enabled the courts to respect the institutional competencies and roles of the other branches of government while playing a meaningful role in enforcing constitutionally guaranteed socioeconomic rights.<sup>161</sup>

This shift in judicial attitude can be traced to the elevation of the subset of the South African legal community under apartheid who resisted the regime through a commitment to human rights as superior to statute. By installing a Constitutional Court composed of lawyers strongly committed to human rights and social transformation, the norms governing what legal arguments would succeed within the South African legal order was able to be augmented from above. Similar to what was observed in Ireland during its second wave, over time, a commitment to rights adjudication percolated into the legal culture, through an understanding that rights arguments would be greeted favourably by the bench.

Over the lifetime of constitutional democracy in South Africa, the fervour of the judicial community towards rights adjudication appears only to have grown. The most notable development for this thesis is the emergence and ultimate strengthening of social rights by the Court, in which the influence of both common law and comparative constitutional law as well as an attachment to transformative constitutionalism have been explored.

The influence of these factors explains how the Court's understanding of its social rights protecting function developed. This then supports the central thesis of my doctorate: that judicial culture and prevailing conventions within

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<sup>161</sup> Sandra Liebenberg, 'Adjudicating Social Rights under a Transformative Constitution' in Malcolm Langford (ed) *Social Rights Jurisprudence: Emerging Trends in International and Comparative Law* (CUP 2008) 75, 100.

that culture play the key conditioning role in determining rights protection including social rights. Having undertaken extensive case studies of Ireland and South Africa, in Part Four this thesis will proceed to inductively distil from this research factors which lead social rights protection to develop within common law systems.

PART FOUR: DEVELOPING SOCIAL RIGHTS IN  
COMMON LAW SYSTEMS

## Chapter Thirteen: Developing Social Rights in Common Law Systems

As Hirschl and Rosevear noted, ‘to facilitate the realisation of socioeconomic rights it is necessary to go beyond the largely insular constitutional discourse concerning such rights to identify the political and judicial conditions that are conducive to such realisation.’<sup>1</sup> In this chapter, I follow this instruction and, from my comparative studies I identify what jurisprudential attitudes must predominate within a judicial community for social rights protection to effectively develop.

In this doctorate, I have examined how social rights protection develops within common law jurisdictions. To study this, I have examined the noteworthy development of judicial social rights protection in South Africa, and contrasted this with the avoidance of such adjudication in Ireland, notwithstanding both jurisdictions being founded on textual constitutions that permit a judicial power with broad remedial discretion for rights breaches, and hybrid bills of rights containing both civil and social rights. In examining the difference between the two rights regimes, and how rights protection developed within both jurisdictions over time, I have posited that *the* contingent variable informing the degree of rights protection afforded within a common law system is the cultural cleavages within the domestic judicial community that inform their understanding of both the nature of rights and the propriety of judicial actions to protect rights.

In almost all contemporary common law legal systems, the authoritative definition of what constitutional rights mean within a legal order is determined by the judiciary.<sup>2</sup> Whilst a judicial determination as to the content of a right can be challenged - in a strong form system by constitutional amendment, in a weak form system by legislative override - the use of either override is exceptional, not the rule. As, in the main, the actions of the elected branches

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<sup>1</sup> Ran Hirschl and Evan Rosevear, ‘Constitutional Law Meets Comparative Politics: Socioeconomic Rights and Political Realities’ in Tom Campbell, KD Ewing, and Adam Tomkins (eds) *The Legal Protection of Human Rights: Sceptical Essays* (OUP 2011) 207, 208 - 209.

<sup>2</sup> See Chapter Two of this doctorate.

are then assessed with reference to a judicially-defined standard of rights compliance, it follows implicitly that the conception of rights dominant within the judicial culture of a common law legal system is of decisive significance to the degree of rights protection the constitutional order affords.

At the moment a common law legal system obtains self-governance - either through independence or the extension of responsible government from Westminster - the legal order is one based upon the Westminster model. The extant judicial community are professionally unfamiliar with the practicalities of judicial rights review, or indeed of constitutional rights. Developing judicial rights protection cuts against orthodox common law principles of judicial restraint and parliamentary supremacy embedded in the legal community during colonisation.<sup>3</sup>

In effecting a shift in judicial attitudes *away* from one advocating restraint and parliamentary supremacy *towards* one where the Court can direct resource-intensive state policies to ensure state compliance with *their* interpretation of the content of social rights, a transformative shift in the judiciary's conception of its function must occur. If this shift does not occur, as the Irish right to provision for free primary education demonstrates, a textual guarantee of social rights protection will be superfluous, as the presumptive authority on rights protection - the judiciary - will not engage substantively with these provisions.

Proceeding from my comparative doctoral research, there are three conceptual commitments that must develop within a common law judiciary's role conception in order to make social rights protection practically viable. First, there must develop a 'Civil Rights Commitment': a positive disposition towards judicial rights review must exist at least within a sufficient proportion of the community that a senior bench disposed to judicial review can be formed. Second, the 'Positive Remedial Commitment': there must be an internalisation

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<sup>3</sup> See the discussion of the Irish jurisdiction's approach to rights in the years after independence in Chapter Three of this doctorate. Note in particular Hogan: 'Unfamiliarity with the concept of judicial review led the judiciary to give the personal rights guarantees of the new Constitution of the Irish Free State a highly restricted ambit.' Gerard Hogan, *The Origins of the Irish Constitution 1928 - 1941* (RIA 2012), 4.



of the legitimacy of issuing court orders that direct, at cost, future state action to cure continuing rights breaches. Third and finally, the ‘Social Rights Commitment’; the conventional objection within common law judiciaries to the adjudication of social rights must be overcome. The presence of all three of these attributes within a common law judicial community is necessary for the viability of social rights adjudication, and thus their effective protection within common law systems.<sup>4</sup>

Ireland and South Africa’s differential social rights regimes result from differences in the cultural attitudes towards these commitments within their judicial communities. Whereas the South African judicial community has incorporated all three commitments to a relevant degree, the Irish judiciary has failed to satisfactorily develop a Positive Remedial Commitment. It will be shown that, in the absence of all three, the judicial community will not be disposed to engage in social rights adjudication, whether such rights are expressly included within a bill of rights or not. In the presence of these attachments however, such rights protection may even develop in the absence of express constitutional prescription of such rights.<sup>5</sup>

As discussed in Part One, changes in the educational, professional, or political environment in which judges are immersed changes cultural attitudes within this group.<sup>6</sup> Judicial communities, like all social groupings, are not ideologically static. Rather, their attitudes and preferences are informed by the cultural conditions in which they operate. Whilst the effect of changing the background conditions which inform a judicial community’s understanding of its rights

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<sup>4</sup> As discussed in Chapter One, ‘rights protection’ in this doctorate refers to the existence of processes whereby identifiable ‘rights-bearers’ can make a socially-legitimate claim that they believe they are entitled to something, in the reasoned understanding that making that claim will lead to a process whereby the entitlement may be secured or its restriction compensated for. Whilst the interest that is sought to be protected may be protected in the absence of such a process, on this definition that interest will not be protected ‘as of right’. Following Martha Minnow then, “Rights” typically are the articulation of such rules in a form that describes the enforceable claims of individuals or groups against the state.’ Martha Minnow, ‘Interpreting Rights: An Essay for Robert Cover’ (1987) 96:8 *Yale Law Review* 1860, 1866.

<sup>5</sup> Consider in this regard the emergence of Indian socioeconomic rights jurisprudence in the absence of express textual prescription. See Arun K Thiruvengadam, *The Constitution of India: A Contextual Analysis* (OUP 2017). See also Sujit Choudhry, Madhav Khosla and Pratap Bhanu Mehta (eds) *The Oxford Handbook of the Indian Constitution* (OUP 2012).

<sup>6</sup> See also Stanley Fish, *Doing What Comes Naturally: Change, Rhetoric, and the Practice of Theory in Literary and Legal Studies* (Clarendon Press, 1989) 141.

protection function - changing the admission criteria to become a member of the community, for instance - is never fully knowable, important insight can be gleaned from examining correlations between significant political and juridical shifts in contemporary common law systems and increased judicial willingness to engage in social rights adjudication within these states.

My reasoning is inductive - inasmuch as it can be shown that the preponderance of such factors within common law legal systems *has led to* the emergence of those judicial attachments necessary to make socioeconomic rights adjudication viable, it can be posited that the impact of the existence of such factors upon other common law judicial communities *may be* similar. By this, I have expanded the study of social rights in common law systems from the normative inquiry as to why social rights ought to be enforced, to a greater understanding of *how* to make social rights practicably enforceable. By engaging in this understudied area, I clarify *how* to make such rights protection develop in jurisdictions such as Ireland, which is considering expanding its rights regime to include further social rights protection in the future.<sup>7</sup>

## I: The Civil Rights Commitment

The first cultural attribute a judicial community must internalise in order to make social rights adjudication viable is a commitment to judicial review. This is a prerequisite for all constitutional rights adjudication - the primary mode of rights protection in the common law world.

For judicial rights review to develop, the judicial community within a common law jurisdiction must shift their understanding of what it means to act with propriety from a baseline of restraint imported from the English system, to a more assertive sense that it is *their function* to define content for

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<sup>7</sup> See Eighth Report on the Convention on the Constitution: Economic Social and Cultural Rights <[http://escr-irl.org/wp-content/uploads/2016/01/CC\\_ESC\\_Report.pdf](http://escr-irl.org/wp-content/uploads/2016/01/CC_ESC_Report.pdf)> (accessed 10 November 2019). For an analysis of the failure of amendments to effect desired change, consider the Irish Children's Rights amendment, as discussed in Oran Doyle and David Kenny, 'Constitutional Change and Interest Group Politics: Ireland's Children's Rights Referendum' in Richard Albert, Xenophon Contiades and Alkmene Fotiadou (eds) *The Foundations and Traditions of Constitutional Amendment* (Hart Publishing 2017) 199.

constitutional rights and to ensure the elected branches act in conformity with their interpretation of the rights. As Young noted:

Courts operate in a system in which their legitimacy depends upon the appropriate conception of their role within the constitutional culture. That culture may perceive other institutions as having responsibilities for applying and enforcing the terms of the constitution.<sup>8</sup>

As my study of the first wave of Ireland's rights jurisprudence illustrated, the existence of a constitutional culture that fosters judicial rights review need not follow immediately from the presence of the Constitution which allows for it.<sup>9</sup> A constitution may empower a judiciary to engage in judicial rights review but, if judicial commitment is unforthcoming, the practical effect of constitutionalising such a judicial power is fundamentally frustrated.<sup>10</sup> This can also be seen in the Canadian experience with the Canadian Bill of Rights. As Boughey has noted:

The Bill of Rights had a limited impact on Canadian law, as a result of judicial caution and conservatism. The Supreme Court only invalidated one legislative provision between its enactment in 1960 and the entrenchment of the Charter in 1982.<sup>11</sup>

Indeed, not only can judicial review fail to develop *despite* express textual provision, the inverse can equally occur: the development of judicial rights review can emerge *in the absence* of express textual license. Famously, in the United States Constitution, judicial rights review is not expressly mentioned

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<sup>8</sup> Katherine G. Young *Constituting Economic and Social Rights* (OUP 2012) 212.

<sup>9</sup> As Hiebert wrote, 'although a bill of rights can have significant consequences for a political system, its mere introduction does not determine the societal or institutional effects that follow. Nor does the introduction of rights-based judicial review dictate whether or how courts will influence legislation.' Janet Hiebert, 'Governing Like Judges?' in Tom Campbell, KD Ewing, and Adam Tomkins (eds) *The Legal Protection of Human Rights: Sceptical Essays* (OUP 2011) 40, 43.

<sup>10</sup> As Erdos wrote: 'the strength of a bill of rights or, in other words, the extent of its effect on the legal and political system, depends in part on factors that emerge after its enactment including the degree of 'activism' by the judiciary and the extent to which it is used by potential litigants.' David Erdos, *Delegating Rights Protection: The Rise of Bills of Rights in the Westminster World* (OUP 2010) 11.

<sup>11</sup> Janina Boughey, *Human Rights and Judicial Review in Australia and Canada: The Newest Despotism?* (Hart 2017)

but was established in the decision of *Marbury v Madison*.<sup>12</sup> This can also be seen in the development of an ‘Implied Bill of Rights’ in Canada,<sup>13</sup> and to a much lesser extent Australia.<sup>14</sup> Most notably it can be seen in Israel, a common law jurisdiction with a technically unwritten constitution (at the very least with a textually incomplete constitution) in which a culture of judicial rights review has nevertheless emerged.<sup>15</sup>

The emergence of judicial review in these common law systems notwithstanding the absence of express license is consistent with the thesis that the degree of willingness within a judicial culture to engage in judicial rights review is *the* key axis on which to assess the propensity for a rights regime to emerge within a common law system. It can develop without license - even, in the Israeli instance, perhaps without a Constitution.<sup>16</sup>

There are, it seems, three stages to the development of a judicial community from which a regime of judicial rights review may develop. First, members of the judicial community must develop an interest in establishing a domestic

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<sup>12</sup> *Marbury v Madison* (1803) 5 US 137; see also Robert Lowry Clinton *Marbury v Madison and Judicial Review* (University Press of Kansas 1989).

<sup>13</sup> Reference: *Re Alberta Statutes* [1938] SCR 71; *Saumur v City of Quebec* [1952] 2 SCR 299; *Roncarelli v Duplessis* [1959] SCR 121. As Dickson CJ, writing extrajudicially, noted: For those of us who had grown up with the British tradition of parliamentary sovereignty, in which courts were expected to respect the will of the legislature, this line of reasoning marked a rather novel development. It meant that our highest court was beginning to look at the nature of individual rights, even if it was through the lens of debates about the division of powers. Brian Dickson, ‘The Canadian Charter of Rights and Freedoms: Dawn of a New Era?’ (1994) 1 *Review of Constitutional Studies* 1.

Jeremy Webber *The Constitution of Canada: A Contextual Analysis* (OUP 2015).

<sup>14</sup> *Australian Communist Party v The Commonwealth* [1951] HCA 5; *Australian Capital Territory v Commonwealth* [1992] HCA 45; *Lange v Australian Broadcasting Corporation* [1997] HCA 25; *Roach v Electoral Commissioner* [2007] HCA 43. As Saunders noted, ‘Despite the extent of its reliance on democratic institutions for rights protection, Australia is not a classic example of political constitutionalism. The entrenched Australian Constitution, enforced through judicial review, provides some protection for some rights, both expressly and by implication.’ Cheryl Saunders, *The Constitution of Australia: A Contextual Analysis* (OUP 2010) 274.

<sup>15</sup> *United Mizrahi Bank Ltd v Migdal Cooperative Village* [1995] IsrSC 49 (4) 221; Susie Navot, *The Constitution of Israel: A Contextual Analysis* (OUP 2014); Yoram Rabin and Arnon Gutfel, ‘*Marbury v Madison* and its Impact on Israeli Constitutional Law’ (2007) 15(2) *University of Miami International and Comparative Law Review* 303.

<sup>16</sup> As Richard Posner commented in regards Barak CJ, the architect of Israel’s ‘constitutional revolution’: ‘Barak is John Marshall without a Constitution to expound [...] What Barak created out of whole cloth was a degree of judicial power undreamed of by even our most aggressive Supreme Court justices [...] Only in Israel (as far as I know) do judges confer the power of abstract review on themselves.’ Richard A. Posner, ‘Enlightened Despot’ *The New Republic* 23 April 2007.

< <https://newrepublic.com/article/60919/enlightened-despot>> (accessed 25 August 2020)

judicial review function. Coming under the influence of sources promotional of judicial rights review is, it appears, consequential in this. Second, a process of judicial selection must exist that, intentionally or unintentionally, elevates rights-conscious members of the legal community to the senior bench. Third and finally, the exercise of judicial review must be either supported or acquiesced to by the State. With the coincidence of these three stages, the general rights commitment that is preconditional to the emergence of judicial rights protection, and by so social rights protection, can develop.

### I(A): Cultivating Judicial Interest in Rights Adjudication

Whilst a Bill of Rights is not an *essential* feature for the development of judicial rights review, such texts certainly *can* act as persuasive stimulants for a judicial community to engage in such adjudication. As Hirschl has noted:

The existence of a constitutional catalogue of rights [...] not only provides the necessary institutional framework for courts to become more vigilant in their efforts to protect fundamental rights and liberties of a given polity's residents, but also enables them to expand their jurisdiction to address vital moral dilemmas and political controversies of crucial significance to that polity.<sup>17</sup>

Thus, in attempting to generate a general judicial commitment to rights review, an obvious but salient prescription is the textual provisioning that this function is a legitimate one for the judiciary. While not a necessary feature, nor an inevitably effective mechanism to stimulate judicial rights consciousness, by increasing the domestic legitimacy of rights adjudication, this may influence the judiciary to conceive of their function within the constitutional order as involving *some* degree of rights protection. It is through the stimulating of rights consciousness, then, such a bill can become significant to rights protection.<sup>18</sup>

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<sup>17</sup> Ran Hirschl, *Towards Juristocracy: The Origins and Consequences of the New Constitutionalism* (HUP 2004) 170.

<sup>18</sup> Donal Barrington offers an interesting anecdote illustrating how a textual constitutional provision may stimulate interest in judicial review. 'When [later Chief Justice] Cearbhall Ó Dálaigh was an ordinary member of the court [...] it must have been 1953 or later. Suddenly Cearbhall looked up from his papers and, so far as I can recall his words, said 'Gentlemen, we

The judicial internalisation of the normativity of judicial rights review is influenced considerably by the availability of sources promoting the virtues of developing of such a function within the domestic legal order. One clear influence upon the development of an interest in judicial rights review within a judicial community is the existence of attractive comparator jurisdictions with judicial rights review. In both Ireland and South Africa, this influence can be seen, particularly drawing on American and also Canadian jurisprudence.<sup>19</sup> Judiciaries within comparable common law systems (with sufficiently accessible judgments) engaging in judicial rights review provides an inspiration and a template showing how rights adjudication can be performed in the interim period between the elevation of a rights-interested bench and the percolation of indigenous rights engagement within the judicial community. Whilst it presumes the existence of jurists who *seek out* such foreign jurisprudence in the first place,<sup>20</sup> comparator jurisdictions can therefore have both pedagogical and rhetorical utility - showing that judicial rights review *can* feasibly *and positively* be done.<sup>21</sup>

Alongside this, commentary from within the domestic legal academy advocating the emergence of judicial review can encourage and reinforce the development of an attitude within members of a professional legal community supportive of judicial review. The impact of Patrick McGilligan and JM Kelly in

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have a Constitution. Yet, no one seems to know what it means.’ Donal Barrington, ‘The Constitution in the Courts’ in Frank Litton (ed) *The Constitution of Ireland 1937 - 1987* (IPA 1988) 110, 114.

<sup>19</sup> See also Ran Hirschl *Comparative Matters: The Renaissance of Comparative Constitutional Law* (OUP 2014).

<sup>20</sup> Per Hirschl:

The choices courts and judges make with respect to foreign reference - which bodies of foreign law are referred to and cited as authoritative and which are decried or ignored - are an important indicator of their ideological and strategic preferences with respect to the polity’s social, cultural, and political divisions. These choices are socio-political, not judicial. They signal commitment to and advancement of certain worldviews, aspirations, and visions of the ‘right’ way of life and of the polity’s place in the world.’

Ibid, 43.

<sup>21</sup> Donal Barrington provides a further illustration of this. In 1988, he wrote: ‘nowadays a barrister arguing a point of constitutional law in the High or Supreme Courts will, as a matter of course, refer to the decisions of the American Federal Supreme Court as persuasive authority. If, by chance, he does not, the trial judge will, as likely as not, ask him if the American Federal Supreme Court ever had to consider this point.’ Barrington (n 18) 115.

Ireland,<sup>22</sup> and human rights academics in South Africa such as John Dugard and Edwin Cameron,<sup>23</sup> are notable in this regard, not least given their citation as influences upon later members of their jurisdiction's benches.<sup>24</sup>

A history of past executive failure in the absence of judicial supervision can also play a formative role in the development of judicial rights review as well insofar as, within members of the judicial community already disposed to judicial review, this can provide additional incentive to judicially police rights upon election to the bench. Whilst this has less frequently been expressed as informing the development of Irish rights protection,<sup>25</sup> it can be seen noteworthy in the study of South Africa. The Constitutional Court legitimated its development of judicial review by highlighting its agenda of transforming South Africa from the racist regime which preceded the constitutional dispensation. The internalisation within members of the judicial community that a better system would be one with judicial oversight of state action where the state has a history of poor (if not inhumane) administration, is thus a considerable stimulant of the emergence of judicial rights consciousness.

Additional to these influences may be the expectation that members of the Court can thereby expand their power within the constitutional order. It is

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<sup>22</sup> See Chapter Four of this doctorate. See also Donal O'Donnell, 'Review Article: Irish Legal History of the Twentieth Century' (2014) 105 (417) *Studies* 98, 112.

<sup>23</sup> John Dugard, 'The Judicial Process, Positivism and Civil Liberty' (1971) 88 *SALJ* 181; John Dugard, 'Human Rights in South Africa - Retrospect and Prospect' (1979) *Acta Juridica* 263; Edwin Cameron, 'Legal Chauvinism, Executive-Mindedness and Justice - LC Steyn's Impact on South African Law' (1982) 99 *SALJ* 38; Albie Sachs, 'Towards the Reconstruction of South Africa' (1985) 12(1) *Journal of Southern African Studies* 49; AS Mathews, 'The South African Judiciary and the Security System' (1985) 1 *SAJHR* 199; John Dugard, 'The Quest for a Liberal Democracy in South Africa' (1987) *Acta Juridica* 237; Edwin Cameron, 'Nude Monarchy: The Case of South Africa's Judges' (1987) 3 *SAJHR* 338; Hugh Corder, 'Crowbars and Cobwebs: Executive Autocracy and the Law in South Africa' (1989) 5 *SAJHR* 1; Christopher Forsyth, 'Interpreting a Bill of Rights: The Future Task of a Reformed Judiciary,' (1991) 7 *SAJHR* 1.

<sup>24</sup> As Donal O'Donnell would note 'almost all of the judges in the High Court and the Supreme Court during the 1970s and 1980s were taught constitutional law by McGilligan,'. O'Donnell (n 22) 112. Further, O'Donnell noted that 'the light did go on, for me at least' upon 'the good fortune to be lectured by John Kelly, who took the time to address some constitutional issues at a more abstract level and with extraordinary perceptiveness and lucidity' Donal O'Donnell 'The Sleep of Reason' (2017) 40(2) *DULJ* 191, 191. See in South Africa Ismail Mahomed, 'Professor John Dugard Appointed to the Chair of Public International Law in the University of Leiden: Tribute by the Honourable Mr Justice Ismail Mahomed, Chief Justice (1998) 115 *SALJ* 74; Dikgang Moseneke, 'The Fourth Bram Fischer Memorial Lecture - Transformative Adjudication' (2002) 18 *SAJHR* 309.

<sup>25</sup> *Melling v Ó Mathghamhna* [1962] IR 1. *Byrne v Minister for Finance* [1959] IR 1; *McMahon v Attorney General* [1972] IR 69, 111.

inevitable that a judiciary exercising the power to invalidate legislation for incompatibility with rights commitments possesses greater power over the elected branches than one which does not possess such authority.<sup>26</sup> Thus, the preponderance of members of the judicial community desirous of an increase in political or reputational cachet may also increase the likelihood of judges developing a commitment to judicial rights review.<sup>27</sup>

These factors stimulate the development of a pool of members of the judicial community that are supportive of developing judicial rights review. The potential latent in this group depends for its realisation however on their ability to act upon their preference for judicial review, which depends upon their elevation to the bench.

### I(B): Elevating Rights Conscious Jurists to the Bench

What emerges from the study of Ireland and South Africa is that the attachment to developing judicial rights review within the existing judicial community need not be universal prior to formative exercises of the judicial review power in order for a culture of such review to develop. Rather, what is necessary is a lower threshold: a sufficient number of members of the legal community must be drawn towards judicial rights review that a dominant cohort of the senior judiciary can be formed with this disposition. Common law jurisdictions are defined in part by a commitment to the principle of vertical *stare decisis*. In such systems, where members of the apex court have a commitment to rights review, a culture of rights adjudication can be encouraged from the top down.<sup>28</sup>

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<sup>26</sup> Among the more brazen expressions of judicial power is that of John Kenny of the Irish Supreme Court, extrajudicially, that ‘judges have become legislators and have the advantage they do not have to face an opposition.’ John Kenny, ‘The Advantages of a Written Constitution Incorporating a Bill of Rights’ (1979) 30 *NILQ* 189, 196.

<sup>27</sup> Discussing the current Irish Supreme Court, Comyn quotes that Brice Dickson ‘compares the Court favourably with Supreme Courts in other common law jurisdictions such as Australia, Canada and the UK: ‘That is partly because the judgments are now citing the decisions of other foreign courts more frequently than they did in the past, which is a good thing and again indicates that they are more aware of their role as a national court operating on a common law world stage.’ Francesca Comyn, ‘Law in a Golden Age: The Reimagining of the Supreme Court,’ *The Currency*; see also Hirschl, (n 17) 11.

<sup>28</sup> As Nicolson perceptively predicted prior to the institution of the Constitutional Court, ‘the principles laid down by the Constitutional Court would be constantly brought to the attention of all practising lawyers deciding what advice to give their clients and what arguments to raise in Court.’ Donald Nicolson, ‘Ideology and the South African Judicial Process’ (1992) 8 *SAJHR*



As the terms of legal engagement change to include an eagerness to engage with rights reasoning, a shift in the appetite of legal professionals to litigate on rights grounds will follow.<sup>29</sup> From this, attempts at judicial rights review can be made, conditional upon state acquiescence to this attempt to revolutionise the judicial function.<sup>30</sup>

The influence of a relatively small pool of rights-conscious senior judges can be seen by examining both the Irish and South African development of rights adjudication. The key transition within Irish rights protection occurred in the middle 1960s, when a younger generation of jurists ascended to the senior bench. These judges - Ó Dálaigh CJ, Walsh, Henchy, and Kenny JJ most notably - led an engagement with the rights provisions of the Constitution inconceivable earlier in that decade.<sup>31</sup>

It did not require an immediate transformation of the cultural attachments of the entire judicial community to effect the change in rights protection. Rather, through the signalling by the senior bench to the legal community that they would respond favourably to rights claims, a trickle-down effect generally occurred. Per McMahon, 'once lawyers began to appreciate the legal significance of the [Constitutional] document in relation to fundamental rights, once they discovered the potential of the document, as it were, a veritable

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50, 67; See also Marius Pieterse, 'Eating Socioeconomic Rights: The Usefulness of Rights Talk in Alleviating Social Hardship Revisited' (2007) 29(3) *Human Rights Quarterly* 796, 821.

<sup>29</sup> This has been noted to be the case in many common law jurisdictions beyond Ireland and South Africa. Consider India: 'Initially too slow to emerge, activist lawyering now flourishes. But it is also the case that cause lawyering in India begins its career under the push and prod of activist justices, rather than constituting an autonomous development within the profession.' Upendra Baxi, 'The Avatars of Judicial Activism: Explorations in the Geography of (In)justice' in Shashi Kant Verma and K Kusum (eds) *Fifty Years of the Supreme Court of India: Its Grasp and Reach* (OUP 2001) 156, 159.

<sup>30</sup> The inverse of this observation also holds - by the appointment of judges unwilling to engage in substantive rights adjudication, the political branches can also restrain the power of the judiciary to protect rights. This can be seen most notably in the highly politicised appointments procedure for Supreme Court Justices in the United States of America. In this vein, as Fallon noted 'Justice Frankfurter argued that the only disputes justiciable in federal court were those that could have been heard in the courts of Westminster in the eighteenth century.' Richard Fallon, 'The Linkage between Justiciability and Remedies: And their Connection to Substantive Remedies' (2006) 92(4) *Virginia Law Review* 633, 656.

<sup>31</sup> For example, Article 40.3 was essentially a constitutional dead letter before 1965. After 1965, however, it was interpreted in such a manner as to discover a basket of unenumerated rights.

revolution occurred in the legal system.’<sup>32</sup> The proliferation of rights adjudication - and thus effective rights protection - in the second half of the Twentieth Century in Ireland followed from this revolution.

Similarly in South Africa, there existed within the overwhelmingly positivist judicial community of the apartheid state a subculture of lawyers which sought to use the apartheid legal order against itself by asserting that human rights, legally superior to the will of Parliament, existed and predominated.<sup>33</sup> Upon the transition to democracy, the only immediate change to the institutional set-up of the legal system was the creation of a new apex court - the Constitutional Court - staffed with jurists from this tradition, which were positively disposed to rights review.

Here also, the message that the senior judiciary were interested in rights review, and had internalised a sense of their constitutional function which approved of the Court declaring acts of the elected branches unconstitutional for failure to comply with rights commitments, was received by a legal community that remained composed predominantly of practitioners broadly unfamiliar with and unenthusiastic about rights adjudication. In response to this change in the effectiveness of rights arguments, the legal community developed a practice of rights adjudication that has grown sufficiently capacious as to even support a practise of iterated social rights adjudication.

For judicial rights review to develop, the process of judicial selection must enable members of this rights-interested group to ascend to the senior bench. This can occur by selecting judges due to their ideological disposition - as was the case in South Africa both under apartheid and since,<sup>34</sup> and as is also visible

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<sup>32</sup> Bryan McMahon, ‘A Sense of Identity in the Irish Legal System’ in Joseph Lee (ed) *Ireland: Towards a Sense of Place: The UCC- RTÉ Lectures* (Cork University Press 1985) 34, 34 - 35. Further note Barrington, discussing barristers of the 1950s, ‘they were unlikely to press original arguments based on the Constitution until they felt judges were prepared to receive them.’ Barrington (n 18) 114.

<sup>33</sup> Stephen Ellman, *In a Time of Trouble: Law and Liberty in South Africa’s State of Emergency* (1992 Clarendon Press); Richard L. Abel, *Politics by Other Means: Law in the Struggle Against Apartheid 1980 - 1994* (Routledge 1995).

<sup>34</sup> Cameron (n 23). As Arthur Chaskalson, writing extrajudicially, noted of the appointment process: ‘Non-racialism will not be an issue. Nor will commitment to transformation. (All will be committed to that.) The merits of the candidates, their qualities of leadership and institution-building, their commitment to the values of the Constitution, their independence and integrity, the impact of their appointment might have on the standing of the Constitutional

in the instructions Taoiseach Lemass gave to Walsh J and Ó Dálaigh CJ upon appointment ‘that he would like to see the Supreme Court behave more like the United States Supreme Court,’ led then by the activist Chief Justice Earl Warren.<sup>35</sup> It can alternatively occur through coincidence - the appointment of judges whose rights commitments were perhaps under-observed prior to ascension to the bench, but who, upon appointment, are able to bring about a culture of rights activism - such as the example of the appointment of Earl Warren by President Eisenhower.<sup>36</sup> I will not engage here in assessing the probability of the coincidental approach occurring.

Two factors influence the likelihood of the elected branches intentionally appointing pro-judicial review judges. One, to distinguish the existing regime from a predecessor; two, to lock in advantages gained by a group during a period of political hegemony which is now under threat by appointing jurists who will protect this group’s interest from democratic challenge.<sup>37</sup> Whichever

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Court, and other relevant factors, will no doubt be considered. Pierre de Vos and Warren Freedman (eds) *South African Constitutional Law in Context* (OUP 2014) 233.

<sup>35</sup> [Taoiseach] Seán Lemass consciously initiated the era of judicial activism as part of his project of modernising Ireland, by his selection of Ó Dálaigh CJ and Walsh J and by his private admonition to each of them on appointment [...] that he ‘would like to see the Supreme Court behave more like the United States Supreme Court.’ David Gwynn Morgan, *A Judgment Too Far: Judicial Activism and the Constitution* (Cork University Press 2001) 12. Note also, per Coffey, ‘In the early 1960s [de Valera] privately expressed the view that the Courts should use the constitution in the same way as the United States courts did the constitution in 1789.’ Donal K. Coffey *Constitutionalism in Ireland 1932 - 1938: National, Commonwealth and International Perspectives* (Palgrave Modern Legal History 2018) 157 (quoting *The Irish Press* 14 October 1982). For a study of how judges are appointed in Ireland, see Jennifer Carroll-McNeill, *The Politics of Judicial Selection in Ireland* (Four Courts Press 2016).

<sup>36</sup> ‘Eisenhower famously said that his biggest mistake had been selecting “that dumb son of a bitch Earl Warren.” Or so one of his early biographers claims; the remark has come into question. [...] Another version has it that when asked whether he had ever made any mistakes, Eisenhower replied, “Yes: two. And they are both sitting on the Supreme Court.” Eisenhower’s other appointees, especially John Marshall Harlan II and Potter Stewart, were more-conservative proponents of judicial restraint’ Michael O’Donnell, ‘Commander v Chief’ *The Atlantic* (April 2018).

<<https://www.theatlantic.com/magazine/archive/2018/04/commander-v-chief/554045/>> (accessed 10 November 2019). For an argument that the US turn away from positive rights was a product of Nixon’s judicial appointments, see Cass Sunstein, ‘Why Does the American Constitution Lack Social and Economic Rights?’ (2005) 56 *Syracuse Law Review* 1.

<sup>37</sup> South African judicial review and creating the Constitutional Court can be understood through both perspectives. It sought to transform the constitutional order to distinguish it from the apartheid regime which preceded it; also, it can be understood as a means by which structural advantages gained by the white minority during apartheid could be locked in prior to majoritarian rule. See Hirschl (n 17) 10 - 12. See also Martin Chanock, ‘A Post-Calvinist Catechism or a Post-Communist Manifesto? Intersecting Narratives in the South African Bill of Rights Debate’ in Philip Alston (ed) *Promoting Human Rights Through Bills of Rights: Comparative Perspectives* (OUP 1999) 392, 395.

impulse motivates the elected branches to appoint judges who will engage in judicial review, this stage comes secondary to the pre-existence of a community of jurists willing to engage in such adjudication.<sup>38</sup>

Even with the elevation of rights conscious jurists to the bench, however, this does not assure the emergence of a commitment to judicial rights review emerging within the judicial community. A final factor must exist in order for this to emerge.

### I(C): State Support or Acquiescence to Early Judicial Rights Review

Upon the coincidence of these two preconditions occurring, the fostering of a culture of judicial rights review requires either the acquiescence or encouragement of the government. As Hirschl noted, ‘A harsh political response to unwelcome activism or interventions on the part of the court, or even the credible threat of such a response, can have a chilling effect on judicial decision-making patterns.’<sup>39</sup> The responses of Taoiseach de Valera to the judgment in *State (Burke) v Lennon*,<sup>40</sup> and of President Mandela to the judgment in *Executive Council, Western Cape*,<sup>41</sup> were crucial to the development of judicial rights review in these jurisdictions. By not stifling the emergence of judicial review at the instance it became inconvenient to their governments, and instead effecting compliance with these court orders, these

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<sup>38</sup> In this, I dispute Hirschl’s assertion that ‘political power-holders, not economic or judicial elites - are the primary catalyst and driving force behind constitutionalisation.’ Hirschl (n 17), 49. That Éamon de Valera intentionally included within the 1937 Constitution provisions that made constitutional rights judicially enforceable, but the judiciary, through failure to engage with these provisions, rendered these provisions a constitutional dead-letter for almost thirty years, demonstrates the centrality of the judicial, not political, elite to the constitutionalisation process.

<sup>39</sup> Hirschl, *ibid* 42.

<sup>40</sup> *The State (Burke) v Lennon* [1940] IR 136. Per de Valera, ‘the Government, and all those interested in the passing of the Constitution were taken by surprise when they found that an Act which was passed by the Oireachtas last year was held to be unconstitutional.’ Nevertheless, the government accepted the finding. Ruadhán MacCormaic *The Supreme Court* (Penguin 2016) 55.

<sup>41</sup> *Executive Council, Western Cape v President of the Republic of South Africa* [1995] ZACC 8. As reported by Cameron and Taylor: Mandela responded magnanimously. He announced on television that he fully accepted the ruling, in line with the Constitution and the rule of law. He turned his defeat into a lesson in civic responsibility and obedience to the rule of law. It was an unforgettable moment in the building of democracy. Edwin Cameron and Max Taylor, ‘The Untapped Potential of the Mandela Constitution’ (2017) *Public Law* 382, 390.

compliances connected the issuing of an order in a judicial review case with a practicable remedial response.

All judicial rights review depends upon the emergence of the features noted here: the cultivation of a sufficiently sized community of lawyers interested in judicial review; the existence of a process of judicial selection that can lead these lawyers to ascend to the bench; and a political consensus, at least at the moment judicial review is first attempted, inclined or at least acquiescent to the attempt. Through the coordination of these features, a cultural consensus can emerge which sees judicial rights review as an accepted aspect of the judicial function. With state responsiveness to Court orders, rights protection can become sufficiently embedded. This requires an initial receptivity to following orders contrary to the State's interest. With time, rights protection will become assumed within the constitutional order and, as the likelihood of State noncompliance with a court order reduces to negligibility, the reliability of court orders as a means of ensuring rights protection consequently increases.

The emergence of this cultural commitment then enables a common law judiciary to transcend the Westminster model and develop a regime of judicially protected constitutional rights. As noted in Part One, observably this pivot towards rights review begins with the judicial protection civil rights. By itself, this does not enable social rights protection to develop within common law systems. Rather, two further cultural commitments must inhere within a common law constitutional order to make this so, one concerning the remedial power of the Courts, the other concerning the content of rights. It is to these this chapter now turns.

## II: The Positive Remedial Commitment

As well as a commitment to judicial review, to develop a regime of social rights protection, the Court must internalise a willingness to issue orders with resource implications. As noted in Part One, this is not required solely for social rights protection, and social rights can also be protected in certain instances through restraining state action. Nevertheless, social rights cases generally result from systemic failures of state apparatuses to make provision for

realising the right engaged, such as a failure to develop or maintain a comprehensive programme providing or ensuring access to healthcare, education, water, housing, etc.

To effectively protect such rights through adjudication thus requires a Court to develop a capacity to direct state behaviour - and thus state expenditure - to assure the positive establishment or maintenance of systems providing or enabling access to the rights interest, such as housing or educational provision. Ensuring the provision of these systems often requires the capacity to order state intervention, under judicial supervision, with considerable cost implications.

Courts in common law systems are frequently wary of imposing positive obligations on the state on foot of declared breaches of rights. This is in large part due both to a sense that to positively order state activity is to exercise the judicial power contrary to the constitutional separation of powers, as policy decisions with financial implications ought to be left to the elected branches; and also due to a concern that such orders will not be able to *effectively* resolve the breach. Per Landau:

While negative injunctions and individualized remedies could likely enforce some kinds of social rights, the enforcement of many kinds of rights are likely to require the creation of new programs. These tasks are difficult for courts to perform, and they may refuse to perform them because of a perceived lack of capacity or legitimacy.<sup>42</sup>

In common law parliamentary systems, Government funds are commonly allocated by the Legislature to the Executive following approval of a Budget. Judicial orders directing the state to spend monies to vindicate rights therefore can indirectly mandate the Executive to amend the budget requested from the Legislature. The Legislature is constitutionally at liberty to refuse a Government's budget, and in such a scenario, it becomes unclear whether the Executive, the Legislature, or both, would be acting in contempt of court by

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<sup>42</sup> David Landau, 'The Reality of Social Rights Enforcement' (2012) 53(1) *Harvard International Law Journal* 195, 196.

failing to comply with a court order to vindicate the right. Such orders thus risk precipitating profoundly controversial constitutional clashes between the judiciary and the elected branches.

Whereas negative remedies leave open all possible action to the state save that expressly *proscribed*, with positive remedies, the range of state activity which is *prescribed* as rights-compatible by the Court is usually considerably more restricted. Crafting a meaningful positive remedy then can presume a breadth of knowledge which may exceed the limits of the Court's institutional capacities. It also requires a degree of judicial self-confidence in their own ability to issue effective orders that will be able to remedy the rights breach.<sup>43</sup> These considerations make the emergence of a judicial consensus that positive orders ought to be issued difficult.

However, to possess the Positive Remedial Commitment, a judicial commitment to issuing orders of this magnitude is not strictly needed. Again, per Landau:

Structural injunction-like devices have been rare in comparative constitutional law. Although various scholars have pointed out their theoretical utility in resolving difficult social rights problems, they remain for the most part the pipe dream of academics in other countries, a remedy that exists in journal articles but is almost never seen in reality.<sup>44</sup>

Alongside such orders of compulsion, there is an additional, indirect way in which the Court can effectively create a regime whereby rights interests that require additional state acts to vindicate can be protected. There is a third form of remedy beyond negative or positive injunctions: the declaratory order. With this relief, neither a duty of restraint nor of compulsion is imposed, rather

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<sup>43</sup> 'A common objection to the full recognition of social, economic, and cultural (socioeconomic) rights is the difficulty of crafting meaningful remedies.' Kent Roach, 'The Challenges of Crafting Remedies for Violations of Socio-Economic Rights' in Malcolm Langford (ed) *Social Rights Jurisprudence: Emerging Trends in International and Comparative Law* (CUP: 2008) 46, 46. See also Thomas Bollyky, 'R if C > P + B: A Paradigm for Judicial Remedies of Socio-Economic Rights Violations' (2002) 18 *SAJHR* 161.

<sup>44</sup> Landau (n 42) 235.

all that occurs initially is the Court declares the State to be in breach of its rights commitments.

Strictly speaking, this is negative too, inasmuch as the only cost incurred in the issuance of this remedy is the cost of running a justice system sufficient to declare when rights are breached. However, declaratory orders can also develop into forms of positive remedy as well, depending on the State's response to their issuance.<sup>45</sup> If the inevitable consequence of the issuing of a declaratory order is a state action to positively cure the rights breach going forward, this is an indirect but effective form of remedial protection. This is particularly so if the Court reserves the right to review the state's responses to the breach and will make further declarations if the state persists in default.

Direct or indirect positive remedies, to be effective, require judicial acceptance of some supervisory function. The Court cannot simply issue an order and expect it be fulfilled, rather it must assume that some degree of oversight over the elected branches to ensure their compliance with the order is needed. With negative remedies this is possible through repeated findings against the State where it acts in continued defiance of a Court's interpretation of its rights obligation. When this occurs, each negative finding arises from a discrete case. With enforcement of positive remedies the Court has to accept a role of *continuous* oversight until their threshold for rights compliance in a discrete case has been met.<sup>46</sup> As Mbazira has noted of structural interdicts:

Unlike other forms of interdicts or remedies, such as damages, the purpose of a structural interdict is not deterrence or compensation as such. In broad terms, its purpose is the elimination of systemic violations existing especially in institutional or organisational settings. Rather than

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<sup>45</sup> Per Tushnet, 'Merely declaratory rights are only marginally different from nonjusticiable rights, and only in ways that are contingent on the place courts have in a nation's political culture. Mark Tushnet, 'Social Welfare Rights and the Forms of Judicial Review' (2004) 82 *Texas Law Review* 1895, 1901.

<sup>46</sup> Per Gauri and Brinks: 'Without follow up, individual judicial decisions, no matter how important, remain isolated events with little direct or indirect impact [...] No compliance and no enforcement activity means judicial decisions remain parchment victories, suitable for framing and little else. Varun Gauri and Daniel M. Brinks, 'Introduction: The Elements of Legalisation and the Triangular Shape of Social and Economic Rights,' in Varun Gauri and Daniel M. Brinks (eds) *Courting Social Justice: Judicial Enforcement of Social and Economic Rights in the Developing World* (CUP 2008) 1, 20.



compensate for past wrongs, it seeks to adjust future behaviour, and is deliberately fashioned rather than logically deduced from the nature of the legal harm suffered. Its most prominent feature is the creation of a complex ongoing regime of performance, and it is not a one-shot and one-way approach to providing judicial remedies.<sup>47</sup>

This positive remedial commitment is a necessary requirement for effective social rights adjudication however, it is not sufficient on its own. As Canada's rights jurisprudence demonstrates, positive rights adjudication can exist within common law regimes that do not have justiciable social rights.<sup>48</sup> A combination of influences upon the judicial community, case management, and positive governmental conditions, as well as the conducive impact of time, will be shown to be relevant to the emergence of this cultural commitment. From this study, both a sense of the importance of inculcating this remedial power to social rights, and the cultural contingency of this power existing is demonstrated.

The key difference between the Irish and South African legal orders rendering the latter amenable to social rights adjudication and the former opposed is the cultural attitude within the judicial communities in regards issuing orders that positively cure rights breaches. As Part Two described, during the height of the Irish judiciary's interest in rights-protection during in the unenumerated rights period, the rights jurisprudence advanced pertained almost completely to the recognition of rights without resource implications beyond the ordering of damages. The exception in this regard is the right to legal aid and even in this case the remedy for being found in breach has never been the issuance of a

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<sup>47</sup> Christopher Mbazira, 'From Ambivalence to Certainty: Norms and Principles for the Structural Interdict in Socioeconomic Rights Litigation in South Africa' (2008) 24 *SAJHR* 1, 14.

<sup>48</sup> *Doucet-Boudreau v Nova Scotia (Minister of Education)* [2003] 3 S.C.R. 3. As Roach and Budlender report, 'the Supreme Court of Canada held in *Doucet-Boudreau v Nova Scotia (Minister of Education)* that a trial judge could, after ordering that a government build minority-language schools, retain jurisdiction over the case and require the government to report back to the judge with affidavits on its progress in complying with the order.' Kent Roach and Geoffrey Budlender, 'Mandatory Relief and Supervisory Jurisdiction: When is it Appropriate, Just, and Equitable,' (2005) 122 *SALJ* 325, 325. Whilst pertaining to education, this case is properly understood as pertaining to minority linguistic rights per S23 of the Canadian Charter of Rights and Freedoms.

mandatory order against the State.<sup>49</sup> Indeed, in the only case brought before the senior bench in this period claiming an unenumerated social right, the rights claim was rejected as non-justiciable without concluding that the right alleged was incompatible with the values underpinning the Constitution.<sup>50</sup>

The Court's attitude towards enumerated rights with resource implications - the right to provision for primary education, to vote, to bilingual resources - reflected a similar unwillingness to issue positive remedies to cure accepted rights breaches.<sup>51</sup> This reticence has maintained notwithstanding both a non-proscriptive remedial power within the text,<sup>52</sup> and the Court's juridical expansion of its remedial authority in other directions. The Court has held it has the power to issue remedies for heretofore undiscovered rights,<sup>53</sup> to impose rights obligations horizontally onto private actors,<sup>54</sup> and to suspend the application of declarations of unconstitutionality in certain circumstances.<sup>55</sup> The restraint on the judiciary from issuing positive orders to cure rights breaches does not stem then from a general remedial modesty on the part of the Court.

Further, in regards the argument for judicial restraint in decisions with resource implications, not only has the Irish Court declared taxation programmes unconstitutional, with obvious effects on state resources,<sup>56</sup> and

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<sup>49</sup> *The State (Healy) v Donoghue* [1976] IR 325. As Whyte noted: 'the Supreme Court decision in *The State (Healy) v Donoghue* led to a five-fold increase in public expenditure on criminal legal aid, from approximately £54,000 in 1975 to approximately £252,000 in 1977. Gerry Whyte *Social Inclusion and the Legal System: Public Interest Law in Ireland* (2<sup>nd</sup> edn, IPA 2015) 430ff. See also *Carmody v Minister for Justice* [2010] 1 IR 635.

<sup>50</sup> *O'Reilly v Limerick Corporation* [1989] ILRM 181.

<sup>51</sup> See Chapters Six and Seven of this doctorate.

<sup>52</sup> As Kelly noted, 'Neither the Constitution nor any other law prescribes any particular procedure as appropriate for remedying the breach of constitutional rights.' Gerard Hogan, Gerry Whyte, David Kenny and Rachel Walsh, *Kelly: The Irish Constitution* (5<sup>th</sup> edn, Bloomsbury 2018) 1532.

<sup>53</sup> See Chapter Four of this doctorate.

<sup>54</sup> *Meskell v CIÉ* [1973] IR 121; *Hanrahan v Merck Sharpe & Dohme* [1988] ILRM 629; *Sullivan v Boylan* [2013] IR 510; See Colm Ó Cinnéide, 'Taking Horizontal Effect Seriously: Private Law, Constitutional Rights and the European Convention on Human Rights' 4 (2003) *Hibernian Law Journal* 77.

<sup>55</sup> *NHV v Minister for Justice* [2017] IESC 82; *PC v Minister for Social Protection* [2017] IESC 63; *Agha v Minister for Social Protection* [2017] IEHC 6; *AB v Clinical Director of St Lomans Hospital* [2018] IECA 123; See David Kenny, 'Remedial Innovation, Constitutional Culture and the Supreme Court at a Crossroads' 40(2) (2017) *DULJ* 85.

<sup>56</sup> *Murphy v Attorney General* [1982] IR 241, *Daly v Revenue Commissioners* [1995] 3 IR 1.

caused the establishment of a costly legal aid programme,<sup>57</sup> in the *Health Amendment Bill* case,<sup>58</sup> the Court made the State, on foot of its rights protection function, pay up €484 million, ‘more than the annual current budget of the Department of Justice.’<sup>59</sup> Thus, the resistance to positive rights adjudication is neither a resistance to remedial experimentation nor to issuing financially burdensome orders against the State *per se*. Instead, an aversion to positive remedies dislocated from an objection to resource intensive or experimental adjudication appears to be prevalent.

The Irish case law demonstrates the potential and drawbacks of the indirect remedial approach to positive rights protection. *O’Donoghue v Minister for Education* shows the potential. There, the High Court declared that O’Donoghue’s right to an education had been breached ‘in the expectation that the institutions of the State would respond by taking whatever action was appropriate to vindicate the constitutional rights of the successful applicant.’<sup>60</sup> On appeal, the Supreme Court noted that the State had started providing O’Donoghue with an education appropriate to his current condition. As a result, the Supreme Court substituted O’Hanlon J’s declaration that the State was in breach with a new declaration that ‘the infant applicant is entitled to free primary education in accordance with Article 42.4 of the Constitution and the State is under an obligation to provide for such education.’<sup>61</sup>

Declaratory orders can thus indirectly coax the State into vindicating a rights breach, without requiring the Court to engage in the precarious constitutional issues arising from injuncting the Executive to acquire the funds on pain of contempt to do so. However, despite this promising start, the potential for the development of a convention whereby declaratory orders in cases of continuing rights breaches *necessarily* led to State responses to cure the breach, failed to materialise.

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<sup>57</sup> *The State (Healy) v Donoghue* [1976] IR 325.

<sup>58</sup> *Re Article 26 and the Health (Amendment) (No 2) Bill 2004* [2005] IESC 7.

<sup>59</sup> MacCormaic (n 40) 259.

<sup>60</sup> *O’Donoghue v Minister for Education* [1996] 2 IR 20, 71.

<sup>61</sup> [1996] 2 IR 20, 72 [editor’s note].

The *TD* saga meanwhile illustrates the limits of this indirect approach relying on receptivity to declaratory orders. Indeed, *TD* appears to have practically stopped the development of any possible convention enabling the emergence of indirect positive relief through declaratory orders.<sup>62</sup> A series of High Court cases found a constitutional obligation on the State to cater for the needs of children in need of special residential care. First, the Court noted the right but did not even make a declaratory order.<sup>63</sup> Then, the Court made declaratory orders affirming the rights breach.<sup>64</sup> The rights breaches were not rectified. Then, ‘between 1998 and 2000, Kelly J took public interest litigation in this area to its logical conclusion by detailing the steps required of the authorities and by threatening them with contempt of court for failing to carry out court rulings.’<sup>65</sup>

The court issued a mandatory order in *DB*, asserting ‘it is no exaggeration to characterise what has gone on as a scandal.’<sup>66</sup> This order was not appealed and was understood to have been effective. *TD* was another mandatory order ‘to fill the vacuum which exists by reason of the failure of the legislature and the executive.’<sup>67</sup> This time, it was appealed and the Supreme Court stridently rejected Kelly J’s injunction, stopping in its tracks the emergence of any nascent positive rights jurisprudence in Ireland.<sup>68</sup>

It was from the ineffectiveness of declaratory orders to induce the State to act to cure the rights breach that the High Court expanded its remedial powers by issuing a further mandatory relief for the rights breach. Had the preceding declaratory orders effectively precipitated a remedying of the declared rights breach, a conventional yet effective form of social rights protection could have

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<sup>62</sup> MacCormaic, (n 40) 342.

<sup>63</sup> *FN v Minister for Education* [1995] 1 IR 409; *DT v Eastern Health Board* (unreported, 24 March 1995), *DD v Eastern Health Board* (unreported 3 May 1995); *DG v Minister for Justice* (unreported, 24 March 1995). Whyte notes, ‘It would appear in the aftermath of *FN* and *DD*, two secure units were opened by the Eastern Health Board but these quickly filled up and so litigation in relation to other children continued.’ Whyte (n 48) 287ff.

<sup>64</sup> *DG v Eastern Health Board* [2997] 3 IR 511.

<sup>65</sup> Whyte (n 49) 292.

<sup>66</sup> *DB v Minister for Justice* [1999] 1 IR 29, 43.

<sup>67</sup> *TD v Minister for Education* [2000] 3 IR 62.

<sup>68</sup> As Whyte described, ‘the Supreme Court decision in *TD v Minister for Education* applied the brakes to this development of the judicial role.’ Whyte (n 49) 301. See also Chapter Seven of this doctorate.

developed without requiring the issuance of an (ultimately reversed) mandatory order.<sup>69</sup>

In the meantime, the interests which this regime of rights protection was meant to protect were disadvantaged; and so the extent to which rights holders can view these rights as legal claims which they can assert to have their rights breach cured is limited, to the point of negligible. In this way, the capacity for a direct or indirect remedial power to develop in Ireland that could order the State to positively assign further funding to cure systemic rights breaches was critically frustrated.

In South Africa meanwhile, the Court has repeatedly issued positive remedies, both initially for civil,<sup>70</sup> and subsequently for social rights.<sup>71</sup> Whereas the Constitution of Ireland is permissibly silent on the extent of the remedial power, the South African Constitution expressly permits of broad remedial discretion.<sup>72</sup> In recent years, the judiciary has expanded its powers in this area by commencing the issuing of positive remedies to cure immediately realisable socioeconomic rights particularly in regards the right to a basic education.<sup>73</sup> The Court has also elected to issue declaratory orders in other cases,<sup>74</sup> has imposed rights horizontally,<sup>75</sup> and has even issued suspended declarations in

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<sup>69</sup> The language rights cases noted in Chapter Six of this doctorate further showed that, despite repeated declaratory orders, a rights breach identified in 1990 was not cured until the second decade of the 21<sup>st</sup> Century. Here again, the ability for declaratory orders to operate as a means of positive rights protection in Ireland was frustrated through state unresponsiveness.

<sup>70</sup> *August v Electoral Commission* [1999] ZACC 3, *Sibiya v DPP* [2006] ZACC 22; See also *Dawood v Minister of Home Affairs* [2000] ZACC 8.

<sup>71</sup> See Chapters Ten, Eleven and Twelve of this doctorate.

<sup>72</sup> Constitution of the Republic of South Africa 1996 S172(1). Per Ackermann J in *Fose v Minister of Safety and Security*:

appropriate relief will in essence be relief that is *required* to protect and enforce the Constitution. Depending on the circumstances of each particular case the relief may be a declaration of rights, an interdict, a mandamus or such other relief as may be required to ensure that the rights enshrined in the Constitution are protected and enforced. If it is necessary to do so, the courts may even have to fashion new remedies to secure the protection and enforcement of these all important rights.

*Fose v Minister of Safety and Security* [1997] ZACC 6 [19].

<sup>73</sup> See Chapter Twelve of this doctorate. See also Jason Brickhill and Janet van Leeve, 'From the Classroom to the Courtroom: Litigating Education Rights in South Africa' in Sandra Fredman, Meghan Campbell, and Helen Taylor (eds) *Human Rights and Equality in Education: Comparative Perspectives on the Right to Education for Minorities and Disadvantaged Groups* (Policy Press 2018) 143, 165.

<sup>74</sup> *Rail Commuters Action Group v Transnet Ltd trading as Metrorail* [2004] ZACC 20.

<sup>75</sup> *Van Biljoen v Minister of Correctional Services* 1997 (4) SA 441 (C).

some cases, to allow state responsiveness to rights breaches, demonstrating, save for in regards positive remedies, a broadly similar approach to expanding the remedial function as the Irish Courts.<sup>76</sup>

The Constitutional Court has continuously rejected the possibility of conceptualising a minimum core content for social access rights and has deferred the responsibility to substantiate access rights and remedy their breach onto other parties (who are often enjoined to act, without specific orders as to *how*), either through meaningful engagement or deferral to the elected branches. By holding the State to a high standard of reasonableness in providing access for social rights, without substantiating the precise content of these rights, the Court has enabled an articulated jurisprudence of social rights to develop without asserting a monopoly on understanding the content of the rights in all instances, or on how they are to be protected.<sup>77</sup>

Had the High Court in *TD* adopted a similarly evasive attitude towards what the content of the right in question was, and instead of mandating provision of the minimum core content of the right<sup>78</sup> had merely assessed the reasonableness of the State's attempts to provide the necessary facilities, it is conceivable the judgment on appeal may have been different.<sup>79</sup>

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<sup>76</sup> *Fourie v Minister of Home Affairs* [2005] ZACC 14.

<sup>77</sup> As Klug noted:

The Court has asserted its right to provide appropriate relief, including mandatory orders and structural relief; yet it has also used its ability to suspend declarations of invalidity to give the legislature or the executive the time and flexibility to formulate constitutional alternatives. In this way, the Court has effectively engaged in a dialogue with the other branches of the government in its attempt to assert its power while preserving and protecting its own institutional authority against potential popular and political backlashes.

Heinz Klug *The Constitution of South Africa: A Contextual Analysis* (2010 OUP) 150. Alana Klein, 'Judging as Nudging: New Governance Approaches for the Enforcement of Constitutional Social and Economic Rights,' (2008) 39 *Columbia Human Rights Law Review* 351, 422.

<sup>78</sup> Understanding the Minister's proposal to construct secure units as constituting the minimum content of the child's right.

<sup>79</sup> Kelly J did stress the unreasonableness of the State's refusal to vindicate the rights over time, further Kelly J only enjoined that the State fulfil its obligations *as the State had defined them*. This comment is instead referring to the remedy which Kelly J ordered which could have been focused on ensuring the State underwent a reasonable procedure, as judicially defined, potentially including a lesser construction than that previously committed to by the State. This may have been found to cure the right without substantiating its exact content in a manner akin to the South African access rights jurisprudence, as an alternative to issuing an injunction to perform specific functions, as was made in the case. See also Alan DP Brady, 'The Vindication

What becomes clear from the South African example is that an articulated regime of positive rights adjudication is compatible with a common law constitutional order. In the distinction between Ireland and South Africa, lessons can be learned as to what factors led the South African bench towards this cultural commitment to expansive remedial powers in rights breach cases, and what inhibited the Irish bench from following a similar path.

### II(A): Developing a judicial willingness to consider positive remedies for rights

As with the civil rights commitment, the fostering of a culture in which the Court can positively direct future State behaviour to vindicate continuing rights breaches requires a coordination between the inception of such a concept within the judicial culture, and a willingness of the other branches of government to respond positively or acquiescently to the judiciary broadening its remedial discretion. Again, this commitment must manifest itself in the reasoning of those members of the judicial community that ascend to the senior bench. It is not essential for the entire culture to accept the premise that positive rights adjudication is valid for it to develop.

Preliminarily, the plausibility of issuing such remedies must increase within the judicial community. Again, a non-inevitable but useful way to develop the sufficient judicial self-perception necessary for the practical protection of social rights is to contain within the Constitution or Bill of Rights a textual provision allowing broad remedial in rights cases, as well as the enumeration of rights which impose positive resource-implicative obligations. While Ireland shows that this need not necessarily lead the judiciary to construct a correlative positive-remedy-ordering role for itself, inasmuch as it may do so, it provides a supportable suggestion to a common law system seeking to develop positive rights protection within its legal system.

In examining the Irish reticence to positive rights adjudication, the significance of American constitutional law in the formation of Irish rights jurisprudence

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of Constitutional Welfare Rights: Beyond the Deprivation of Liberty?' (2017) 40(2) *DULJ* 127, 137 - 138.

cannot be discounted. The dominant template for rights protection was provided by a jurisdiction largely attached to Enlightenment-era conceptions of rights as negative restraints against government activity.<sup>80</sup> Expressions of Irish judges' philosophical influences are illuminating. Costello J in *O'Reilly v Limerick Corporation* grafted an Aristotelian distinction between commutative and distributive justice into the Constitution.<sup>81</sup> In *TD*, Hardiman J, as well as citing extensively Costello J's judgment, associated the Irish separation of powers (and thus the judicial remedial power) with 'Aristotle, Locke, Montesquieu and the founding fathers of the United States.'<sup>82</sup> Murphy J writing extrajudicially asserted that 'the Constitution of 1937, like most other constitutions, adopts the Montesquieu principle of the separation of powers.'<sup>83</sup>

Among the conceptual barriers to overcome, then, for the Irish judiciary, is to challenge the dominance of a commitment to Enlightenment liberalism within the judicial community, that views the State as a necessary evil which the Court must restrain to protect rights.<sup>84</sup> A conception that views the State as a potentially positive force in the advancement and protection of the rights of its members must instead be asserted.

Amongst the ways to proactively stimulate a move towards an active role in curing continuous rights breaches would be both the assertion of a latent social

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<sup>80</sup> As Zackin noted, 'the [US] Supreme Court has never fully embraced a positive-rights reading of the Constitution.' This is notwithstanding the right to vote, one of the signal rights associated with the Enlightenment and 'Supreme Court opinions throughout American history that have suggested the existence of positive constitutional obligations on government.' Emily Zackin, 'Positive Rights' in Mark Tushnet, Mark Graber and Sanford Levinson (eds) *The Oxford Handbook of the U.S. Constitution* (OUP 2015) 717, 730. (emphasis added).

<sup>81</sup> *O'Reilly v Limerick Corporation* [1989] ILRM 181, 194.

<sup>82</sup> *TD v Minister for Education* [2001] 2 IR 545, 710. As MacCormaic noted, Hardiman J 'saw himself as a proud nineteenth-century liberal.' MacCormaic (n 40) 327.

<sup>83</sup> Francis Murphy, 'The Administration of Justice,' in Jeremy Sarkin and William Binchy (eds) *The Administration of Justice: Current Theories in Comparative Perspective* (Four Courts Press 2004) 252

<sup>84</sup> As Woods notes of liberalism:

The autonomous individual presents a substantial barrier to the development and implementation of a theory of social rights. He embodies a limited and incomplete concept of human dignity, which is the asserted normative premise of human rights discourse—a concept that omits the fundamental moral and material prerequisites to a dignified human life. Freedom is defined as the ability to engage in activity without external interference. The greater the detachment of the self from the community, its values, ends, and history, the more free one is deemed to be.

Jeanne Woods, 'Justiciable Social Rights as a Critique of the Liberal Paradigm' (2003) 38 *Texas International Law Journal* 763, 769.



dimension within the Irish constitutional order<sup>85</sup> and the increased consideration of alternative common law systems such as that of South Africa or Canada, in which positive rights adjudication is not just possible but practised.<sup>86</sup> In South Africa, the Court are constitutionally *directed* to consider comparative constitutional law as well as international law.<sup>87</sup> However, the South African Constitutional Court has also resisted directly pegging the Bill of Rights to a standard in another jurisdiction and have rather insisted on developing positive rights adjudication *in spite of* the absence of instructive comparative jurisprudence.<sup>88</sup>

Similarly again, academic encouragement can appear to strengthen the likelihood of positive rights adjudication developing. South Africa possessed an active academic commentary on the possibility of positive remedies *prior to* their first usage in a rights case in *August*.<sup>89</sup> When the Court made this order, it came after discussion within the legal discourse of possible benefits and drawbacks of issuing such an order. As well as providing inspiration to the judiciary and validating the use of such a power, academic support can thereby

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<sup>85</sup> Colm Ó Cinnéide, 'Zones of Constitutionalisation' and the Regulation of State Power: The Missing Social Dimension to the Irish Constitutional Order' (2014) 37(1) *DULJ* 173.

<sup>86</sup> As was noted in Part Two of this doctorate, in this fourth wave a greater engagement with comparative constitutionalism beyond the USA may be underway.

<sup>87</sup> Constitution of the Republic of South Africa 1996, S39(1).

<sup>88</sup> In *S v Makwanyane* the Court distinguished the South African constitutional order from the American model: 'Comparative "bill of rights" jurisprudence will no doubt be of importance, particularly in the early stages of the transition when there is no developed indigenous jurisprudence in this branch of the law on which to draw. Although we are told by *section 35(1)* that we "may" have regard to foreign case law, it is important to appreciate that this will not necessarily offer a safe guide to the interpretation of Chapter Three of our Constitution. *S v Makwanyane* [1995] ZACC 3 [37]; In the *First Certification* case, the Court rejected that the non-existence of social rights in comparator jurisdictions meant such rights should not be protected in South Africa. *Certification of the Constitution of the Republic of South Africa, 1996* [1996] ZACC 26

<sup>89</sup> Albie Sachs and Andre Astrow, 'Post-Apartheid South Africa: A Constitutional Framework' (1989) 6(3) *World Policy Journal* 589; Albie Sachs *Protecting Rights in a new South Africa* (OUP 1990); Etienne Mureinik, 'Beyond a Charter of Luxuries: Economic Rights in the Constitution' (1992) 8 *SAJHR* 462; Bertus de Villiers 'Social and Economic Rights' in Dawid van Wyk, John Dugard, Bertus de Villiers, Dennis Davis (eds) *Rights and Constitutionalism: The New South African Legal Order* (Clarendon Press: 1995) 599; Craig Scott and Patrick Macklem, 'Constitutional Ropes of Sand or Justiciable Guarantees? Social Rights in a New South African Constitution.' (1992) 141(1) *University of Pennsylvania Law Review* 1. Contrarily, see DM Davis, 'The Case Against the Inclusion of Socioeconomic Demands in a Bill of Rights Except as Directive Principles' (1992) 8 *SAJHR* 475; Nicolas Haysom, 'Constitutionalism, Majoritarian Democracy and Socioeconomic Rights' (1992) 8 *SAJHR* 451; Pierre de Vos, 'Pious Wishes or Directly Enforceable Human Rights: Social and Economic Rights in South Africa's 1996 Constitution' (1997) 13 *SAJHR* 67.

also lower the controversy resulting from making such an order. Noticeably less academic commentary advocated the development of positive remedies for rights breaches prior to the definitive Irish decisions in *Sinnott* and *TD*.<sup>90</sup> (However, if academic commentary *is* of significance, the almost unanimous wave of academic support for positive rights adjudication in the aftermath of *TD* may yet crest into the emergence of judicial acceptance of positive dimensions to rights.)<sup>91</sup>

A further subtle but consequential consideration when assessing the cultural disposition of a judiciary to positive rights adjudication is assessing the judiciary's attitude to positive remedies generally within the legal system. To understand this, it is necessary to ascertain the willingness of the courts to issue mandatory injunctions or interdicts within other areas of both public and private law. In South Africa, the development of structural interdicts for rights breaches followed in part from the existence of such a remedy and legitimate expectations within administrative and private law.<sup>92</sup>

In contrast, the prevalence of mandatory orders within Irish law is considerably less. Mandatory injunctions are very difficult to acquire, and legitimate expectations comparatively underdeveloped.<sup>93</sup> The cause of this, in part, is the

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<sup>90</sup> Peter Ward, 'Homeless Children and the Child Care Act 1991' (1995) 13 *ILT* 19; Paul Anthony McDermott, 'The Separation of Powers and the Doctrine of Non-Justiciability' (2000) 35 *Ir Jur* 281; Gerard Hogan, 'Directive Principles, Socioeconomic Rights and the Constitution' (2001) 36 *Ir Jur* 174; David Quinn, 'Rethinking the Nature of Economic, Social and Cultural Rights in the Irish Legal Order,' in Cathryn Costello (ed) *Fundamental Social Rights: Current European Legal Protection and the Challenge of the European Charter on Fundamental Rights* (2001 ICEL) 35.

<sup>91</sup> Gerry Whyte, 'The Role of the Supreme Court in our Democracy: A Response to Mr Justice Hardiman' 28 (2006) *DULJ* 1; David Langwallner 'Separation of Powers and Judicial Deference and the Failure to Protect the Rights of the Individual' in Eoin Carolan and Oran Doyle (eds) *The Irish Constitution: Governance and Values* (Round Hall 2008) 256; Rory O'Connell, 'From Equality Before the Law to the Equal Benefit of the Law: Social and Economic Rights in the Irish Constitution' Individual' in Eoin Carolan and Oran Doyle (eds) *The Irish Constitution: Governance and Values* (Round Hall 2008) 327; Whyte (n 48) 357 - 363; Claire-Michelle Smyth, 'Social and Economic Rights in the Irish Courts and the Potential for Constitutionalisation' in Laura Cahillane, James Gallen and Tom Hickey (eds) *Judges Politics, and the Irish Constitution* (MUP 2017) 289.

<sup>92</sup> 'South African law in the pre-constitutional era did not limit the power of courts to make mandatory orders on government. Such orders were however, not common. They were most frequently used as a remedy in administrative law, where they were known as mandatory interdicts.' Roach and Budlender (n 47) 328; See also Laurence Baxter *Administrative Law* (Juta 1984) 696 - 698.

<sup>93</sup> Note the recent judgment of the Supreme Court in *Merck Sharp & Dohme v Clonmel Healthcare Ltd* [2019] IESC 65, in which the requirement for damages to be an inadequate remedy in order for an interlocutory injunction to be granted was removed. It follows from the

continued judicial attachment to a restrained, negative model of enforcement. While this reticence in other areas could also be challenged by the same comparative and academic influences highlighted above, it remains the case that greater judicial willingness to issue positive orders generally by making the exercise of such a power more familiar to the judicial community will likely precipitate greater willingness to use such remedies in rights breach cases.

### II(B): The impact of case ordering and lowering the risk of state resistance

A potentially highly significant factor in the development of the Positive Remedial Commitment is the order in which cases issuing positive remedies for rights breaches are presented to the Court. While trite, hard cases *can* make bad law. There can be perverse consequences for positive rights adjudication generally if hard cases are heard first as, in finding against positive remedies in such cases, the Court can foreclose on the viability of less controversial cases meriting positive orders from being considered.<sup>94</sup>

In Ireland, the key decisions on the imposition of positive remedies to cure rights breaches were *Sinnott* and *TD*, two controversial cases on their facts insofar as the former arguably was moot,<sup>95</sup> and the latter concerned a claim of an unenumerated social right.<sup>96</sup> Finding for the plaintiffs in either case would have had considerable financial implications. Were the Court to have engaged first instead with a case concerning, say, legal documentation in the Irish language, an issue with marginal resource implications and which the Court appears less resistant to issuing a mandatory order, the likelihood of developing a nascent jurisprudence of positive rights adjudication may have been

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removal of this step that more applications for injunctions will succeed that hitherto failed here, including mandatory injunctions, which may potentially have the effect of inuring the judiciary to issuing such orders.

<sup>94</sup> Gerry Whyte, 'Judicial Decisions as Catalysts for Social Change' in Eoin Carolan (ed) *Judicial Power in Ireland* (IPA 2018) 147; Gerard Hogan, 'Declarations of Incompatibility, Inapplicability and Invalidity: Rights, Remedies and the Aftermath' in Kieran Bradley, Noel Travers and Anthony Whelan (eds) *Of Courts and Constitutions: Liber Amicorum in Honour of Nial Fennelly* (Hart 2014) 233; Conor Casey, 'Public Interest Litigation and Homelessness: A Commentary on Recent Case Law' (2020) 42 *DULJ* (forthcoming).

<sup>95</sup> *Sinnott v Minister for Education* [2001] 2 IR 545.

<sup>96</sup> *TD v Minister for Education* [2001] 4 IR 259.

stronger.<sup>97</sup> Arguably then, the scale of the remedies in the key cases of the Court's engagement with positive rights may have unwittingly undermined what otherwise might have been a developing positive rights jurisprudence in Ireland.<sup>98</sup>

The fact that the first two cases in which the Constitutional Court of South Africa issued positive remedies for rights breaches concerned voting rights<sup>99</sup> and the commutation of death sentences is notable.<sup>100</sup> Even there, within a judicial community with greater textual license for positive rights adjudication, a common law which not infrequently issued mandatory injunctions, and a considerable domestic academic literature on positive rights enforcement, the development of mandatory remedies for rights breaches was incremental and began with relatively uncontroversial applications. With normalisation of this role for the judiciary, these cases would be cited in later more controversial cases to validate the issuance of further orders of compulsion.<sup>101</sup>

Not only does the order in which such cases come before the Court matter to the viability of generating a culture of positive rights enforcement, so too does it matter to the willingness of the elected branches to assent to following a positive order. Whilst judicial rights review is frequently discussed in terms of the counter-majoritarian difficulty,<sup>102</sup> inasmuch as rights review relies on state compliance with court orders to be effective, prior to issuing an order, to feel confident the order will be effective the Court must anticipate some *threshold* amount of State compliance, if not support, for their orders. With positive

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<sup>97</sup> Compare in this regard the attitude of Hardiman in *Ó Beoláin* to issuing a mandatory order, in which he admits of the possibility of issuing one in the future, [2001] 2 IR 545, 694, to that of the same judge in *TD*, where to issue such an order is seen as 'an absolute final resort in circumstances of great crisis and for the protection of the constitutional order itself.' [2001] 4 IR 259, 372.

<sup>98</sup> While neither the enumerated right in Article 42.4 or the unenumerated right in Article 42.5 were parsed in what could be considered 'access rights' language akin to those provisions in the South African text, standards of reasonableness and proportionality are well-established in Irish public and private law. Holding the State to these standards then rather than mandating the precise provision of the core of the right may have been met more favourably by the Supreme Court on appeal.

<sup>99</sup> [1999] ZACC 3.

<sup>100</sup> [2006] ZACC 22.

<sup>101</sup> See the citation of *August* to support issuing a mandatory order in *Minister for Health v Treatment Action Campaign* [2002] ZACC 15 [99].

<sup>102</sup> Alexander Bickel, *The Least Dangerous Branch* (Bobbs-Merrill 1962)

orders, this anticipation must be heightened, as to expect compliance the Court must expect the State will positively change its expenditure plans from those previously planned due to the Court order.

This may explain in part the delay of the Constitutional Court of South Africa in its usage of positive remedies in early social rights cases. Where the risks of failure are ameliorated, by ordering the remedy of a particularly uncontroversial rights breach, by issuing a relative light positive order,<sup>103</sup> by expressing deference to the elected branch,<sup>104</sup> and by developing a custom over time of state compliance with such orders, the probability of state assent necessary to make the order an effective means of rights protection increases.<sup>105</sup>

The likelihood of a cultural commitment supportive of issuing positive remedies developing is increased then by reducing the risk of constitutional crisis arising from a state rejection of a Court order.<sup>106</sup> For the judiciary to feel confident a mandatory injunction to the Executive to spend money will be complied with, the cooperation of the Legislature to approve the resulting budget measures must be expected.<sup>107</sup> A key factor in the development of positive rights protection within a common law system may be then the prevalence of majority

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<sup>103</sup> Per Ebadolah, the structural interdict 'preserves an active role for the judiciary yet avoids difficult separation of powers problems by requiring appropriate political actors to formulate plans for change. As such, structural interdicts circumvent institutional competency critiques; legislators and/or executive branch officials are required to take action but are given the necessary flexibility to accommodate complex polycentric decision-making. Mitra Ebadolah, 'Using Structural Interdicts and the South African Human Rights Commission to Achieve Judicial Enforcement of Economic and Social Rights in South Africa' (2008) 83 *New York University Law Review* 1565, 1595 - 1596.

<sup>104</sup> The test expounded by Kelly J *DB v Minister for Justice*, expressing his reluctance to issue the mandatory injunction, and why he felt in the narrow circumstances it was necessary, can be seen as emblematic of the recognition of the risks involved in innovating such an order, and a desire to signal the extraordinary circumstances that impelled it. [1999] 1 IR 29, 42-43.

<sup>105</sup> Mark Tushnet, 'Social Welfare Rights and the Forms of Judicial Review' (2004) 92 *Texas Law Review* 1895, 1912.

<sup>106</sup> On the risks of such crises, see MacCormaic's commentary on *TD v Minister for Education* (n 40).

<sup>107</sup> 'Under relatively common political conditions, courts may be more likely to receive an effective response when they frame orders as ones of bureaucratic ineptness rather than as policy-making failures by the legislature [...] In some contexts, there may be a heavy risk of backlash against the court if it were to issue an aggressive remedy against the legislature, and the risk is lessened if the problem can be framed as a principle-agent one rather than as a substantive attack. This is most likely to occur in a dominant party democracy.' David Landau, 'Choosing Between Simple and Complex Remedies in Socioeconomic Rights Cases' (2019) 69 *University of Toronto Law Journal* 105, 112.

government, with the most favourable circumstances being dominant-party democracy as was the case in South Africa.<sup>108</sup> This requires then strong governmental control of the legislature. The risks of constitutional crisis arising where a court attempts to order the Executive to make the Legislature pass a law to ensure compliance with the court's interpretation of the Constitution's rights provisions, appear too great to tolerate in the absence of strong governmental assurance of legislative support.

### II(C): Entrenching the positive remedial power

The first two factors necessary for the development of the Positive Remedial Commitment then appear to be the inculcation of a sense of the practicability of positive orders as a means of rights protection within the judicial community, and then the reduction of the risks of state rejection of such a positive order. These factors are complementary: the likelihood that a positive order will be complied with informs the judiciary's understanding of its capacity to issue such a remedy.

In these circumstances, a custom may develop whereby judicial declarations that the state is in continuing breach of a rights obligation lead to a government response. The judicial community must then appreciate the existence of this iterated responsiveness on the part of the State to its positive orders, and internalise an understanding that by this process they are able to effect compliance with what they interpret to be the State's positive rights commitments. Where a declaratory order affirming a breach of rights indirectly but almost inevitably results in a cure of the rights breach, without engaging the risk of a constitutional crisis arising out of executive noncompliance with a court injunction, a similar rights-curing procedure has developed as would if the Court expressly ordered, on risk of contempt, a cure.

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<sup>108</sup> In a dominant-party democracy like South Africa, a constitutional court may be insulated from political attack by the governing political party. [...] The single most important feature of South African politics during the Chaskalson Court's term was the ANC's overwhelming dominance of electoral politics. This meant that the Chaskalson Court's lack of public support was not initially troubling to the ANC, even after highly unpopular decisions like that in the death penalty case.' Theunis Roux *The Politics of Principle: The First South African Constitutional Court 1995 - 2005* (Cambridge University Press 2013) 37.

So far I have focused on how to develop a judicial community and constitutional order such that the successful remedying of a rights breach by the issuance of a positive order is conceivable. As with the introduction of any change into a complex system with various interdependent actors, a key factor in the transition to a legal system in which positive remedies for rights breaches is so sufficiently normalised that remedies of compulsion become routine ways to resolve continuing breaches is the impact of time.

This can be seen in South Africa, with the eventual accretion over time of greater judicial discretion to issue orders to the State to cure social rights breaches. The late emergence of the right to basic education jurisprudence is perhaps the most interesting example of this.<sup>109</sup> The breaches of the right to basic education subsisted for generations - since long before the constitutional dispensation. In early cases, the Court resisted substantiating the right or asserting its positive remedial potential.<sup>110</sup> The development of education rights as a relevant subset of South African constitutional law only emerged in the last fifteen years.<sup>111</sup> A degree of judicial acculturation and acclimatisation to positive rights adjudication can only have occurred over the preceding fifteen years, as the Court resolved previous positive rights disputes. The size of the cultural shift, the leap of faith which the Court was taking, in issuing positive mandatory injunctions for the provision of select equipment necessary for the immediate realisation of the right to basic education was thus shortened.<sup>112</sup>

As Ackermann noted:

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<sup>109</sup> As McConnachie and McConnachie noted in 2012, 'to date, there has been only a trickle of reported judgments, with most involving disputes over language policy. There are now signs of a change. The emerging education adequacy movement' is increasingly turning to litigation as a means to improve conditions in South African schools, with an initial focus on school facilities. Cameron McConnachie and Chris McConnachie, 'Concretising the Right to a Basic Education' (2012) 129 *SALJ* 554, 555 - 556.

<sup>110</sup> Prior to *Juma Masjid*, the only discussion of the content of the right to a basic education was an obiter comment in *Ex Parte Gauteng Provincial Legislature: In re Dispute Concerning the Constitutionality of Certain Provisions of the Gauteng Education Bill of 1995* [1996] ZACC 4 [9] where the Constitutional Court confirmed that the right to a basic education includes positive and negative rights.' See also *ibid*, 25ff.

<sup>111</sup> Faranaaz Veriava and Ann Skelton, 'The Right to Basic Education: A Comparative Study of the United States, India and Brazil' (2019) 35 *SAJHR* 1, 2.

<sup>112</sup> See Chapter Twelve of this doctorate; See also Brickhill and van Leeve (n 73) 165.

Even after their revolutionary text is proclaimed in the name of the People, there will be lots of work to do before the profession as a whole can fully assimilate the revolution's constitutional principles into its repertoire of legal argument. By definition, the radical principles announced at the Founding disrupt many older legal notions - and it takes a great deal of time for lawyers and judges to reorient their older notions to build new doctrinal solutions to a host of practical problems. [...] Rather than risk institutional humiliation, courts will typically develop their early constitutional doctrines in less provocative settings - building up an increasingly elaborate body of authoritative opinions that will serve as the basis for greater professional self-confidence as the years go by.<sup>113</sup>

Time, and repeated successful iterations of exercises of the power to issue either positive remedies or declaratory orders with indirect positive effect, can induce the development of a cultural practice of state compliance with such orders.<sup>114</sup> The more embedded this practice, the more likely the positive dimension of a right will be practicably enforceable, the more likely the convention will survive outside of the existence of a majority government, and the greater the likelihood of possibly more controversial rights with positive remedial dimensions being vindicated. That the South African judiciary's power to issue positive remedies has only grown over the last decade notwithstanding its growing friction with the Zuma administration for most of this period appears to be due in part to this earlier embedding of the norm of state compliance with positive court orders.

There is one final cultural threshold to overcome in order for a judicial role conception supportive of social rights protection to develop within a common law system. While related to the foregoing, inasmuch as positive rights adjudication can exist within a rights regime that does not protect social rights

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<sup>113</sup> Bruce Ackermann *Revolutionary Constitutions: Charismatic Leadership and the Rule of Law* (HUP 2019)

<sup>114</sup> 'Through investment in previous decisions, courts evolve into more insistent actors, and arrogate a greater power to dictate the terms of rights and the necessary steps towards enforcement.' Young (n 8) 181.



it merits consideration on its own. That is the inveteracy of the justiciability distinction drawn between civil and social rights, and the necessity of overcoming it to ensure effective social rights protection.

### III: The Social Rights Commitment

The final conceptual feature that a judicial community must culturally internalise in order to be able to viably protect social rights is, perhaps self-evidently, an understanding that social rights claims *are* rights. There are two dimensions to this. First, that the nature of an interest in the provision or ability to access housing, healthcare, social security, water, or education, are properly understood as interests to which persons within the common law jurisdiction are entitled *as of right*, akin to civil rights. Second, resultantly, that social rights so understood are an appropriate topic of adjudication. That is, that such rights interests *are justiciable*.

For this, the dominant cultural distinction between civil rights as justiciable and social rights as non-justiciable must be overcome.<sup>115</sup> Generally, upon the elevation of a plurality of rights-conscious judges to the bench, the conception of rights which the judiciary have considered it their function to adjudicate upon and protect have been exhausted by civil rights. As Moyn noted, ‘When human rights exploded in the 1970s they were focused so centrally on political and civil rights, their social and economic cousins have come to be regarded as ‘second generation’ principles.’<sup>116</sup>

All common law rights regimes protect civil rights, with some regimes protecting both civil and social rights. In no common law rights regime, however, are social rights protected to the exclusion of civil rights. Civil rights protection is thus the baseline form of rights protection afforded within common law systems with judicial rights review.<sup>117</sup> As I have noted, it is for this reason that a key commitment is the acceptance of the propriety of civil rights

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<sup>115</sup> This distinction was discussed in Part One of this doctorate.

<sup>116</sup> Samuel Moyn, *The Last Utopia: Human Rights in History* (Belknap 2010) 17; See also Samuel Moyn *Not Enough: Human Rights in an Unequal World* (2018 HUP) 110.

<sup>117</sup> ‘A fixed point in modern constitutionalism is that first-generation rights *must* be enforced by the courts.’ Tushnet *Weak Courts, Strong Rights: Judicial Review and Social Welfare Rights in Comparative Constitutional Law* (Princeton University Press 2008) 251.

review. To assert the justiciability of social rights within common law systems is to say that social rights should be treated similarly if not identical to civil rights.

The ubiquity of civil rights protection may result from two possible circumstances. Either the rights interests protected by civil rights are viewed by members of the judicial community as especially meaningful and exclusively worthy of protection. That is, a broad liberal-democratic consensus predominates across common law judiciaries which have developed judicial rights review such that rights protecting paradigmatic interests associated with this political ideology are recognised approvingly by the judicial branch. Alternatively, and potentially compatibly with the foregoing, whatever the ideological attachment of the members of the judicial community to the contention that provision or access to certain socioeconomic interests should be due *as of right*, there is a consensus against the premise that it is the court's function to engage with such rights through adjudication. The resolution of the positive remedial commitment may partially resolve the justiciability issue. However as will be shown, there are particular issues relating to social rights justiciability *exclusively* that have to be addressed.

The cultural dominance of common law cleavages to civil rights is partially informed by the radiating cultural impact of the Cold War, and the coincident rise to dominance of rights reasoning during this period. As the development of judicial review within common law jurisdictions developed during the 20<sup>th</sup> Century, the trend within rights discourse globally was to mark civil rights as distinct from, if not oppositional to, social rights. The recognition of the latter rights were associated with the communist bloc during the Cold War, leading to their ostensible preclusion from most common law jurisdictions, which lay largely on the 'Western' side of the Cold War.<sup>118</sup> Relating to an understanding that positive rights protection demands a strong interventionist state contrary to market capitalism, a common convention grew within common law

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<sup>118</sup> The development of social rights adjudication in India during the Twentieth Century is an instructive exception, as India was a non-aligned state within the Cold War with a broadly socialist government and economy and therefore was an outlier within the common law world.

jurisdictions that socioeconomic interests were, *prima facie*, not conceivable as rights.<sup>119</sup>

This demarcation of social rights as somehow in conflict with common law capitalist legal systems must be overcome.<sup>120</sup> The understanding of the compatibility of social rights with such systems noted in Chapter Two must become mainstream. It is necessary in this to further recognise the influence of education and comparative constitutional experiences upon members of the judicial community and to encourage providing such sources a sense that socioeconomic interests *can* be due as of right.<sup>121</sup> Governmental enthusiasm for seeing such interests *as* rights can play an important conditioning factor in developing such a sense among the judiciary,<sup>122</sup> as noteworthily can the

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<sup>119</sup> Per Pieterse:

Debates about the justiciability of socioeconomic rights typically focus in the first place on their legitimacy (i.e. whether their nature and content is suitable for constitutionalisation) and secondly on whether courts are institutionally competent to enforce them. Legitimacy-based objections to the constitutionalisation of socioeconomic rights typically relate to broader ideological concerns on redistribution of wealth and state intervention in market economies.

Marius Pieterse, 'Coming to Terms with Judicial Enforcement of Socioeconomic Rights' 20 (2004) *SAJHR* 383, 389.

<sup>120</sup> O'Connell suggests this 'rests either on the Lockean premise that atomistic, rational and atavistic individuals require only certain limited civil liberties in order to function in a community; or, at a baser level, on the self-serving rhetoric of neoliberalism which justifies a limited set of 'market-friendly' rights, small government and 'market solutions' ostensibly to enhance and improve human welfare, but which in fact serves the material interests of global economic elites.' Paul O'Connell, *Vindicating Socio-Economic Rights: International Standards and Comparative Experiences* (Routledge 2012) 7.

<sup>121</sup> Theological influences can also be of importance here, as shown by the discussion in Part Two of this doctorate of how the greater theological attachment to an individuated natural law-centric understanding of Catholicism over Catholic communitarianism likely impacted the viability of engaging with the Irish Constitution's social dimension including social rights.

<sup>122</sup> Per Hirschl:

Leftist political forces have historically been influential in polities such as Brazil, India, and Spain. All three countries feature strong constitutional support for social welfare rights. The United States' example may be compatible in that, much like Brazil or India, the United States feature one of the most unequal distributions of income among advanced industrial societies; it has vast social and economic disparity (the second largest among western societies); and is controlled to a large extent by the sheer power of corporate capital. Unlike Brazil or India, however, a true socialist (let alone communist) political agenda has never garnered any meaningful popular support in twentieth century United States.

Ran Hirschl, 'Review of Mark Tushnet *Weak Courts, Strong Rights*' (2008 - 2009) 40(1) *Ottawa Law Review* 40(1) 173, 183.

existence of popular social advocacy groups raising awareness of the need to construe social interests *as due as of right*.<sup>123</sup>

An additional factor which appears relevant to developing social rights consciousness amongst the judiciary is the proximity of the judicial community to the reality of socioeconomic deprivation. As Langford observed, 'Judicial receptivity to social rights claims is usually conditioned by clear evidence of State or private failure. Inhumane suffering in the face of the State unwillingness to fulfil its own legislation and policy has sparked much of the ground-breaking jurisprudence from South Africa to the United States to India to Colombia.'<sup>124</sup> The stubborn reality of deprivation on an unavoidable scale resulting from the absence of housing, basic education, and reliable healthcare in a jurisdiction such as South Africa, it is suggested, is thus informative of the judiciary's acceptance of socioeconomic rights *as rights*.

Thus a stimulant to the recognition of social rights *as rights* appears to be socioeconomic deprivation existing within a common law order at such a threshold as to make the judicial community react to the scale of deprivation by concluding that it constitutes a breach of essentials which ought to be pronounced guaranteed *as of right*. Underfunded, overstretched state institutions and inequality thus appear to be important factors in the emergence of such a cultural commitment. State mismanagement further reduces the legitimacy of the government to be trusted to competently cater for socioeconomic interests absent judicial oversight, which may incidentally raise the legitimacy of judicial activity in this area.<sup>125</sup> Simultaneously, it can

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<sup>123</sup> 'Translation of socioeconomic rights need not, indeed should not, be a one-way, "top-down" process. Litigants, activists, and social movements have an important role to play in ensuring that conceptually empty socioeconomic rights are awarded content "from the bottom up," so as to resonate with the experiences and needs of those for whom their effective vindication matters most. Furthermore, by making the needs and experiences of socioeconomic rights' intended beneficiaries audible to courts and legislatures (who may otherwise be conditioned to turn a deaf ear to such experiences), social movements can at once implore and enable the accommodation of such needs and experiences in "top down" articulations of rights.' Pieterse (n 28) 821.

<sup>124</sup> Malcolm Langford, 'The Justiciability of Social Rights: From Practice to Theory,' in Malcolm Langford (ed) *Social Rights Jurisprudence: Emerging Trends in International and Comparative Law* (CUP 2008) 3, 10.

<sup>125</sup> Consider in this regard the *Black Sash* litigation discussed in Chapter Twelve of this doctorate.

make the judiciary understand the rectification of such mismanagement as something over which *they* should take responsibility. Whilst South Africa provides an illustrative example to point to, the impetus upon the Indian Courts to engage in social rights jurisprudence provides further illustration of this. As Desai and Muralidhar comment, in the Indian context, ‘It is discernible that the strength of a judiciary is proportionate to the weakness of the executive.’<sup>126</sup>

It follows that, in common law systems containing more robust state structures to deal with socioeconomic disadvantage, such as Ireland, the judicial internalisation of the harm caused by an absence of interests protected by social rights may therefore be more abstract to members of the bench. As a result, the capacity of such rights to act as safeguards for rights-bearers unable to ensure provision or access to healthcare, housing, or education interests is frustrated. By this, the ability of social rights to act similarly to civil rights within such legal systems - as social claims that can be made when one’s rights are affected by state policies oppositional or merely ignorant to their interests - is also then frustrated.

Ireland is a peculiar common law jurisdiction in regards social rights recognition. The Court accepts that it *can* adjudicate social rights, however the Court do not appear to have developed a sense that socioeconomic interests are comparable to civil rights as *due as of right*. In regards the right to education, the Courts have focused less on substantiating why state provision for free primary education is an interest due to children *as of right*, and more on limiting the right’s remit and explaining the Court’s remedial limitations in cases of breach.<sup>127</sup>

In regards unenumerated social rights, the Court first rejected the capacity to find social rights, in *O’Reilly v Limerick Corporation*, without reference to the

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<sup>126</sup> Ashok H. Desai and S Muralidhar ‘Public Interest Litigation: Potential and Problems’ in BN Kirpal, Ashok H. Desai, Gopal Subramanian, Rajeev Dhavan and Raju Ramchandran (eds) (eds) *Supreme but not Infallible - Essays in Honour of the Supreme Court of India* (Oxford University Press 2004) 159. See also S Muralidhar, ‘India: The Expectations and Challenges of Judicial Enforcement of Social Rights’ in Malcolm Langford (ed) *Social Rights Jurisprudence: Emerging Trends in International and Comparative Law* (CUP 2008) 102.

<sup>127</sup> *Crowley v Ireland* [1980] IR 102 *Sinnott v Minister for Education* [2001] 2 IR 545, *O’Carolan v Minister for Education and Science* [2005] IEHC 296; *Ó’C v Minister for Education and Science* [2007] IEHC 170.

existence of an enumerated socioeconomic right, and without concluding the foundational preliminary inquiry as to whether the interest sought to be protected was one that followed from the values that the Constitution is meant to uphold. In fact, partly conceding that the right ‘may’ exist,<sup>128</sup> the Court then promptly proceeded to dispute the justiciability of such rights.<sup>129</sup> In *TD*, however, while citing repeatedly *O’Reilly*, the Court tacitly accepted the existence of the social right in question as being due protection within the constitutional order. As Brady has noted:

The problem that the Supreme Court found with the High Court decision in *TD* was not the finding in respect of the content of the children’s constitutional welfare rights [...] The content and strength of the constitutional rights appear to have been affirmed to some extent. The issue in *TD* was the remedy given.<sup>130</sup>

It appears then that the Court accepts that socioeconomic interests *may* be due as of right, and that they *can* be adjudicated upon, without seeming to have internalised any substantive conception of *why* such interests *are* due as of right.<sup>131</sup> This is contrastable then with South Africa, where, even when finding against the applicant, the Court has recognised the normative and jurisprudential foundation of the social right within the constitutional order.<sup>132</sup> This appears to be the result, in considerable part of the influence upon the South Africa judicial community, of some of the factors highlighted above.

The above factors can lead to the internalisation within members of the judicial community of the contention that social rights *are* rights. As Gauri and Brinks noted, ‘the most important social prerequisites for the legalisation of economic

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<sup>128</sup> Per Costello J: ‘it is certainly at least open to argument that the personal freedom and dignity of which the Constitution speaks cannot be adequately achieved without the provision of certain basic services.’ *O’Reilly v Limerick Corporation* [1989] IRLM 181, 193.

<sup>129</sup> [1989] IRLM 181, 193.

<sup>130</sup> Brady (n 79) 137. [2001] 4 IR 259.

<sup>131</sup> See Daryl Levinson, ‘Rights Essentialism and Remedial Equilibration’ (1999) 99(4) *Columbia Law Review* 857; Richard H. Fallon, ‘The Linkage between Justiciability and Remedies: And their Connection to Substantive Remedies’ (2006) 92(4) *Virginia Law Review* 633.

<sup>132</sup> See for instance the introduction to *Mazibuko v City of Johannesburg*: ‘Cultures in all parts of the world acknowledge the importance of water. Water is life. Without it, nothing organic grows. Human beings need water to drink, to cook, to wash and to grow our food. Without it, we will die. It is not surprising then that our Constitution entrenches the right of access to water.’ [2009] ZACC 28 [1].

and social demands are the conditions that favour the mobilisation of wants and desires into demands.’<sup>133</sup> In other words, there must have occurred that transformation of outlook in which, as Pitkin puts it, ‘I want’ has become ‘I am entitled to.’<sup>134</sup> This transformation is, however, only one half of developing the social rights commitment. The judiciary must also accept the premise that social rights interests are appropriate topics of adjudication.

Judges may internalise the fact that social rights *exist* - that is, that entitlements to social rights are akin to entitlements to free speech or voting rights - however, to render such rights justiciable, the Court has to accept that it has *a role* in their protection. A dominant judicial role conception that inveighs against positive rights protection can remain a strong barrier to the development of an acceptance of their justiciability within a constitutional order.

The usual focus within common law systems upon civil rights needs not *per se* be to the exclusion of social rights. In reality however, the judicial consensus that leads to the development of the former usually comes complementary with a quasi-American understanding of the separation of powers. It comes with a common understanding that the State is a necessary evil that should be *restrained* from interfering with rights. The methods by which the Positive Remedial Commitment can become incorporated into a common law order can then be relevant to deconstructing this objection to the justiciability of these rights.

The convention of non-justiciability has maintained notwithstanding, as aforementioned, the existence of both civil rights that can impose positive obligations, and social rights which do not.<sup>135</sup> This convention has stubbornly

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<sup>133</sup> Gauri and Brinks (n 46) 14.

<sup>134</sup> *Ibid.*

<sup>135</sup> This idea that rights should be considered strictly immunities can exist complementarily if not wholly coherently in a common law jurisdiction which permits positive remedies for rights breaches. As Bilchitz observed:

Courts are not criticised for ordering the provision of legal representation to the unrepresented, or for ordering that all are provided with the vote in a society: why then should they be criticised for ordering a state to ensure that people are provided with enough food to avoid malnutrition? The rationale for this distinction seems to lie in the fact that the critics regard socioeconomic rights as in some way inferior to civil and political rights and as not warranting equal protection [...] There is no justifiable

lasted beyond the end of the Cold War, and against persistent academic commentary espousing the relatedness (if not indivisibility) of civil and social rights.<sup>136</sup>

Thus, discrete cultural obstacles lie in the way of the justiciability of socioeconomic rights, as distinct from rights that can impose positive obligations generally. Their association with forms of state intervention considered foreign to common law systems, and the consequent exclusion of these rights from the classical canon of common law constitutional rights inhibits judicial internalisation of the interests protected by such rights qualifying *for* rights protection. This association thus, in particular, must be deconstructed. The express enumeration of such rights can in this regard be a helpful if not guaranteed approach to securing the judicial community assent to their justiciability.<sup>137</sup>

#### IV: Conclusion

A supportive judicial culture is essential to social rights adjudication. In this chapter I considered what discrete judicial assumptions have to be internalised within the judicial community to make social rights practically enforceable. Three key cultural commitments have been elevated as essentials to the development of judicial social rights protection, and the reasons why these commitments are, taken together, necessary has been noted. Factors that may make judicial cultures more amenable to the development of these cultural necessities for social rights protection have been raised. I have explained why

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normative basis for this contention and [...] the same normative foundations support both types of rights.

David Bilchitz, *Poverty and Fundamental Rights: The Justification and Enforcement of Socioeconomic Rights* (OUP 2007) 129.

<sup>136</sup> Geoffrey Budlender, 'The Role of the Courts in Achieving the Transformational Potential of Socioeconomic Rights' (2007) 8(1) *ESR Review* 9, 10.

<sup>137</sup> Illustratively, per the Constitutional Court in *Government of the Republic of South Africa v Grootboom*:

Socio-economic rights are expressly included in the Bill of Rights; they cannot be said to exist on paper only. Section 7(2) of the Constitution requires the state "to respect, protect, promote and fulfil the rights in the Bill of Rights" and the courts are constitutionally bound to ensure that they are protected and fulfilled. The question is therefore not whether socio-economic rights are justiciable under our Constitution, but how to enforce them in a given case.

[2000] ZACC 19 [20].



these factors are so crucial to the development of social rights review. These factors are not exhaustive, nor prescriptive - particularly in regards the factors that may enhance a judicial community's consciousness of social rights as rights, that a scale of deprivation may prove conducive to the development of such a frame of mind in no way advocates the development of such inequality.

The existence of these commitments does not mean that practically enforceable social rights *will* necessarily emerge, but it does make the emergence *possible*. Moreover, adjudication which follows from a judicial community so influenced may not optimally protect social rights, and the interests that are sought to be protected may be better served by a different system of protection not involving judicial oversight. But in examining how common law legal systems - operating within presumptions of judicial supremacy in rights interpretation - may develop social rights, I have provided an explanation for why some common law states have social rights, why others do not, and what may cause those which do not to develop them.

In the absence of any of these three key cultural commitments, social rights adjudication cannot exist. This is most obvious in the absence of the first feature, as it is the foundational for all contemporary rights review. However, Canada shows that positive rights protection can exist without social rights adjudication;<sup>138</sup> and Ireland shows that you can have social rights adjudication without positive remedies, and that in neither of these jurisdictions has practically enforceable social rights protection developed. South Africa then, by developing all three key features, shows how a jurisdiction developing from a similarly situated common law starting point of parliamentary supremacy and judicial restraint, can develop a robust and articulated regime of social rights protection.

The shifts needed to develop socioeconomic rights protection within common law jurisdictions such as Ireland take time. Considering Ireland, the inclusion of additional social rights tomorrow likely would not, by itself, have the impact

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<sup>138</sup> As Hirschl noted, 'In Canada [...] an inexplicable gap exists between the polity's long-standing commitment to a relatively generous version of the Keynesian welfare state model and the outright exclusion of subsistence social rights from the purview of rights provisions.' Hirschl (n 19) 183.

desired by those who advocate such an inclusion.<sup>139</sup> Rather, as the judiciary have the assumed role as arbiters of the Constitution's rights commitments owed by the other branches of the State, judicial willingness to engage with such new commitments - to give them practicable relevance - is preconditional to giving new socioeconomic rights substantive impact within the constitutional order. However, through the development of the commitments described above, a regime which protects social rights *can* emerge in a common law system such as Ireland.

In this chapter I synthesised my comparative research into a general examination of how social rights protection develops in common law systems. The process by which social rights protection develops in common law systems has been seriously underexplored. Drawing together my research, I have defended my understanding of what causes social rights protection to develop in contemporary common law systems. By this, I have shown the contingency of rights protection on judicial culture generally, and more particularly, supported by my case studies, I have shown how *social* rights protection is conditional upon particular cultural commitments.

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<sup>139</sup> See Report on the Convention on the Constitution: Economic Social and Cultural Rights (n 6).

## Conclusion

The adjudication of social rights has been one of the prevailing controversies of rights jurisprudence for at least the last half century.<sup>1</sup> In my doctorate I have examined the development of social rights within two common law systems. From a close study of the both jurisdictions, I have shown that, whilst social rights protection developed in South Africa, it has failed to emerge within the Irish constitutional order. The directions which both judicial communities have taken in their social rights reasoning has been explained by noting the major influences upon the cultures in which the judges were situated.

In Part One I defended the central inquiry of the thesis: the underexplored question of *how* does social rights protection actually develop within common law systems. I explained the pragmatic conception of ‘rights’ used throughout my doctorate. It is a definition of rights that derives from a pragmatic observation of ‘what rights do’ in social systems. Rights, under this approach, are claims which can be made by rights-bearers to an entitlement, made in the reasonable expectation that, through making them, an authority will either cure the breach or provide compensation.

The assessment of whether an interest *should be due as of right* within a rights regime depends on an understanding of the rights regime itself, and the values which inform its identification of rights. Property rights, for instance, are arguably not considered due in a communist state. The rights regimes of most common law legal systems, including those I have studied in my doctorate, share similar conceptual foundations: an understanding that the State should

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<sup>1</sup> As Langford noted:

In the space of two decades, social rights have emerged from the shadows and margins of human rights jurisprudence [...] Despite this flurry of constitutional innovation, little attention has been given by legal academics to questions such as what prompts countries to constitutionally entrench socioeconomic rights, the place of such rights in a larger scheme of the welfare state, or the non-idealist ‘realpolitik’ factors that explain the variance in judicial interpretation of socioeconomic rights provisions or divergence in the actual distributive consequences of social rights regimes.

Matthew Langford (ed) *Social Rights Jurisprudence: Emerging Trends in International and Comparative Law* (2009 CUP) 1.

protect a basket of civil rights in order to preserve a sphere of personal autonomy from state control.<sup>2</sup>

Social rights, Chapter One argued, are claims that rights bearers have an entitlement to certain resources that are essential to human survival and flourishing, most notably rights to housing, education, social security, and healthcare. Such rights do not conflict with the general value-foundation for rights in common law systems. Unlike other forms of rights such as group conceptions of rights, interests of individuals to certain essential resources is consistent with an autonomy or dignity-based conception of rights. Following this, the question of *whether* social rights *can* be coherently incorporated into common law legal systems is answerable in the affirmative - these rights are compatible with liberal-democratic conceptions of rights. South Africa demonstrates this in this thesis.

To study social rights protection in common law systems, it is necessary to understand where within such systems the rights authority resides. Chapter Two located this authority within the judiciaries in contemporary common law systems. Given this, to understand how judiciaries reason about rights - and by extension what rights are protected within a common law system - it is necessary to study the influences upon the members of the judiciary in their rights reasoning.

With social rights, cultural factors that inform the Court's role conception as a social rights protector must to be understood. In particular, the judiciary's attitude towards rights review, towards orders of compulsion, and towards social rights must be studied. Together, the presence of a threshold willingness within the judicial community towards all three of these will enable social rights protection to develop within common law systems. In the case studies in Parts Two and Three, then, the rights jurisprudence of Ireland and South Africa will be understood in relation to these three factors.

In Part Two I provided a close study of the development of rights protection - and the underdevelopment of social rights protection - in Ireland. There has

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<sup>2</sup> Mark Tushnet 'An Essay on Rights' (1984) 62(8) *Texas Law Review* 1363

been a social right included within the Constitution of Ireland for over eighty years (indeed almost a hundred years if you include the Free State Constitution!) and yet the right to provision for free primary education has never developed into a practically enforceable claim that rights-bearers can use to assert their interests.

Whilst the text may have been drafted in order to direct the State to make provision for the disadvantaged, this was not how the Constitution came to be understood by the Courts. Whilst first the judicial community displayed a disinterest with rights adjudication, by the middle 1960s, a change in the demography of the bench led to the emergence of rights enthusiasm, and the development of a culture of rights protection. Notably, however, whilst this culture was accommodating of considerable judicial interpretation - including the finding of new unenumerated rights within the Constitution and the interference in formerly walled-off policy areas such as tax and foreign affairs - social rights adjudication did not take off and the Court consistently avoided issuing positive remedies.

In the last decade of the Twentieth Century, the Irish Courts moved away from the rights enthusiasm that had characterised their jurisprudence since the 1960s. It was in this era that they also most substantively engaged with social rights. In a series of seminal judgments, the Supreme Court turned its face against issuing orders of compulsion to cure rights breaches, even where they accepted that a social right was both engaged and breached. I traced the reasons for this cultural aversion to ordering the State to positively act on its rights commitments to the influence of an Enlightenment liberal conception of rights upon the Twentieth Century judicial community, particularly as exemplified by the rights jurisprudence of the USA.

Potentially, a change is underway. Rights adjudication is becoming more frequent and innovative, and there are also signs that social rights claims *may* get a more sympathetic hearing in the future. Whilst this is speculative, what can be seen from the case study in Part Two is the dependence of rights protection within Ireland on cultural influences on the judicial community. It

follows from this that, with sufficient cultural inducement, social rights protection could become internalized within the community as well.

In Part Three I conducted a similarly in-depth study of South African rights law. In just over a quarter century, South African rights jurisprudence has developed such that rights-bearers cannot just resist both public and private actions that infringe on social interests, but can also in certain instances impel the State to provide them with resources necessary to realise the interest protected by the right. Crucial to this was the establishment of the Constitutional Court, and the populating of that Court with jurists fervently committed to rights adjudication. By examining the influences upon those jurists, and the conducive institutional relationship they enjoyed with the ANC for the first ten years, the creation of social rights in South Africa becomes understandable. Whilst Part Three details the breakdown of this close relationship with the ANC, it has been shown that by this point the judiciary were in a sufficiently strong position within the constitutional order that their rights protecting function could survive - and indeed advance - in the absence of governmental support.

The social rights reasoning of the South African judiciary has been critiqued for being overly concerned with procedure, and avoidant of the substance of the rights engaged. The recent emergence of a strong immediately realisable right to basic education is a notable development complicating this narrative. It suggests a strengthening of the Court's social rights protecting capacities. Even within the access rights cases in which this criticism was founded, it can be made without sufficient regard for the culture in which the South African judiciary are adjudicating. When the common law and comparative influences upon the judiciary are considered, the limits within which the South African judicial community understands its social rights protecting function becomes explicable. When critics expect a breadth of rights adjudicatory capacity far beyond the soft limits imposed by these influences, then, the strength of these criticism diminishes.

In Part Four, I produced from these case studies my central contribution to the study of how social rights develop in common law system. I engaged with a wider comparative, alongside the two jurisdictions studied in the thesis. I

followed the assertion that a supportive judicial culture is essential to social rights adjudication, by considering then what discrete judicial assumptions have to be internalised within the judicial community to make social rights practically enforceable. Three key cultural commitments have been elevated as essentials to the development of judicial social rights protection, and the reasons why these commitments are, taken together, necessary have been noted. Factors that may make judicial cultures more amenable to the development of these cultural necessities for social rights protection have been raised. These factors are not exhaustive, nor always prescriptive, but are the minimum core commitments needed for social rights to develop.<sup>3</sup> Particularly in regards the factors that may enhance a judicial community's consciousness of social rights *as* rights, that a scale of deprivation may prove conducive to the development of such a frame of mind in no way advocates the development of such inequality.

My research contributes considerably to the academic discourse on how social rights develop within common law systems. However, there is more to understand about the relationship of judicial culture in common law systems to the development of social rights. Examining other common law systems with judicial rights review will illuminate further the degree to which the three commitments identified as relevant in the two jurisdictions under review recurs, as expected, in a broader set of jurisdictions. India and Canada provide two particularly notable jurisdictions that merit further inquiry. In the former, the judiciary developed practically enforceable social rights notwithstanding the absence of textual license within the Constitution, whilst in the latter a relatively expansive remedial power in rights review cases has developed without an expansion of protection to include social rights. I have touched on these jurisdictions in this thesis and they suggest themselves for further study.

In my doctorate, I focused on the protection of social interests through rights adjudication. This may not be the only, nor the best, way to ensure provision of social essentials such as provision of adequate housing, education,

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<sup>3</sup> Particularly in regards factors that may enhance a judicial community's consciousness of social rights *as* rights, that a scale of deprivation may prove conducive to the development of such a frame of mind in no way promotes the development of such inequality.

healthcare, and water. Indexing countries of the world by their provision of socioeconomic essentials, it is clear adjudicable entitlements to provision or access to socioeconomic interests *as of right* does not guarantee the best regime of provision of such essentials.<sup>4</sup> As Moseneke DCJ wrote, extrajudicially:

When the Constitution [of South Africa] was negotiated, the parties skirted around the need for social change. The negotiators did not stare in the eye the historical structural inequality in the economy. There was no pact on how to achieve the equality and social justice the constitution promised. Instead, the constitution imposed qualified duties on the state to facilitate access to social goods such as health, housing, water, education, and social grants. But these socioeconomic entitlements were premised on and limited to state transfers as and when funds were available. On the face of it, the protections were praiseworthy, and they promised a state-sponsored reduction of poverty, but in practice socioeconomic rights did not speak to how to restructure the economy in a way that rendered it more productive and inclusive.<sup>5</sup>

Be this as it may, as this doctorate has shown, the understanding of entitlements *as of right* within common law systems has become largely synonymous with justiciable entitlements, with the content of the entitlement determined by members of the senior judiciary. That regimes with practically enforceable social rights are not *per se* the optimal regimes for provision of

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<sup>4</sup> Per Murray:

In practice, the constitutional recognition of socio-economic rights in countries such as India and South Africa appears to have neither impeded their neoliberal economic development, nor lessened rapidly widening social inequality. Conversely, the welfare provisions that now exist to varying degrees in contemporary states ‘emerged as a result of an emphasis on public goods, the general welfare and the common good, not as an expression of rights.’ Notably, Sweden, Finland, and Denmark have long adhered to a robust welfare regime while being less than enthusiastic about judicial review and constitutional rights. Socio-economic rights thus appear ‘quite negligible’ factors in terms of ensuring human development.

Thomas Murray *Contesting Economic and Social Rights in Ireland: Constitution, State and Society 1848 - 2016* (CUP 2016) 12; note in contrast Amy Mäkinen, ‘Rights, Review, and Spending: Policy Outcomes with Judicially Enforceable Rights’ (2001) 39(1) *European Journal of Political Research* 23 at 43.

<sup>5</sup> Dikgang Moseneke *My Own Liberator: A Memoir* (Macmillan 2016) 352 - 353



socioeconomic necessities does not invalidate the protection of those necessities *as of right*.

As with most rights, the presumption is that protection of the interest engaged will usually prevail even in the absence of adjudication. Similar to civil rights guarantees to free expression or the vote, cases arise in the *marginal* instances where the state's guaranteeing of the rights interest falls short. Individuated social entitlements *as of right*, then, can exist as a mechanism to ensure uniformity within broader regimes of rights protection, and thus are complementary to, not conflicting with, universal welfare models. As Young has observed:

By understanding how a legal framework can provide sufficient certainty, determinacy, and responsiveness to economic and social rights, we can use our public laws to protect people from the harms of poverty and to allow them to participate in the design of that protection. No less is required for the fulfilment of human dignity, freedom, and the end of gross inequality in our constitutional democracies.<sup>6</sup>

My study has shown the centrality to rights protection of a small culture of senior lawyers. As McCarthy J noted extrajudicially, 'when [future judges] do become leading lawyers, they become members of the middle class, with all the prejudices and traditions attached to them.'<sup>7</sup> The rights protections of millions of people are largely informed by the cultural influences upon a small, socially stratified community of senior judges, filtered through a legal system with high entry costs. Such cultures are hard to change and can thus provide stubborn blocks to developing rights protections. However, like all cultures and communities, these groups are not static, they respond and react to stimulation, and can in that way be engendered closer to intended forms of rights protection.

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<sup>6</sup> Katherine G Young *Constituting Economic and Social Rights* (OUP 2012) 299

<sup>7</sup> Niall McCarthy, 'Observations on the Protection of Fundamental Rights in the Irish Context' in Keith Ewing, Conor Gearty, and Bob Hepple (eds) *Human Rights and Labour Law: Essays for Paul O'Higgins* (Mansell 1994) 179, 180.

Whilst in some respects this conclusion is disquieting, in this doctorate I have defended my contention that this reflects accurately how rights protection function in common law legal systems. This therefore is the milieu in which the development of practically enforceable social rights must occur. Having shown the propriety of this judicial-cultural perspective for discerning the viability of rights protection in common law systems, I have achieved my initial aim in this doctorate. Further, to advance the cause of extending rights protection to protect the basic essentials necessary for a valuable life of those most in need, in a common law system the focus must be placed on a tranche of well-paid job-secure civil-servants: the senior judiciary. My doctorate has aimed to do just that.

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