‘Zones of Constitutionalisation’ and the Regulation of State Power: The Missing Social Dimension to the Irish Constitutional Order

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Constitutions steer and direct the exercise of state power in various ways. In so doing, they mark out a ‘zone of constitutionalisation’, within which substantive legal and/or political constraints are imposed upon the freedom of action otherwise generally enjoyed by the legislative and executive branches of governments. Different constitutional systems map out their zones of constitutionalisation in different ways: Anglo-American states tend to adopt a narrower approach in this regard than do countries in other parts of the democratic world. In particular, Anglo-American constitutional systems usually lack a ‘social dimension’, ie they do not attempt to direct how the executive and legislative branches of government go about giving effect to principles of social justice, in contrast to the systems of many states in continental Europe and the Global South. The Irish constitutional system has at best an attenuated social dimension, reflected in the hollowed-out provisions of the Directive Principles set out in Article 45 of the 1937 Constitution: in this respect, Ireland adheres closely to the standard Anglo-American constitutional template. However, this lack of a social dimension leaves a gap in the framework of Irish constitutionalism, as illustrated by a comparison with Germany and other jurisdictions. As a consequence, it is time that serious debate started as to how the Irish zone of constitutionalisation could be reconfigured so as to accommodate some recognition of the right of individuals to live in ‘material conditions consistent with human dignity’.

Introduction

Constitutions steer and direct the exercise of state power in a variety of different ways. Taken together, these constitutional ‘rules of the game’ mark out what might be described as a ‘zone of constitutionalisation’: within their scope of application, constraints are imposed upon the freedom of action of public authorities. Different constitutional systems map out their zones of constitutionalisation in different ways: Anglo-American systems tend to adopt a narrower approach in this regard than do continental European systems or the emerging democracies of the Global South (ie post-colonial states outside of Europe and North America). This trend is particularly marked when it comes to the constitutional regulation of issues relating to social rights and principles of social justice. Anglo-American constitutional systems usually lack a ‘social dimension’: in contrast, constitutional systems in continental Europe and the Global South increasingly regulate how public authorities go about giving effect to social commitments set out in their national constitutional text.

* Reader in Law, University College London. An initial version of this paper was presented at the conference on the enforcement of social, economic and cultural rights convened by Prof Gerry Whyte of the Law School of Trinity College Dublin and held in Dublin on 9 May 2014

As discussed in what follows, the Irish constitutional system has at best an attenuated social dimension: in this respect, it resembles the constitutional systems of most Anglo-American legal systems. As a consequence, it differs not just from the constitutional systems of states such as South Africa where socio-economic rights are legally enforceable, but also from many continental European legal systems such as Germany and France as well as the framework of EU law and other systems of European legal regulation. This paper explores the reasons for this lack of a substantive social dimension, and argues that the Irish constitutional system is poorer for it.

'Zones of Constitutionalisation' – How Constitutions Regulate the Exercise of State Power

Constitutions give formal expression to the sovereign will of a body politic and confer legal authority upon the various constituent organs of the state. They also delineate the powers and responsibilities of these different state organs and 'steer' the exercise of state power by imposing constraints on how public authorities exercise their powers. As Russell Hardin has argued, '[t]he whole point of a constitution is to organize politics and society in particular ways':[1] written constitutional texts, along with the unwritten conventions and practices, case law and other associated legal and political 'rules of the game' that make up a national constitutional order, organise and direct the functioning of a state with a view to ensuring that it conforms to certain values and aspirations.

Constitutional provisions relating to fundamental rights and the separation of powers play a particularly important role in this respect. In every western democracy, legally binding constitutional requirements relating to the protection of individual freedom and separation of powers limit the freedom of action of public authorities. Ireland is no exception: the powers of the executive and legislative branches of government are significantly constrained by the fundamental rights provisions of Articles 40–45 of *Bunreacht na hÉireann* and the constitutional system of separation of powers.

However, constitutions can also steer the exercise of state power in more indirect ways. The process of 'constitutionalisation', whereby the freedom of action of public bodies is constrained by the requirement to adhere to higher-order constitutional norms, does not only unfold via the development of legal controls relating to the protection of rights and the separation of powers. There is a symbolic or 'signalling' dimension to the constitutionalist project, which complements these legal controls and adds an important extra dimension to constitutional governance.

In particular, written constitutional texts often contain 'mission statements', ie affirmations of the principles and goals that should guide how state organs perform their functions.[2] They are often framed in highly abstract terms and viewed as amounting to little more than rhetorical statements.[3] However, such 'expressive' provisions can nevertheless exert significant influence

[1] Russel Hardin, 'Why a Constitution?' in Dennis J Galligan and Milla Versteeg (eds), *Social and Political Foundations of Constitutions* (CUP 2013) 51, 52.

[2] Jeff King, 'Constitutions as Mission Statements' in Galligan and Versteeg (eds) (n 1) 73. In German constitutional terminology, such principles and goals are described as *Staatsziele*: see Karl-Peter Sommermann, *Staatsziele und Staatszielbestimmungen* (Mohr Siebeck 1997) 3–4; I am grateful to Jeff King for drawing this work to my attention.

[3] As discussed below in more detail, this is the case with the Directive Principles set out in Article 45 of the *Bunreacht*.

over the political culture of a state: governments and legislatures may face political pressure to act in a manner that is not inconsistent with these constitutional mission statements.[4] Such expressive constitutional provisions may also form an important and sometimes controversial element of the symbolic discourse of the state, ie the manner in which the state presents itself both internally and externally and defines its purpose, ambition and self-identity.[5] As such, they may influence public debate and the functioning of public governance, while also becoming the object of political and legal contestation. [6]

This type of expressive constitutional provision can also influence the interpretation and application of legal rules. Courts may take constitutional 'mission statements' into account in interpreting legislation or other constitutional provisions, or in developing the common law.[7] They may also be interpreted as laying down objective legal norms that public bodies must respect in carrying out their various functions: a failure to act in a manner that is compatible with these constitutional norms may thus be unlawful, even if no separation of powers rules or individual 'subjective' rights have been infringed.

One of the best-known examples of a constitutional principle functioning as an objective norm of a national legal order is the commitment to respect 'human dignity' set out in Article 1 of the German Basic Law: the German Constitutional Court has confirmed that all public and private law must be compatible with this commitment.[8] In the Irish context, the text of *Bunreacht na hÉireann* has similarly been interpreted by the Supreme Court as setting out certain principles and goals that the organs of the Irish state must respect and strive to implement in how they exercise their public functions. Thus, in *Byrne v Ireland*,[9] the Supreme Court held that the immunity formerly enjoyed by the State from suit in common law was derived from and

[4] Such constraints may become *de facto* binding norms, giving rise to a form of political constitutionalism that may supplement the legally binding provisions of the constitutional text itself.

[5] Grimm suggests that constitutions are often expected to exert an 'integrative influence' that 'extends well beyond' their normal regulatory functions: see Dieter Grimm, 'Integration by Constitution' (2005) 3 Int J Const L 193, 194. Similarly, Steven Lukes refers to the manner in which written constitutions help 'to define as authoritative certain ways of seeing' and serve 'to organize people's knowledge of the past and present and their capacity to imagine the future': see Steven Lukes, 'Political Ritual and Social Integration' (1975) 9 Sociology 289, 301. For general commentary on the 'expressive' function of law, see Cass Sunstein, 'On the Expressive Function of Law' (1996) 144 U of Pennsylvania L Rev 2012; Elizabeth S Anderson and Richard H Pildes, 'Expressive Theories of Law: A General Restatement' (2000) 148 U of Pennsylvania L Rev 1503.

[6] In Ireland, the provisions of the 1937 Constitution that make reference to Christian beliefs, the social and economic role of women and aspirations to the integration of Northern Ireland within the national territory were at various times viewed as having considerable political and symbolic significance: as a consequence, they became a focus for debates about the nature and identity of the Irish State, which in turn influenced the evolution of law and policy. For an excellent analysis in general of the 'symbolic' dimension of *Bunreacht na hÉireann*, see Ronan McCrea, 'Rhetoric, Choices and the Constitution' in Eoin Carolan (ed), *The Constitution of Ireland: Perspectives and Prospects* (Bloomsbury 2013) 59.

[7] King (n 2).

[8] For a useful introduction to the German jurisprudence in this regard, see Kai Möller, 'On Treating Persons as Ends: The German Aviation Security Act, Human Dignity, and the Federal Constitutional Court' (2006) Pub L 457. The provisions of s 27 of the Canadian Charter of Fundamental Rights and Freedoms, which state that 'this Charter shall be interpreted in a manner consistent with the preservation and enhancement of the multicultural heritage of Canadians', have similarly been taken into account by the Canadian courts in interpreting both legislation and other provisions of the Charter. See, for example, *R v Big M Drug Mart* [1985] 1 SCR 295 (24 April 1985).

[9] [1972] IR 241.

dependent upon the concept of the royal prerogative, which it deemed to be incompatible with the republican and democratic character of the new Irish State. In his seminal judgment, Walsh J concluded that the 'provisions of the Constitution obliging the State to act in a particular manner may be enforceable by the Courts against the State as such'[10]: national law had to reflect and conform to the 'sovereign, independent and democratic' nature of the State as set out in Article 5, and State immunity from suit contravened this overarching fundamental norm.[11]

Therefore, to summarise, national constitutional orders organise and direct the exercise of public power through the protection of rights, the establishment of a system of separation of powers, and the manner in which they give expression to certain principles and goals that are supposed to underpin the functioning of the state. These constitutional 'rules of the game' can be legal or political in character. They also can impose more or less substantive constraints upon public bodies, depending on how they are interpreted by courts and/or how they influence political debate. Some constitutional norms fail to acquire any meaningful legal or political traction, and consequently exert little if any impact upon the functioning of state organs.[12] However, when they do acquire such traction, whether through judicial interpretation and/or political discourse, they mark out what might be described as a 'zone of constitutionalisation': within the scope of application of these norms, the freedom of manoeuvre of public bodies is often substantially circumscribed. Furthermore, the range of state action that comes within such zones of constitutionalisation can extend beyond measures that impact on individual rights or raise issues relating to separation of powers, depending on the extent to which public authorities are subject to substantive political and/or legal requirements to exercise in their powers in a manner that adequately respects the principles and goals that underpin the constitutional order in question.

A Comparative Overview – The Differing Scope of 'Zones of Constitutionalisation' in the Anglo-American World, Continental Europe and the Democracies of the Global South

What comes within such zones of constitutionalisation can differ considerably from state to state. Social, historical and ideological factors all play a role in generating these differences, and the interplay of these factors can vary greatly even as between states with similar constitutional traditions. However, it is possible to identify three major 'families' of democratic states whose constitutional systems share certain common characteristics.

The written constitutions of Anglo-American states such as Australia and the USA contain comparatively few provisions setting out principles or goals. Furthermore, their national apex courts are usually slow to infer the existence of unwritten constitutional principles, or to stretch

[10] ibid 265.

[11] For another example of the Supreme Court being willing to review the compatibility of State action with underlying constitutional principles, in this case the obligation formerly imposed under the original provisions of Articles 2 and 3 of the *Bunreacht* to secure the 're-integration of the national territory', see *McGimpsey v Ireland* [1990] 1 IR 110.

[12] This can happen in respect of constitutional provisions relating to fundamental rights or separation of powers just as it can in relation to expressive provisions: an example would be the provisions of Article 15.3 1°, which provide that the Oireachtas can establish or recognise 'functional or vocational councils representing branches of the social and economic life of the people'.

the scope of individual rights protection beyond the limits of the relevant textual provisions.[13] In general, Anglo-American constitutional systems are primarily focused on limiting public power and protecting individual freedom: they are less concerned with regulating the aims of state action or with controlling how public authorities go about their business, once separation-of-powers principles are respected and the negative liberty of individuals is secured.[14] This reflects the influence of the classical liberal tradition outlined by Locke, Madison, Mill and the other intellectual architects of Anglo-American democracy: collective self-government as exercised through elected representatives of the people is subject only to those constraints necessary to protect individual freedom and to prevent an excessive concentration of state power in a few hands.

In contrast, the constitutional systems of many continental European states aim to exert more-ranging control over the exercise of public power than their Anglo-American counterparts. The constitutions of states such as Germany and Italy not alone contain extensive provisions relating to individual rights and the separation of powers, but also set out various principles and goals that are supposed to guide how public bodies perform their functions: taken together, these norms impose regulatory constraints upon the executive and legislative branches of government whose scope and substance often exceeds that of equivalent norms in Anglo-American constitutional systems.[15] The same is true in respect of the French constitutional order, along with that of many other European states.[16]

In part, this reflects the ideological struggles that shaped much of the history of Europe during the 19th and 20th century. Whereas the classical liberal tradition exerted a firm grip over the development of legal and political systems in the Anglo-American world from the late 18th century on, continental European states experienced convulsive clashes initially between liberalism and autocratic conservatism, and subsequently between socialism and capitalism. As a result, national constitutions were often framed in a manner that sought to bridge these deep social chasms by requiring public authorities to pursue certain agreed social objectives while avoiding extremes of either left or right. For example, the text of both the Weimar Constitution of 1918 and the Basic Law of 1949 committed the German State to both respecting property rights and also giving effect to a wide range of social rights.[17]

The historical experience of fascism and communism also left its mark in this regard: European constitutions drafted after 1945 contain extensive provisions protecting individual rights and also committing the state to respecting principles such as human dignity and equality, in order to steer the exercise of state power away from any possible return to authoritarianism. The influence of alternative modes of philosophical and political thought that depart from the classical liberal

[13] See, for example, *R (on the application of Bancoult) v Secretary of State for Foreign and Commonwealth Affairs (No 2)* [2008] UKHL 6.
[14] Colm O'Cinneide, 'The Constitutionalisation of Socio-Economic Rights', in Helena Alviar García, Karl Klare and Lucy A Williams (eds), *Social and Economic Rights in Theory and Practice: Critical Inquiries* (forthcoming: Routledge 2015).
[15] See in general the essays in Georg Nolte, *European and US Constitutionalism* (CUP 2005).
[16] See in general Alec Stone Sweet, *Governing with Judges: Constitutional Politics in Europe* (OUP 2000).
[17] See the useful discussion of the evolution of the German constitutional order in Chris Thornhill, *A Sociology of Constitutions: Constitutions and State Legitimacy in Historical-Sociological Perspective* (CUP 2011) chs 4–5.

tradition has also been important. Catholic natural law, social corporativist theory, Marxist-influenced social democracy and the legacy of the French republican tradition have all played a significant role in shaping modern constitutional thought in continental Europe. These ideologies differ from each other in significant ways, but all share the belief that the state should play an active role in remoulding society to achieve a more just social order. These views have influenced the evolution of the more 'directive' continental Europe mode of constitutionalism, which aims to steer how the various organs of state set about performing this actively interventionist role.[18]

The interplay of these various factors has ensured that the scope of zones of constitutionalisation tends to be wider in many continental European states than is the case in respect of Anglo-American states. This is manifested in a variety of different ways. Apex courts in Anglo-American legal systems usually interpret fundamental rights provisions as imposing negative obligations upon the state to refrain from violating a relatively narrow range of civil and political rights: in contrast, constitutional courts in continental European states often regard the state as subject to a relatively wide range of negative and positive obligations to respect, protect and give effect to an extensive set of individual rights.[19] Continental European courts are also often more willing to give substantive legal effect to general constitutional principles, such as respect for human dignity, and to take account of the expressive elements of constitutional texts in interpreting legislation.[20] As discussed below in further detail, they also tend to be more willing to review state action in the socio-economic field, subject to certain qualifications. There are, of course, exceptions to these trends. For example, the zone of constitutionalisation in many of the Scandinavian states is relatively narrow when compared to other continental European constitutional systems, at least when viewed through a legal lens.[21] However, the readiness, for example, of the German Constitutional Court to review the legitimacy of German involvement in the European Stability Mechanism (ESM)[22] or the adequacy of social welfare payments to the unemployed,[23] or the French Constitutional Council to review the compatibility of income-tax increases with the principle of equality,[24] finds little if any parallel in the Anglo-American world.

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[18] Grimm has described how the German constitutional order in particular views the State as subject to a general obligation to play an actively 'protectionist' role in vindicating fundamental rights: see Dieter Grimm, 'The Protective Function of the State', in Nolte (n15) 137.

[19] ibid. See also Stone Sweet (n 16).

[20] For a comprehensive overview of German constitutional law and theory in this respect, see Sommermann (n 2); for an introduction to the relevant jurisprudence of the Italian Constitutional Court, see Tania Groppi, 'The Italian Constitutional Court: Towards a "Multilevel System" of Constitutional Review?' (2008) J Comp L 100.

[21] See Thomas Bull, 'Sweden: Constitutional Changes and the Limits of Law' (2005) 11(2) Euro Pub L 187. It should nevertheless be borne in mind that strong established expectations exist in Scandinavian political culture as to how State power should be exercised, which could be viewed as giving rise to a relatively extensive zone of constitutionalism based upon a deep-rooted commitment to certain social democratic principles: see Ola Wiklund, 'The Reception Process in Sweden and Norway' in Helen Keller and Alec Stone Sweet, *A Europe of Rights: The Impact of the ECHR on National Legal Systems* (OUP 2008) 165.

[22] BVerfG, 2 BvR 1390/12, 18.3.2014.

[23] BVerfG, 1 BvL 1/09, 9.2.2010.

[24] See, for example, Decision No 2007–555 DC of August 16th 2007, available in English translation at <http://www.conseil-constitutionnel.fr/conseil-constitutionnel/root/bank_mm/anglais/a2007555dc.pdf > accessed 20 August 2014.

Wide zones of constitutionalisation can also be found in many states in the Global South, in particular those who experienced a period of colonial rule or were subject to military dictatorships.[25] In Africa, South and Central America and South Asia, it is common for written constitutions both to contain an extensive set of individual rights guarantees and also to set out a range of directive principles that are supposed to steer the exercise of state power towards what Klare has described as socially 'transformative' ends.[26] Organs of the state are supposed to exercise their powers and functions in a manner that enhances respect for human dignity and the equal status of all citizens, as part of their overall mission to overcome the legacy of colonialism, under-development and autocratic/military rule. Thus in India, the Directive Principles set out in Part IV of the Indian Constitution are taken into account by the courts in interpreting other provisions of the constitutional text and are supposed to guide how all State institutions discharge their functions[27]; in Brazil, a range of detailed constitutional provisions guarantee access to third-level education, adequate health care and other key social goods[28]; and in South Africa, the Constitutional Court has remodelled many aspects of private law to reflect the transformative aspirations of the new post-apartheid constitutional order.[29] The extent to which these transformative ambitions have been channelled through the constitutional framework, rather than being left to be given effect through the day-to-day functioning of the ordinary political process, reflects the historic weakness of representative institutions in many states of the Global South and the barriers that prevent large proportions of their population from participating meaningfully in the electoral process. [30]

Ireland finds itself sitting at the intersection of all three of these major constitutional traditions. On the one hand, the drafting of the 1937 Constitution was greatly influenced by the provisions of the Weimar Constitution, as Gerald Hogan and Eoin Kinsella have established in their magisterial work on this subject.[31] Its provisions also reflect the influence of Catholic natural law and the social teaching set out in the *Rerum Novarum* Papal encyclical of 1891, as well as de Valera's desire to assert national sovereignty and to mark a clear break with the legacy of British rule. It is therefore not surprising that the text of the *Bunreacht* sets out various principles and goals that are supposed to guide the exercise of State power: as acknowledged in *Byrne*, it aims to orientate the functioning of public governance in Ireland away from some of the values and assumptions that characterised the colonial period of rule and towards a strong commitment to the republican and democratic character of the new State. The Irish constitutional order could thus be viewed as having transformative ambitions, in a manner analogous to that of India and

[25] Note, however, that the constitutions of the Caribbean states in particular closely adhere to the Anglo-American template, reflecting their drafting process and the time period in which they were drawn up: see in general Derek O'Brien, *The Constitutional Systems of the Commonwealth Caribbean: A Contextual Analysis* (Hart 2014).
[26] Karl Klare, 'Legal Culture and Transformative Constitutionalism' (1998) 14 SA J Hum Rts 146.
[27] See, for example, *Minerva Mills v Union of India* [1980] AIR SC 1789.
[28] Octavio Luiz Motto Ferraz, 'Harming the Poor through Social Rights Litigation: Lessons from Brazil' (2011) 89 Texas L Rev 1643.
[29] See, for example, *Khumalo v Holomisa* 2002 (5) SA 401 (CC).
[30] See Roberto Gargarella, 'Theories of Democracy, the Judiciary and Social Rights' in Roberto Gargarella, Pilar Domingo and Theunis Roux (eds), *Courts and Social Transformation in New Democracies: An Institutional Voice for the Poor?* (Ashgate 2006) 13.
[31] Gerard Hogan and Eoin Kinsella, *The Origins of the Irish Constitution 1928–41* (Royal Irish Academy 2012).

some of the more recently established constitutional systems of the Global South, while the text of the *Bunreacht* certainly resembles many continental 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 most Anglo-American constitutions of a similar vintage.

However, Anglo-American constitutionalism has also played a key role in shaping Irish legal and political culture, and in particular it has exerted considerable influence over how courts and other key constitutional actors have interpreted and applied the provisions of the *Bunreacht*. Thus, for example, the fundamental rights provisions of the Constitution have by and large been interpreted in a manner that accords priority to the importance of protecting individual liberty against interference by the State, as reflected, for example, in the property-rights jurisprudence of the Irish courts.[32] In contrast, the concept of positive obligations is relatively underdeveloped in Irish constitutional law,[33] while as discussed further below the Irish courts remain generally unwilling to review State action in the socio-economic field. Furthermore, the scope and substance of the constitutional principles that supposedly underpin the Irish legal order remain sketchy, notwithstanding Walsh J's invocation of the 'sovereign, independent and democratic' character of the State in *Byrne*. Irish courts have invoked the principle of human dignity and other fundamental constitutional norms, but have not developed an extensive case law in this regard.[34] Constitutional jurisprudence remains focused on the protection of rights and the policing of conformity with separation of powers, in a manner that remains generally 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 play a limited role in shaping the development of case law or influencing public governance at large.

This Anglo-American influence is not all-embracing. There are important elements of the Irish constitutional order that echo the more 'directive' ambitions of its counterparts in continental Europe and the Global South. Examples include the manner in which constitutional rights can (at least in theory) have direct effect in the context of 'horizontal' relationships between private bodies,[35] and the way in which constitutional principles and goals have been invoked from time to time in cases such as *Byrne*. However, in general, the Irish zone of constitutionalisation has come to bear more of a resemblance to its Anglo-American counterparts than to those of continental European states or the post-colonial 'transformative' legal systems of the Global

[32] See, for example, *In Re Employment Equality Bill 1996* [1997] 2 IR 321.
[33] See Aoife Nolan, 'Holding Non-state Actors to Account for Constitutional Economic and Social Rights Violations: Experiences and Lessons from South Africa and Ireland' (2014) 12(1) Int J Const L 61.
[34] See in general Conor O'Mahony, 'Human Dignity in Constitutional Adjudication: Filling the Void Left by Natural Law', paper presented at *Judges, Politics and the Irish Constitution*, Inaugural Law and Government Conference, School of Law and Government, Dublin City University, 4 September 2014. Natural law principles played an important role in the evolution of constitutional jurisprudence. However, in recent decades their influence has waned, or at least has been transmuted into a form that is easier to reconcile with Anglo-American 'liberal democratic' constitutional orthodoxy: see *In re Article 26 and the Regulation of Information Bill* [1995] 1 IR 1, and also Aileen Kavanagh, 'The Irish Constitution at 75 Years: Natural Law, Christian Values and the Ideal of Justice' (2012) 48 Ir Jurist 71.
[35] See *Meskell v CIÉ* [1973] I.R. 121; see also Colm O'Cinneide, 'Grasping the Nettle: Irish Constitutional Law and Direct Horizontal Effect' in Jorg Fedtke and Dawn Oliver (eds), *Human Rights and the Private Sphere* (Cavendish 2007) 213.

South. It remains focused on regulating State action that impacts upon individual liberty and securing compliance with the constitutional system of separation of powers: beyond that, it imposes few substantive constraints on State action.

Social Constitutionalism in Comparative Perspective

Ireland's attachment to the Anglo-American tradition is particularly marked when it comes to the question of whether the Irish zone of constitutionalisation should have a 'social dimension' or not, ie whether or not it should impose constraints on the freedom of action of the executive and legislative branches of governments in the field of socio-economic policy with a view to promoting respect for social rights. It is in this context that perhaps the sharpest differences emerge between the different constitutional 'families' outlined above, and the Irish constitutional system's current orientation towards the Anglo-American tradition.

The Lack of a Social Dimension to Anglo-American Constitutionalism

Anglo-American constitutionalist theory has generally been sceptical and/or actively opposed to the idea that constitutional frameworks should incorporate a social dimension. Its normative framework has been largely structured around the liberal assumption that individual citizens are self-sustaining, free-standing monads whose dignity and autonomy needed to be secured against state interference.[36] Consequently, it has emphasised the importance of embedding civil and political rights in national constitutional frameworks as a means of limiting the ability of the executive and legislative branches to interfere with individual liberty. In contrast, issues relating to the socio-economic status of individuals are usually conceptualised as issues of 'policy' rather than 'principle', to use Dworkin's classification[37]: they are viewed as relating less to the inviolable core of individual liberty usually protected by constitutional rights than to the collective and mutable dimensions of social existence that are generally left to be regulated by the executive and legislative branches of government.[38]

As a consequence, Anglo-American constitutionalist thought has generally lacked a social dimension. If anything, the notion of constitutionalising issues relating to social justice has often been viewed as incompatible with a serious commitment to the principle of collective self-government, on the basis that it would impose potentially wide-ranging constraints on the free flow of political contestation that form the lifeblood of a healthy democracy.[39] Courts have often placed limits on the incremental expansion of the scope of civil and political rights in order to prevent them acquiring an overtly 'social' dimension. They also regularly grant the legislative and executive branches of the state a wide margin of discretion when reviewing decisions related to the allocation of resources. Variants of such 'containment doctrines' exist in all Anglo-American legal systems, all designed to limit the 'spillover' of constitutional rights protection

[36] See O'Cinneide (n 14).
[37] See in general Ronald Dworkin, *Taking Rights Seriously* (Harvard UP 1978).
[38] Goodwin Liu, 'Rethinking Constitutional Welfare Rights' (2008) 61(2) Stanford L Rev 203.
[39] See Conor Gearty's arguments to this effect in Conor Gearty and Virginia Mantouvalou, *Debating Social Rights* (Hart 2010).

into the socio-economic realm.[40] Their existence reflects the underlying orientation of Anglo-American constitutionalism towards the protection of individual liberty and away from questions of social justice.

There are exceptions to this general trend. The constitutions of several states in the USA contain legally enforceable provisions protecting access to education and other socio-economic rights.[41] Containment doctrines are also not always watertight: the legal protection of civil and political rights or the application of administrative law controls can indirectly establish a right of access to socio-economic entitlements, as demonstrated by a range of cases from Canada, the UK and the USA.[42] However, in general, Anglo-American constitutionalism lacks a social dimension: indeed, it is usually an article of faith in Anglo-American legal systems that social issues should be excluded from the reach of constitutional regulation and left to be resolved by the ordinary cut-and-thrust of political debate.

Social Constitutionalism in Europe and the Global South

This hostility towards the development of a social dimension to constitutionalism is often assumed to represent the default or orthodox understanding of the appropriate limits of constitutional regulation. In contrast, states such as South Africa, Colombia and Brazil, whose constitutions make provision for socio-economic rights to be legally enforceable are usually viewed as unique outliers to the general trend. As a consequence, these jurisdictions attract much excited academic attention: they are viewed as fascinating, once-off exceptions to a global norm. However, the situation is more nuanced in reality. The zone of constitutionalisation of many continental European states extends at least to some degree into the terrain of social rights, while the judicial protection of such rights has become a feature of many constitutions in the Global South.

The intellectual roots of these alternative strands of constitutionalist thought can be traced back to the constitutional theories advanced by the radical left element of the French republican movements of 1789 and 1848, and subsequently to the emergence of social democratic political thought in the late 19th and early 20th centuries.[43] The Mexican Constitution of 1917 was the first national constitution that contained an extensive set of social rights provisions.[44] It was soon followed by the Weimar Constitution of 1919 and subsequently by more of the continental European constitutions drawn up in the aftermath of the First and Second World Wars. These provisions have sought to add a social dimension to the classical liberal framework inherited

[40] See Colm O'Cinneide, 'The Problematic of Social Rights – Uniformity and Diversity in the Development of Social Rights Review' in Liora Lazarus, Christopher McCrudden and Nigel Bowles (eds), *Reasoning Rights: Comparative Judicial Engagement* (Hart 2014).
[41] Jeff King, 'American Exceptionalism over Social Rights' in Lazarus, McCrudden and Bowles (n 40).
[42] See O'Cinneide (n 40).
[43] George S Katrougalos, 'The (Dim) Perspectives of the European Social Citizenship', *Jean Monnet Working Paper 05/07* <http://centers.law.nyu.edu/jeanmonnet/papers/07/070501.pdf> accessed 24 December 2013.
[44] Rodrigo Gutiérrez Rivas, 'Judges and Social Rights in Mexico: Barely an Echo for the Poorest' (2006) 6 Mexican L J 51.

from the Anglo-American states. They were designed to express a national commitment to social justice, and to steer the functioning of public governance with a view to ensuring that 'formal rights under law… [are] flanked by rights of material dignity'.[45]

The Directive Principles set out in Part IV of the Indian Constitution of 1948 were intended to serve a similar purpose, by providing a constitutional 'mission statement' to guide the exercise of State power in the newly independent State. More recently, many of the constitutions of the new democracies established in Latin America and Africa following the end of the Cold War make provision for social rights to be directly enforceable in law – the most prominent examples being the Brazilian Constitution of 1988, the Colombian Constitution of 1991, the South African Constitution of 1996 and the Kenyan Constitution of 2010.

Considerable differences exist between the social elements of these various constitutional systems.[46] Some general patterns can be identified – the social dimension to continental European systems mainly serves an expressive function, while national courts are expected to play a much more active role in securing respect for social rights in states such as India, South Africa and Brazil. However, what unites this diverse range of constitutional systems is a common commitment to 'social constitutionalism', ie to the idea that constitutionalism should seek to steer the exercise of state policy towards the attainment of greater social justice – unlike Anglo-American systems, the socio-economic sphere is not viewed as a constitutional 'no go' area.

Social Constitutionalism in Europe

From the beginning, the inclusion of social provisions in continental European constitutions was controversial. Many legal scholars viewed the inclusion of social rights provisions within constitutional texts as an exercise in empty rhetoric, on the basis that such rights lacked any tangible substance. Conservative critics also attacked their inclusion on the basis that they constituted an attempt to close down political debate about the orientation of public policy, and also because they could provide a platform for the state to interfere with property rights. In Germany, the unwillingness of conservative judges and the political parties of the right to give effect to the social rights provisions of the Weimar Constitution meant that they were 'robbed of any real legal [or political] substance' well before the Nazi takeover in 1933.[47]

This social mode of constitutionalism nevertheless succeeded in putting down roots in the constitutional traditions of many continental European states in particular. It proved to have particular appeal in in the wake of the Second World War, as it provided constitutional backbone

[45] Chris Thornhill, *A Sociology of Constitutions: Constitutions and State Legitimacy in Historical-Sociological Perspective* (CUP 2011) 336.
[46] For a multi-jurisdictional overview, see Malcolm Langford (ed), *Social Rights Jurisprudence: Emerging Trends in International and Comparative Law* (CUP 2008).
[47] See Hans Mommsen, *The Rise and Fall of Weimar Democracy* (U of North Carolina Press 1998) 60.

for the establishment of the post-war national welfare states.[48] The text of many European constitutions thus now expressly affirm that they are 'social states'[49] and/or contain lists of fundamental social rights or directive principles setting out social goals to which state policy should strive to give effect.[50]

The status of these provisions and their relationship with other constitutional norms can at times be a source of controversy. This was illustrated by the famous dispute between Abendroth and Forsthoff in Germany in the 1950s as to whether or not the level of administrative discretion required to establish and maintain a comprehensive welfare state in existence was compatible with the liberal commitment to the idea that the exercise of public power should be limited and constrained in accordance with rule-of-law values (the *Rechtstaat* principle, in German constitutional terminology).[51] Abendroth's view that the establishment of a 'social state' is reconcilable with a commitment to rule of law is generally viewed as having prevailed in that particular debate. However, the social dimension to continental European constitutions can still generate sharp disagreement about the appropriate scope of zones of constitutionalisation. In the 1990s, the retention of social rights provisions in the post-1989 constitutional orders of many Eastern European states was criticised by Sunstein and others on the basis that they might impede the implementation of necessary economic reforms.[52] In Hungary, judicial intervention in the socio-economic field to ensure compliance with constitutional principles of human dignity and equality of status have attracted both enthusiastic support and strong opposition: recent constitutional reforms have imposed significant constraints on the ability of the courts to impose constraints upon state social and economic policy.[53] In other states, legal and political debates continue about the extent to which the social dimension to European constitutional orders can and/or should be given substance in law, which have been amplified in recent years by the economic crisis of 2008 and the subsequent introduction of austerity policies across Europe.

Uncertainty often surrounds the exact scope and content of the social provisions of continental European constitutions. They are primarily viewed as rhetorical affirmations of a state's commitment to respecting social rights. They are also usually couched in highly abstract terms. This means that they are generally interpreted as not giving rise to subjective individual rights that are legally enforceable against the state.[54]

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[48] Cécile Fabre, 'Social Rights in European Constitutions', in Gráinne de Búrca and Bruno de Witte (eds), *Social Rights in Europe* (OUP 2005) 15.
[49] See, for example, Constitution of Spain, art 1(1); Constitution of Portugal, art 2; Constitution of Slovenia, art 2.
[50] See, for example, Constitution of Belgium, art 23; Constitution of the Netherlands, arts 19, 20 and 22; Constitution of Greece, arts 21 and 22; Constitution of Portugal, arts 56, 59, 63–72, 108–9, 167, 216.
[51] For an overview of this debate, see Matthew G Specter, *Habermas: An Intellectual Biography* (CUP 2010) 42–45.
[52] Cass Sunstein, 'Against Positive Rights: Why Social and Economic Rights Don't Belong in the New Constitutions of post-Communist Europe' (1993) 2 E Euro Const Rev 35. Note that Sunstein subsequently changed his views in this respect: see Cass Sunstein, 'Social and Economic Rights? Lessons from South Africa' (2000–01) 11 Const Forum 123.
[53] See, for example, art 17 of the Fourth Amendment (CDL–REF(2013)014) to the Fundamental Law of Hungary (CDL–REF(2013)016 – consolidated version), analysed by the European Commission for Democracy through Law (the 'Venice Commission') in its Opinion 720/2013, adopted on 17 June 2013, paras 109–14.
[54] Colm O'Cinneide, 'Austerity and the Faded Dream of a Social Europe' in Aoife Nolan (ed), *Economic and Social Rights after the Global Financial Crisis* (CUP 2014).

However, this is not to say that these social provisions lack any substantive normative content. They serve as important constitutional 'mission statements' that give expression to the social responsibilities of the state. Thus, in Germany, the provisions of Article 20 of the Basic Law that commit Germany to being a 'social state' (*Sozialstaat*) represent an integral part of German constitutional self-identity.[55] In Katrougalos's words, this 'normative, prescriptive principle' is viewed as a fundamental organising norm of the German State, which is understood to be under an obligation both to act in accordance with the requirements of this principle and to take measures to give it concrete expression.[56]

Furthermore, these constitutional mission statements also have a degree of legal substance, as they form part of the background framework of core constitutional principles that courts must take into account in reviewing the actions of public authorities and interpreting and applying other legal norms.[57] Primary and secondary legislation can thus be interpreted by reference to the social dimension of the national constitutional order, which are also often invoked to justify state action that imposes constraints on the free market or private property rights.[58]

The existence of a social dimension to continental European constitutional orders also opens the way for national courts to review state action in the socio-economic field, which is manifestly incompatible with the 'social state' principle, or which otherwise fails to comply with other core constitutional norms such as the principles of respect for human dignity and formal equality. For example, the 2010 German Constitutional Court judgment in *Hartz IV* confirmed that the principle of human dignity set out in Article 1 of the Basic Law requires that persons in need be provided with sufficient material support to enable them to maintain a dignified existence and to participate in the social, cultural and political life of their society, and that courts may review legislative failure to set social-security benefit levels in conformity with this requirement.[59] Similarly, the Court ruled in *Asylum Seekers Benefits* that the amount of cash benefit paid to asylum seekers waiting on processing of their claims was incompatible with the requirements of the human dignity principle and required the legislature to reconsider the amount of benefits available to this vulnerable group.[60] Both judgments affirm that the state is obliged to take positive steps to vindicate the social dimension of the human dignity principle, just as it is obliged to respect its more 'classical' civil and political dimensions.[61]

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[55] Hans Michael Heinig, 'The Political and the Basic Law's *Sozialstaat* Principle—Perspectives from Constitutional Law and Theory' (2011) 12(11) German L J 1879–86.
[56] Katrougalos (n 43) 9–15.
[57] George Katrougalos and Paul O'Connell, 'Fundamental Social Rights' in Mark Tushnet, Thomas Fleiner and Cheryl Saunders (eds), *Routledge Handbook of Constitutional Law* (Routledge 2012) 375.
[58] For a sample of the French jurisprudence on this point, see Constitutional Council Decision No 2010–617 DC, 9 November 2010. See also Laurent Pech, 'France: Rethinking "Droits-créances"' in Langford (n 46) 267.
[59] BVerfG, 1 BvL 1/09, 9.2.2010.
[60] BVerfG, 1 BvL 10/10, 18.7.2012.
[61] See Claudia Bittner, 'Human Dignity as a Matter of Legislative Consistency in an Ideal World: The Fundamental Right to Guarantee a Subsistence Minimum in the German Federal Constitutional Court's Judgment of 9 February 2010' (2011) 12(11) German L J 1941; Stefanie Egidy, 'The Fundamental Right to the Guarantee of a Subsistence Minimum in the *Hartz IV Case* of the German Federal Constitutional Court' in same volume, 961. See also the following judgments of the Constitutional Court (BVerfG) and Federal Administrative Court (BVerwG): BVerfGE

Other European courts have gone even further in reviewing state measures in the socio-economic field for compatibility with constitutional principles. The recent austerity crisis has generated a number of striking examples of such judgments. In 2012 the Portuguese Constitutional Court ruled that the suspension of holiday bonuses paid to public employees and pensioners as part of an austerity budget was unconstitutional on the basis that it violated the right to equality, as only particular categories of person were affected by this measure and more equitable measures could have been adopted to achieve the same financial results.[62] Subsequently, in April 2013, the Court again ruled that a range of budget measures, including public-sector salary and the imposition of a flat-rate solidarity tax, were incompatible with the principles of equality and proportionality and a number of constitutionally protected social rights.[63] Similarly, the Latvian Constitutional Court in 2009 ruled that pension cuts introduced as part of a deficit reduction programme violated the social rights provisions of the Latvian Constitution, on the grounds *inter alia* that the cut in question was excessive and the government had failed to make provision for an adequate transition period.[64]

These judgments are exceptional as regards the extent to which the Portuguese and Latvian courts were willing to intervene in the budgetary process. In general, constitutional orthodoxy across Europe still views the executive and legislative branches of government as having primary responsibility for implementing social policy. As a result, national governments and parliaments usually enjoy wide discretion in framing and giving effect to their socio-economic policies, and in most European states courts will only intervene in situations where the legislature or the executive has manifestly failed to discharge their constitutional responsibilities.[65]

Thus, for example, Heinig notes that German legal scholarship 'has developed a canon on the principle of the [*Sozialstaat*], emphasizing in particular the limits of the constitutional principle': the legislature is regarded as having wide discretion in determining what concrete content should be given to social rights and how forms of social provision should be financed, while the *Sozialstaat* principle itself is generally not viewed as giving rise to subjective individual rights or an entitlement to receive any particular form of social assistance.[66]

However, the *Hartz IV* and *Asylum Seeker* judgments mentioned above demonstrate that the social dimension to the German constitutional order has some substantive legal teeth: the executive and legislative branches are required to take positive steps to ensure individuals have access to the minimum level of social support (*Existenzminimum*) that is consistent with the overriding constitutional commitment to respecting human dignity. Similarly, in other European states, the extensive freedom of action in the socio-economic sphere granted to the political branches remains bounded by the requirement that their policy choices conform to the 'social state' principle. Measures that appear to be clearly out of kilter with this constitutional

1, 97 (104f ; BVerwGE 1, 159 (161); BVerwGE 25, 23 (27); BVerfGE 40, 121 (133, 134); BVerfGE 45, 187 (229); BVerfGE 82, 60 (85) and BverfGE 99, 246 (259).

[62] Constitutional Court of Portugal, Judgment No 353/2012 (5 July 2012).

[63] Constitutional Court of Portugal, Judgment No 187/2013 (5 April 2013).

[64] Constitutional Court of Latvia, Case No 2009–43–01 (21 December 2009).

[65] See O'Cinneide (n 54).

[66] Heinig (n 55) 1888–90.

commitment may be vulnerable to judicial review, while also being exposed to the political charge that they are incompatible with the principles and goals that underpin the national constitutional order. In general, some form of social constitutionalist review, broadly defined, exists in most continental European states, even though the executive and legislative branches enjoy considerable freedom of action in setting national socio-economic policy and fixing national budgets. [67]

The extension of the 'zone of constitutionalisation' in continental European constitutional systems to encompass a social dimension is also reflected in the development of EU law. The Court of Justice of the EU (CJEU) has acknowledged that EU legislation needs to be interpreted and applied with reference to the 'social objectives' of the Union: this was confirmed as far back as 1976, when in the seminal equal pay case of *Defrenne v Sabena (No 2)* the CJEU interpreted the provisions of Article 119 of the Treaty of Rome (now Article 157 of the TFEU) by reference to the 'social objectives of the Community, which is not merely an economic union, but is at the same time intended, by common action, to ensure social progress and seek the constant improvement of the living and working conditions of their peoples '.[68] A social dimension has thus formed part of EU constitutional governance from the early days of its development. This aspect of EU law has remained underdeveloped, especially when compared to the evolution of EU legal standards relating to economic integration goals and free-movement rights.[69] This has generated sharp criticism, and generated calls for a rebalancing of EU constitutional governance to ensure that greater weight is given to social considerations in the framing, interpretation and application of EU law and policy.[70] However, in part as a response to these criticisms, the EU Charter of Fundamental Rights has now clarified the scope and dimension of this social dimension to EU law. The Charter, which since December 2009 has had the same legal status as the EU treaties, contains a list of social rights such as the right to choose an occupation and engage in work (Article 15), the right to social security and social assistance (Article 34), the right to health care (Article 35) and a series of employment rights set out in Articles 27–32.

Many of these social rights set out in the EU Charter, such as the rights of the elderly recognised in Article 25, are stated to be 'principles' and not subjective individual 'rights' *per se.* As such, according to the explanations relating to the content of the Charter agreed by the Praesidium of the Convention, which drafted the Charter in 2000, these provisions 'may be implemented through legislative or executive acts' of the EU institutions and Member States, but 'become significant for the [c]ourts only when such acts are interpreted or reviewed' and do not 'give rise

[67] See, for example, in relation to Eastern Europe, Wojciech Sadurski, 'Constitutional Courts in the Process of Articulating Constitutional Rights in the Post-Communist States of Central and Eastern Europe Part 1: Social and Economic Rights', *EUI Working Paper Law No 2002/14* <http://cadmus.eui.eu/handle/1814/192> accessed 10 September 2014.
[68] Case C–43/75, *Defrenne v Sabena (No 2*) [1976] ECR 455, para 10.
[69] Somek has described this social dimension as 'the sick man of public policy on the Community level': see Alexander Somek, 'Concordantia Catholica: Exploring the Context of European Antidiscrimination Law and Policy' (2005) 14 Transnational L & Contemporary Problems 957.
[70] See, for example, Christian Joerges and Florian Rödl, 'On De-Formalisation in European Politics and Formalism in European Jurisprudence in Response to the "Social Deficit" of the European Integration Project: Reflections after the Judgments of the ECJ in *Viking* and *Laval*' (2009) 15 Euro L Rev 1.

to direct claims for positive action by the Union's institutions or Member States authorities'.[71] In this, they resemble the 'social state' provisions of many continental European constitutions: these 'principles' do not give rise to subjective individual entitlements, but instead constitute objective norms that the EU institutions and Member States must 'observe' in framing and giving effect to EU law.

However, this does not mean that they lack all legal effect: as the case law of the CJEU has established, a failure to respect principles of EU law may result in EU legislation or national implementing measures being overturned by the courts. Furthermore, these principles are already being invoked by the CJEU and national courts in interpreting EU and national legislation.[72] In addition, some of the Charter's social rights provisions, such as the right to engage in work set out in Article 15(1) do appear to give rise to subjective individual entitlements, while other provisions such as the rights to family and professional life protected by Article 33 or the rights to social security and social assistance protected by Article 34 contain 'elements of a right and a principle': these provisions would therefore seem to give rise to subjective rights that are directly enforceable before the courts, while provisions such as the right to human dignity protected by Article 1 of the Charter may have an impact in the socio-economic sphere as well.

It remains to be seen how the social rights provisions of the Charter will be interpreted and applied by the CJEU and national courts, and how political actors at EU and domestic level will respond to them as 'mission statements'.[73] Some of these provisions would seem to have limited practical applicability, given that the scope of the Charter is confined to situations where EU law or national implementing legislation is at issue.[74] The relationship between the social rights contained in the Charter and the economic integration goals and free movement rights that dominate EU law also remains contested and ill-defined.[75] However, the inclusion of these social-rights provisions within the Charter has the effect of confirming their partial constitutionalisation within the framework of EU governance: it represents an attempt to transplant the social dimension of continental European constitutionalism to the EU level.[76]

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[71] [2007] O.J. C303/17, 14.12.2007, at 303/35.

[72] For an example of the CJEU interpreting EU legislation in line with the social rights requirements of the Charter (in this case, the right to paid leave set out in Article 31(2) of the Charter), see Case C–282/10, Dominguez v Centre Informatique du Centre Ouest Atlantique, Préfet de la région Centre (ECJ, 24 January 2012).

[73] See in general Niilo Jääskinen, 'Fundamental Social Rights in the Charter – Are They Rights? Are They Fundamental?' in Steve **Peers**, Tamara Hervey, Jeff Kenner, and Angela Ward (eds), *The EU Charter of Fundamental Rights* (Hart 2014) 1703.

[74] Article 52 of the Charter provides that it only applies to EU law and measures taken by national authorities to implement and give effect to the requirements of EU law. Thus far, the CJEU has taken the view that salary cuts and other austerity measures introduced by national governments to give effect to their general obligations to ensure monetary stability under art 104 EC Treaty and the Stability and Growth Pact as laid out in EU Regulations 1466/97 and 1467/97 'clearly' fall outside the scope of EU law: see, for example, Case C–128/12, *Sindicato dos Bancários do Norte and Others v BPN – Banco Português de Negócios, SA*, Judgment of 4 May 2013; Case C–134/12, *Corpul Național al Polițiștilor – Biroul Executiv Central* [2012] OJ C303/18.

[75] See generally Diamond Ashiagbor, 'Economic and Social Rights in the European Charter of Fundamental Rights' (2004) 9 Euro Hum Rts L Rev 63.

[76] See the collected papers contained in EUI Social and Labour Law Working Group, 'The Fundamentalisation of Social Rights' (EUI Working Paper Law 2009/05) <http://cadmus.eui.eu/handle/1814/11214> accessed 15 November 2013.

A social dimension can also be found in the European Convention on Human Rights (ECHR) jurisprudence, notwithstanding its primary focus on the protection of civil and political rights. As far back as 1976, in *Airey v Ireland*, the European Court of Human Rights (ECrtHR) affirmed that 'the mere fact that an interpretation of the Convention may extend into the sphere of social and economic rights should not be a decisive factor against such an interpretation; there is no watertight division separating that sphere from the field covered by the Convention'.[77] Subsequently, the Court's developing case law in respect of Article 8, Article 14 and other provisions of the ECHR recognised that States may be required to take positive steps to provide social protection to their citizens as part of discharging their obligations under the Convention.[78] In the recent case of *MSS v Belgium and Greece*, the Strasbourg Court has also recently interpreted Article 3 ECHR as precluding state action, which has the effect of driving individuals into a state of extreme destitution.[79]

Many continental European states (along with Ireland) have also ratified the 1995 Additional Protocol to the European Social Charter, which permits certain NGOs, national employer and trade union federations, and 'representative' trade unions, to bring a 'collective complaint' to the European Committee on Social Rights seeking a legal determination that a state party to the Charter has failed to comply with its social rights provisions.[80] As Cullen has noted, this 'collective complaints procedure' is the first quasi-judicial process in international human rights law that has been established specifically to deal with socio-economic rights claims.[81] Its development again highlights the emergence of a distinct social dimension to European constitutional governance, which parallels developments at national level.

In general, constitutional governance in many European states has developed a social dimension, as has pan-European governance at the level of the EU and the Council of Europe. The social provisions of many continental European constitutions primarily function as mission statements asserting a national commitment to social justice. Their legal impact is more limited, but not completely insignificant. At EU level, the attempt to inject a substantive social dimension into EU governance remains a work in progress: however, it is significant that the EU Charter of Fundamental Rights protects social rights and makes provision for them to be justiciable as (for the most part) principles of the EU legal order. Social constitutionalism has thus put down substantial roots in Europe, and the 'zone of constitutionalism' in many European legal systems now extends into the socio-economic sphere. As with other aspects of continental Europe constitutionalism, this reflects the influence of social democratic thought and other intellectual traditions that have tended to enjoy greater influence in Europe than they have in the Anglo-

[77] *Airey v Ireland* (1980) 2 EHRR 305, para 26.
[78] See generally Ida Elisabeth Koch, *Human Rights as Indivisible Rights: The Protection of Socio-Economic Demands Under the European Convention on Human Rights* (Martinus Nijhoff 2009).
[79] *MSS v Belgium and Greece*, App No 30696/09 (ECtHR, 21 January 2011), para 263.
[80] European Social Charter Additional Protocol Providing for a System of Collective Complaints, ETS No 158. See Robin Churchill and Urfan Khaliq, 'The Collective Complaints System of the European Social Charter: An Effective Mechanism for Ensuring Compliance with Economic and Social Rights?' (2004) 15 Euro J Int L 417.
[81] Holly Cullen, 'The Collective Complaints System of the European Social Charter: Interpretative Methods of the European Committee on Social Rights' (2009) 9 Hum Rts L Rev 61.

American world. It also chimes with the more 'directive' orientation of this mode of constitutionalism.

Social Constitutionalism in the Global South

The origins of social constitutionalism in the democracies of the Global South can be traced back to two of the most influential constitutional texts to have emerged from the post-colonial world. The social rights provisions set out in the Mexican Constitution of 1917 were expressive norms that affirmed the State's commitment to social transformation: they were supposed to serve as a point of reference for all branches of government in performing the functions assigned to them under the new constitutional order established in the wake of the Mexican Revolution of 1910.[82] The Directive Principles inserted into the Indian Constitution of 1948 (modelled on the provisions of Article 45 of the *Bunreacht*) were designed to perform a similar function.[83]

Social constitutionalism in the Global South thus began life in a similar manner as it did in Europe, with social provisions being inserted as mission statements into national constitutions drawn up in the wake of revolutionary turbulence, war or newly acquired independence. Both of these sets of social-rights provisions occupy a prominent place in Mexican and Indian constitutional culture: they also have influenced the development of alternative modes of social constitutionalism in other parts of the Global South. Initially, this social dimension was slow to take root in other states: many post-colonial constitutions were framed according to the standard Anglo-American template and at best made passing references to social principles. Furthermore, social constitutionalism was initially viewed as a largely symbolic mode of constitutional discourse – in both Mexico and India, the social provisions of their respective constitutions were generally viewed as non-justiciable norms that had little or no legal effect.[84]

However, following the 'rights revolution' of the 1960s and 1970s and the emergence of international socio-economic rights standards, legal scholars and human rights activists across the Global South began to argue the case for social rights to be constitutionalised and made fully justiciable. In India, the Supreme Court began in the 1980s to make reference to the Directive Principles in interpreting the right to life and the other fundamental rights set out in the Indian Constitution, which resulted in the scope of these rights being extended to cover essential social entitlements.[85] The Brazilian Constitution of 1988 and the Colombian Constitution of 1991 (as noted above) made social rights justiciable before the courts, as did the South African Constitution of 1996: in all three states, there now exists a comprehensive socio-economic rights jurisprudence. Various modes of socio-economic rights review have also taken root in a considerable number of different legal systems in Latin America, Africa and South Asia.[86]

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[82] Gutierrez Rivas (n 44) 51–65.
[83] See Jeffrey Usman, 'Non-Justiciable Directive Principles: A Constitutional Design Defect' (2007) 15 Mich St J Int L 643.
[84] See Gutierrez Rivas (n 44); ibid.
[85] *Olga Tellis and others v Bombay Municipality Corporation* [1985] 2 Supp SCR 51 (India); (1987) LRC (Const) 351 (Supreme Court of India).
[86] See in general Malcolm Langford, 'Domestic Adjudication and Economic, Social and Cultural Rights: A Socio-Legal Review' (2009) 6(11) Sur: J Int Hum Rts 91.

It is therefore now common for 'zones of constitutionalisation' in the Global South to extend into the socio-economic sphere. Furthermore, this social dimension is increasingly viewed as giving rise to substantive legal obligations that can be enforced before the courts. Different states have developed different approaches to protecting social rights through law: the South African 'reasonableness' approach and the use of the *tutela* action in Colombia are perhaps the best known and most developed of these approaches, along with the case law of the Indian and Brazilian courts. There has been extensive academic discussion of the lessons that can be learnt from the experience of socio-economic rights review in these states,[87] while social movements have also engaged actively with these new methods of seeking legal redress for violations of social rights.[88]

The development of this potentially far-reaching mode of social constitutionalism in many states of the Global South reflects the 'transformative' aspirations that underpin their constitutional frameworks and their experience of embedded social injustice. It differs from its continental European counterpart in placing considerable emphasis on the role of courts in enforcing respect for social rights: whereas law plays a residual role in continental Europe in securing respect for social rights, it is expected to play a much more active role in states such as Brazil, India and South Africa. Furthermore, the social provisions of constitutions in the Global South are increasingly viewed as giving rise to subjective individual entitlements, ie to enjoy a certain standard of access to health care or housing, or to have one's socio-economic needs given due weight in administrative decision-making, in contrast with the situation in Europe.

This means that the potential scope of socio-economic rights review in states such as South Africa is wider than equivalent forms of judicial review in states such as Germany, which are limited to ensuring that national law and policies comply with fundamental constitutional principles. Social movements are also much more engaged with the social dimension to national constitutions in states such as Colombia and South Africa than they are in Europe. However, these differences can be overstated. Clear parallels can, for example, be drawn between the application of reasonableness analysis by the South African Constitutional Court and the application of the human-dignity principle by the German Constitutional Court in the case of *Hartz IV*, even if the approach of the two courts differs in several important respects.[89]

In general, the emergence of socio-economic rights review in many of the democracies of the Global South can best be regarded as an intensification of the continental European approach, rather than a radical break. Both of these constitutional 'families' share a belief that national 'zones of constitutionalisation' should have a social dimension, and that law has some role to

[87] See in particular Sandra Fredman, *Human Rights Transformed: Positive Rights and Positive Duties* (OUP 2008); Sandra Liebenberg, *Socio-Economic Rights: Adjudication under a Transformative Constitution* (Juta 2010); Aoife Nolan, *Children's Socio-Economic Rights, Democracy and the Courts* (Hart 2011); Varun Gauri and Daniel M Brinks, 'Human Rights as Demands for Communicative Action' (2012) 20(4) J Pol Phil 407; Paul O'Connell, *Vindicating Socio-Economic Rights: International Standards and Comparative Experiences* (Routledge 2012).
[88] See, for example, Jackie Dugard, Tshepo Madlingozi and Kate Tissington, 'Rights-Compromised or Rights-Savvy? The Use of Rights-Based Strategies to Advance Socio-Economic Struggles by Abahlali baseMjondolo, the South African Shack-Dwellers' Movement' in Alviar García, Klare and Williams (n 14).
[89] See the discussion in Lucy A Williams, 'The Role of Courts in the Quantitative-Implementation of Social and Economic Rights: A Comparative Study' (2010) 3 Const Court Rev 141.

play in steering the exercise of state power in the socio-economic field. This reflects many of the underlying values and assumptions that underpin their respective constitutional cultures, which differ in important ways from the classical liberal/social contractarian values on which conventional Anglo-American constitutionalism is based. In essence, their common commitment to social constitutionalism is based upon a shared set of ideas about the appropriate scope of 'zones of constitutionalisation': constitutional governance is expected to exert a firm steer over how the state goes about actively remoulding society in accordance with certain fundamental underlying values, not just to protect individual liberty and patrol conformity with separation of powers.

Social Constitutionalism in Ireland

Given de Valera's desire to mark a clear break with the era of British rule, the influence of the Weimar Constitution on the drafting of the *Bunreacht* and the pre-dominant role of Catholic social theory in shaping the worldview of Irish political elites in the 1930s, it is not surprising that the text of *Bunreacht na hÉireann* has a social dimension. Its Preamble refers to the restoration of the 'true social order' of Irish society. Article 41 on the rights of the family contains a number of provisions imposing duties on the State to protect the family, including the controversial requirement set out in Article 41.2.2° to the effect that the State shall 'endeavour to ensure that mothers shall not be obliged by economic necessity to engage in labour to the neglect of their duties in the home'. Article 42.4 commits the State to providing free primary education, and also to providing other educational support 'when the public good requires it', subject to appropriate respect for the rights of parents. Most comprehensively of all, Article 45 sets out a list of Directive Principles of Social Policy for the 'general guidance of the Oireachtas', which set out an extensive list of social values and aspirations that are supposed to guide the legislature in discharging its law-making functions. Article 45 thus constitutes a mission statement similar to those set out in other European constitutions of the same era: as noted above, it provided the template for the Directive Principles set out in Part IV of the Indian Constitution.[90]

However, in general, this social dimension has played little role in the evolution of Irish constitutional culture since 1937. The guarantee of free primary education set out in Article 42.4 has teeth, as it imposes an enforceable legal obligation upon the State.[91] However, the other social elements of the text of the *Bunreacht* have languished in relative obscurity and exert little influence on how Irish public authorities exercise their powers and functions. In part, this is because of the outmoded language of some of these provisions, such as the reference to a mother's 'duties in the home' in Article 41.2.2° as cited above, or the commitment in Article 45.2 to establishing 'on the land in economic security as many families as in the circumstances shall be practicable'. More significantly, the purely expressive nature of Article 45 in particular has prevented its provisions from acquiring any meaningful legal or political traction. Its text

[90] See David Keane, 'The Irish Influence on the Indian Constitution: 60 Years On' <http://humanrights.ie/constitution-of-ireland/the-irish-influence-on-the-indian-constitution-60-years-on/> accessed 12 September 2014.

[91] *Crowley v Ireland* [1980] IR 241; *O'Donoghue v Minister for Health* [1996] 2 IR 20. Note, however, that the legal remedies available in respect of a breach of this obligation may be limited to damages and the grant of declaratory relief: see *Sinnott v Minister for Education* [2001] 2 IR 545.

provides that the 'application of those principles in the making of laws shall be the care of the Oireachtas exclusively, and shall not be cognisable by any Court under any of the provisions of this Constitution'; while the Irish courts have made occasional reference to the Directive Principles in interpreting legislation and other constitutional provisions, it is clear that Article 45 itself does not generate any legal rights or obligations.[92] Furthermore, its provisions have, over the years, failed to acquire much in the way of political resonance. As a consequence, it has in effect become a constitutional dead letter.

Other elements of the Irish constitutional order have the potential to serve as foundations for the development of a more substantial social dimension, but by and large this has not materialised.[93] The Supreme Court has interpreted the provisions of Article 40.3.1° as protecting certain unenumerated rights, including the right to earn a livelihood: however, the Court's reluctance to extend its jurisprudence in this regard makes it unlikely for the foreseeable future that a comprehensive set of social rights will be located in the opaque depths of this provision of the *Bunreacht*.[94] In general, the Irish judiciary have been unwilling to extend the scope of constitutional-rights protection to cover socio-economic entitlements,[95] and the Irish 'zone of constitutionalisation' in this context adheres closely to the standard Anglo-American template. Issues relating to access to key social entitlements are regarded as questions of 'distributive justice', to use Costello J's formulation in *O'Reilly v Limerick Corporation*,[96] which are deemed to fall exclusively within the competency of the political branches of government and outside of the appropriate scope of constitutional regulation.[97]

Given this background, the decision of the Convention on the Constitution in February 2014 to vote in favour of affording greater constitutional protection to socio-economic rights is significant.[98] The majority of the Convention expressed support in particular for the *Bunreacht* to be amended to include a provision requiring the State to 'progressively realise ESC rights, subject to maximum available resources', which would be 'cognisable' by the courts. The majority of the Convention also recommended that certain specific social rights, including the right to housing, social security and essential health care, should be expressly enumerated in the

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[92] See Gerard Hogan and Gerry Whyte, *JM Kelly: The Irish Constitution* (4th edn, Tottel 2003) 2077–86; see also Ronan Keane, 'Judges as Lawmakers: The Irish Experience' (2004) 4(2) Jud Stud Inst J 1.

[93] For an authoritative and comprehensive overview of the law in this regard, see Gerry Whyte, *Social Inclusion and the Legal System: Public Interest Law in Ireland* (Institute of Public Administration 2002).

[94] See the comments of Keane J (as he was then) in *O'T v B* [1998] 2 IR 321, at 370. See also Gerard Hogan, 'Unenumerated Personal Rights: Ryan's Case Re-evaluated' (1990–92) 23 Ir Jurist 95; Gerard Casey, 'Are there Unenumerated Rights in the Irish Constitution?' (2005) 23 Ir L Times 123 – but note also 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 DULJ 322.

[95] See, for example, *Mhic Mathsna v Ireland* [1995] 1 IR 484; *Sinnott v Minister for Education* [2001] 2 IR 545; *TD v Minister for Education* [2001] 4 IR 259.

[96] *O'Reilly and others v Limerick Corporation* [1989] ILRM 8.

[97] Alan Keating and Anthony Lowry, 'The Separation of Powers: The Supreme Court's Approach to Affirmative Duties – Part I' (2003) 21 Ir L Times 103; by the same authors, 'The Separation of Powers: The Supreme Court's Approach to Affirmative Duties – Part II' (2003) 21 Ir L Times 118; Aoife Nolan, 'Ireland: The Separation of Powers Doctrine vs Human Rights' in Langford (n 46) 295.

[98] The Convention on the Constitution, 8th Report, *Economic, Social and Cultural Rights*, March 2014 <https://www.constitution.ie/> accessed 28 August 2014.

Constitution. In other words, the Convention favoured a dramatic extension of the stunted social dimension of the *Bunreacht* by the insertion of new expressive norms backed up by the adoption of something akin to a South African-style 'reasonableness review' approach. It remains to be seen whether the Convention's recommendations in this regard lead to any shift in the Irish constitutional position.

Conclusion – Competing Constitutional Visions in Tension

The question of whether zones of constitutionalisation should include a social dimension and, if so, how extensive it should be, ultimately links back to wider debates about the appropriate scope and character of constitutional regulation. Orthodox Anglo-American constitutional thought is generally opposed to extending the scope of the constitutionalist project beyond its core functions of protecting individual liberty and maintaining a separation of powers. It considers that attempts to 'stretch' the zone of constitutionalisation beyond this point risks imposing excessive constraints on the political branches of government, and thus on the functioning of electoral democracy in general. From this perspective, the development of social constitutionalism is a wrong turn: it represents a mutation or distortion of the constitutionalist project, which is incompatible with a serious commitment to the principle of democratic self-governance. In contrast, in much of continental Europe and the Global South, the establishment of relatively wide zones of constitutionalism is often viewed as a way of reinforcing the democratic character of a state and ensuring that the political branches of government respect the foundational values and aspirations that are supposed to underpin the national constitutional order. From this perspective, the development of social constitutionalism adds a useful new dimension to national constitutional orders: it extends the scope of constitutional governance and enables it to play a role in holding public authorities to account for how they give effect to principles of social justice.

At first glance, there is much to commend in Anglo-American orthodoxy. It is important to give breathing space to the ordinary political process, and not impose excessive constitutional constraints upon its functioning: the give-and-take of electoral politics remains the primary mechanism through which the public at large can participate in the collective shaping of their own destiny. Wide zones of constitutionalisation may also unduly limit the freedom of manoeuvre available to public authorities, and hinder their ability to respond to changing economic, social and political contexts. They may also generate a process of judicialisation, whereby courts, lawyers and the legal process in general assume a disproportionately powerful role in steering the exercise of state power.[99] In addition, there are reasons to be sceptical of the capacity of constitutional governance to impose substantial constraints on how public bodies exercise their powers: constitutional guarantees can often become hollowed out if courts and other key actors are unwilling or unable to give effect to their provisions, and formal

[99] See Loughlin's criticism of how constitutionalism often assumes the existence of shared communal norms whose contents can be defined by a jurisprudential 'priesthood' of philosophers and 'Herculean' judges: see in general Martin Loughlin, *The Idea of Public Law* (OUP 2004).

requirements to respect constitutional principles and goals may in practice amount to little more than empty rhetoric.[100]

Taken together, all these considerations should counsel caution against too quick a rush to establish expansive zones of constitutionalisation. Furthermore, these concerns could be viewed as applying with particular force in relation to the idea of social constitutionalism. Determining how to give effect to concepts of social justice is an issue of collective concern to the public at large: as Michael Walzer puts it, social rights 'have their origin in a shared social life, and they partake of the rough and ready character of that life'.[101] Therefore, any self-respecting democracy must leave key issues of socio-economic policy to be resolved by the electoral process. The executive and legislative branches of government also need the freedom of manoeuvre to respond to changing socio-economic conditions, while the legal process arguably lacks the capacity to deal with complex issues of social justice.[102] The content of social rights is also notoriously difficult to define, while views differ radically as to what respect for principles of social justice entails in practice. As a consequence, social constitutionalism often struggles to acquire substantive effect. In continental Europe, its scope and content is often uncertain.[103] In the Global South, the new modes of socio-economic rights review that have developed in states such as Colombia, Brazil and South Africa have struggled at times to establish an effective and consistent floor of protection for social rights, and remain a work in progress.[104]

All these considerations might suggest that Ireland should cling to the established Anglo-American orthodoxy, and avoid experimenting with alternative modes of constitutional governance.[105] However, this counsel of caution risks overselling the merits of the status quo, and underestimating the potential of social constitutionalism. Attempting to impose a comprehensive and rigid scheme of constitutional governance in the socio-economic field would be a foolhardy endeavour: however, this does not necessarily imply that it would be a mistake to develop a basic structure of social constitutionalism, which would impose certain limited constraints upon the freedom of action of the political branches of government. On the contrary, it could be seen as a logical and necessary extension of the constitutional project taken as a whole.

Constitutional rights protection in Anglo-American democracies is usually justified on the basis that it is protects the freedom of individuals and groups who may otherwise lack political power or influence. However, it does little to correct the manner in which socio-economically disadvantaged groups are marginalised within society, or to guarantee their access to education, health care and other forms of basic social goods, which is a necessary precondition for 'human flourishing'.[106] Michelman has argued that a 'legitimation-worthy' constitutional order must be

[100] See Gerald Rosenberg, *The Hollow Hope: Can Constitutions Bring About Social Change?* (2nd edn, U of Chicago Press 2008).
[101] 'Justice Here and Now' in Michael Walzer, *Thinking Politically: Essays in Political Theory* (Yale UP 2007) 68.
[102] See in general Gearty's arguments in Gearty and Mantouvalou (n 39).
[103] O'Cinneide (n 54).
[104] See in general the essays included in Alviar García, Klare and Williams (n 14).
[105] See Gerard Hogan, 'Directive Principles, Socio-Economic Rights and the Constitution' (2001) 36 Ir Jurist 174.
[106] See in general Amartya Sen, *The Idea of Justice* (Harvard UP 2009).

committed to ensuring as far as possible that everyone is capable of actively participating in the political, social, economic and cultural life of their community[107]: however, Anglo-American constitutionalism does little to put this commitment into effect. As a consequence, it is open to the charge of being a stunted and underdeveloped normative framework that fails to engage with what Young describes as an 'age-old problem of distributive politics: that political power usually corresponds with economic power, and that political disadvantage usually corresponds to economic disadvantage'.[108]

The development of social constitutionalism in continental Europe and the Global South represents an attempt to close this gap in Anglo-American zones of constitutionalisation. It reflects the belief that social-rights guarantees should form an element of a national constitutional order including, in Michelman's words, 'the publicly acknowledged basic terms of the law-making system',[109] and that such guarantees can direct 'active attention' to the responsibilities of governments and other 'duty holders' to work to secure these rights and allow 'legal pressure' to be exerted upon such 'duty holders' to live up to these responsibilities.[110] There is considerable force behind these arguments, which are ultimately based on the compelling realisation that the process of constructing a rights-based constitutional democracy will remain incomplete without some recognition at the constitutional level that individuals are entitled to live in 'material conditions consistent with human dignity'.[111]

Social constitutionalism has thus the potential to add new elements to constitutional governance, which can give better effect to the principles of democratic self-governance and respect for individual freedom.[112] It is not even necessary to search for examples in the Global South to illustrate this point: judgments such as *Hartz IV* from Germany show that adding a social dimension to the standard repertoire of constitutional governance can open up new avenues for socially and politically disadvantaged groups to contest laws and policies which contribute to their marginalisation.[113] Furthermore, the danger exists that if constitutional governance is silent on issues of social justice, then this gap opens the door for judges and other constitutional actors to develop the law according to their own views in this regard and deprives courts, tribunals and policy-makers of any clear normative orientation when they are called upon to resolve disputed issues relating to social rights and resource distribution.[114]

Given all this, and taking into account both the long-neglected provisions of Article 45 of the *Bunreacht* and the Premable's affirmation that the Irish constitutional order is committed to

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[107] Frank I Michelman, 'Socioeconomic Rights in Constitutional Law: Explaining America Away' (2008) 6 Int J Comp Const L 663.
[108] Katharine Young, 'Freedom, Want and Economic and Social Rights: Frame and Law' (2009) 24 Maryland J Int L 182, 193.
[109] Michelman (n 107) 675.
[110] Young (n 108) 193–94.
[111] Mark Tushnet, 'A Response to David Landau', 23 January 2012 <http://opiniojuris.org/2012/01/23/hilj_tushnet-responds-to-landau/> accessed 15 September 2014.
[112] See Jeff King, *Judging Social Rights* (CUP 2012).
[113] Gauri and Brinks (n 87) have argued that making socio-economic rights legally enforceable can open up new channels for socially excluded groups to participate in the democratic process.
[114] See King (n 2) 93–4.

achieving a just 'social order', it is time to reconsider the Irish legal system's attachment to Anglo-American constitutional orthodoxy in this regard. It is clear that the original text of the *Bunreacht* was intended to provide a constitutional steer to the political branches of government in relation to principles of social justice: the relevant provisions failed to acquire any real political or legal political traction, but it could be argued that the development of a new mode of social constitutionalism, drawing upon lessons learnt from other constitutional systems, would represent fidelity to the original spirit and purpose of the 1937 Constitution. Furthermore, the Irish legal system will have to engage in any case with the forms of social constitutionalism that have become embedded into EU law (via, in particular, the provisions of the EU Charter of Fundamental Rights) and the case law of the ECrtHR, along with its commitments under the European Social Charter: it is inevitable that this European influence will inject some new social elements into the bloodstream of the Irish legal system, whose absorption may be facilitated if they can be matched up with home-grown equivalents.

The recommendations of the Convention on the Constitution referred to above are thus very welcome: they open the door to debate about how the Irish zone of constitutionalisation can be reconfigured so as to include a substantive and meaningful social dimension. Adding social elements to existing modes of constitutional governance is never going to be an easy task: the determination of socio-economic policy must remain primarily a matter for the political branches of government, meaning that any constraints imposed on their freedom of action in this context must not be overly rigid, or extend too far, or be framed in a manner that renders them unworkable and unenforceable. However, the challenge of developing an Irish mode of social constitutionalism should not be shirked, even though this may necessitate some creative thinking and a willingness to experiment with the full range of the various legal and expressive/political mechanisms through which constitutions can steer the functioning of the various organs of national government. It also may require a critical look at Ireland's tendency to instinctively embrace Anglo-American constitutional orthodoxy: there are useful lessons to be learnt from other constitutional traditions as to how to delineate zones of constitutionalisation and direct the exercise of state power.