Radical Justice: Activist Engagement with Legal Structures During the Irish Housing Crisis

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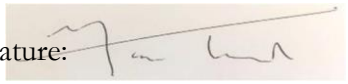
Declaration

I have read and understood the Departmental policy on plagiarism.

I declare that this thesis is my own work and has not been submitted in any form for another degree or diploma at any university or other institution of tertiary education.

Information derived from the published or unpublished work of others has been acknowledged in the text and a list of references is given.

Signature: 

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Abstract

This thesis investigates whether engagement with domestic legal structures can help radical left activists, movements and parties in Ireland, to further their aims and objectives. This question is examined through the lens of the Irish housing crisis, an issue which has dominated Ireland's political sphere in recent years. The crisis, which is rooted in the commodification of the country's housing sector, has provoked a considerable response from the radical left. Activists have protested and campaigned on issues such as homelessness, soaring rental prices and the selling of public lands to private developers. These actions have frequently brought socialists into contact with Ireland's legal architecture. Activists have defended against legal actions and have also attempted to utilise the law as a tool to affect social change. The thesis considers the different way in which socialists have or could engage with the legal system by examining three case studies. Two of these involve instances in which groups involving radical left actors have come into contact with Ireland's legal structures. The first examines the occupation of Apollo House in Dublin by the Home Sweet Home group in late 2016. The study considers the legal action brought to have the activists removed, reflecting on the court proceedings and the impact those proceedings had on the political debate which surrounded the occupation. The second case study investigates the work of the Dublin Tenant's Association, a group which sought to utilise legal practice as part of its political mobilisation. The benefits and difficulties that came with this practice is considered. The thesis also considers a prospective legal engagement, asking whether socialists should engage with the campaign to give constitutional protection to the right to housing in Ireland. This case study considers the impact the right might have on Irish housing policy and the political opportunities which may emerge if socialists choose to campaign on the issue.

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Introduction

Introduction – The Research Question

This thesis aims to investigate whether engagement with domestic legal structures can help radical left activists, movements and parties in Ireland, to further their aims and objectives. I will explore this question through a consideration of the struggles of Irish housing activists in recent years. The reason for focusing on housing activism is that the housing crisis in Ireland has been the key political issue since the financial crash in 2008. As a result, it has been the main site of struggle for radical left actors in Ireland. There have been numerous protests, occupations, campaigns and other interventions which have been focused on challenging the increasing neoliberalisation of Ireland's housing sector. Unsurprisingly many of these have resulted in activists coming into contact with the legal system. This area therefore provides ample opportunities to investigate the research question.

The study will involve an examination of three case studies. I will discuss the particular methodological approaches used in each case study in the outline that follows in the next section. For now, I will comment on the general methodological approach of the thesis. Given the extent to which modern life is juridified, and given that socialists are seeking to change social, economic, and political structures that are shaped and legitimated by law, there are multiple avenues through which activists might interact with the legal system. The thesis aims to investigate these interactions through several case studies. The first of these studies investigates the occupation of the Apollo House building in Dublin by the Home Sweet Home activist group in late 2016. This political intervention involved a defensive legal action, as activists sought to prevent the imposition of a legal injunction requiring them to vacate the building. The second case study considers the actions of the Dublin Tenants Association. This group sought to proactively utilise legal practice by assisting private rental sector tenants who were in dispute with their landlord, in an effort to encourage political mobilisation. The final case study examines the potential benefits of engaging with the campaign to insert a right to housing into the Irish Constitution.

I have chosen to use three case studies as I want to capture the multiple ways in which activists might encounter legal structures. I do this both to draw out generalisations about the impact of law on activist struggle, but also to examine whether the law effects such struggles in distinct ways in particular circumstances. The purpose of drawing out

generalisations is so that we can understand the common effects that law has on the work of socialist activists. For instance, we will see how the concept of formal equality, which is inherent to the legal form, tends to have the effect of decontextualising social relations, a process which has implications regarding law's ability to be used as a tool for tackling structural inequality. This tendency of the law can be seen, in different forms, across the three case studies.

The aim of highlighting these common tendencies is to draw attention to the fact that the legal form tends to impact social relations in predictable ways. If we can understand these processes, it is argued, we can begin to evaluate the potential impact of legal engagement. This does not mean of course that we will always be able to consistently predict legal outcomes. Nor does it mean that we will invariably be able to anticipate the wider consequences that interacting with the legal system will have on the struggles of socialists. However, the following chapters do provide insight into the motivations behind judicial decision-making, and on the ways in which legal engagement can impact how struggles are perceived, both by activists themselves and by the wider public. By recognising these fundamental features of the legal form, and their effects on activism, socialists may be able to avoid tactical dead ends.

One reason therefore, for exploring a number of different case studies, is to show that the legal form will have similar effects in different contexts. However, somewhat paradoxically, the thesis also aims to show that it is important to explore these distinctive contexts in order to interrogate the ways in which the law produces distinct effects in specific social situations. The logic behind such an investigation is to show that, although the law has some general tendencies, and therefore influences social relations in ways that are usually antagonistic towards socialist goals, this does not mean that there should be total disengagement from the legal system. Indeed, such disengagement is impossible, give the ubiquity of the legal form and given that legal repression is such a common response to socialist organising and struggle. Further, as the thesis shows, there can be benefits in engaging with the law, be it benefitting from the legitimacy it endows, or developing a better understanding of, for example, rental markets, by understanding the regulatory architecture which registers their particular dynamics.

Thus, law must not and indeed cannot be disregarded. Socialists must develop new ways to restrict its negative effects, to exploit the limited opportunities it may provide, and to find ways to expose its tendency to undermine progressive material change. In some instances, theoretical critique and past experience may cause us to draw the conclusion

that engaging with the law will unlikely be of benefit. In others, we may decide that engagement may lead to gains behind made, or new avenues of struggle being opened.

The broader point is that law is a complex social phenomenon. As we shall see, even within Left Wing legal scholarship there a number of theories, and much debate, about the nature of law. It must therefore be studied in a number of different contexts. The thesis does this by looking at three areas where socialists are likely to engage with legal system through their struggles; a defensive legal action, the proactive use of legal practice, and engagement with efforts to bring about constitutional change. They provide the opportunity to test theories about the way in which law operates, to draw generalisations about this operation, but also to explore the particular effects of law in concrete situations, and to examine the opportunities this might provide.

Before describing the structure of the thesis in more detail a preliminary issue needs to be considered. As noted, the study aims to investigate whether legal engagement may further the aims of radical left actors in Ireland. I am giving the term 'radical left' quite a broad definition, so that it includes all anti-capitalists from the radical left tradition. Such groups wish to challenge and dismantle the capitalist system of accumulation in Ireland and to replace it with a socialist system of organisation. In recent decades a key tactic which has been used to try and challenge capitalism has been to try and resist the commodification of social goods, a process which has intensified in the neoliberal era. The commodification of housing has been key in recent decades to capitalist accumulation, both globally and in Ireland. Indeed, the actions of the activists studied in this thesis can broadly be characterised as an attempt to resist this process. Therefore, we can say that a key criterion for assessing the utility of legal engagement for the radical left in Ireland is whether it has aided these attempts.

However, resistance to the commodification of social goods is not the preserve of anti-capitalists. Actors and groups who wish to merely see stricter regulation of capital and a broader programme of taxation and redistribution are often involved in protests and campaigns against the increasing exposure of basic social goods to the logic of the market. This point is of particular relevance to two of the case studies examined in the thesis. The Home Sweet Home organisation which is central to the first case study, and the Dublin Tenants Association upon which the second study is focused, did not explicitly identify as radical left or socialist. Indeed, both groups were somewhat ambiguous about their specific ideological background, although both could be characterised as broadly progressive. However, as is often the case with such groups and movements, many of the

actors involved were members of socialist political parties or explicitly identified as being on the radical left. These groups therefore contained actors with some common goals, for instance improving the conditions of homeless people in Ireland. But there was also variation amongst the participants in these groups as to their wider aims. Some of those involved may have been solely focused on the immediate issue, whilst others, the actors who are the focus of this study, saw the occupation or campaign as part of a wider effort to resist neoliberal commodification and to challenge the system of capitalist accumulation in Ireland.

This distinction is important. The question of whether legal engagement will help to further the aims of radical left activists will involve a different set of considerations than would arise if the focus was on those seeking to reform Irish capitalism or those focused on a single issue. For example, the latter may not be concerned with the fact that legal system tends to legitimise capitalist social relations, whilst this would obviously be a concern for radical left actors. Despite the fact that the Home Sweet Home organisation and the Dublin Tenants Association did not explicitly identify as radical left, I believe that the presence of radical left actors within these groups and the fact that they engaged in campaigns which sought to resist the neoliberalisation of Ireland's housing sector, means that they are suitable objects of study. The issues connected to legal engagement which arise specifically for radical left actors can be extracted from the general concerns of the groups and can be analysed in a way that allows the central research question to be answered. I will now set out how I aim to answer this question.

I – Outline of the Thesis

I will begin, in the second half of this introduction, by explaining the importance of struggles over housing and urban development in terms of radical left and anti-capitalist organising, and then by providing an overview of the Irish housing sector, particularly the property boom and bust of the 2010s and the policies which have been adopted since the 2008 crash. In Chapter one I will set out the theoretical framework which will inform the thesis. This will involve providing a brief overview of liberal legal theory, explaining some of the key concepts. This will include a discussion of the notion of negative liberty, the protection of private property, the regulation of state intervention in the private sphere, the Rule of Law, the idea of formal equality and the theory of judicial interpretation known as formalism.

I will then move to a discussion of the work of Karl Marx. Marxist accounts of law will provide the main theoretical background to the thesis. It is thus important to understand some of the main concepts which Marx developed in his work and to highlight some of his sporadic remarks about law. I will thus consider his comments in his essay *On the Jewish Question* in which he considered the public-private dichotomy in modern society which was a precursor to the emergence of the modern legal system. I will note his comments on law in *The German Ideology*. I will also discuss his theory of historical materialism and the different questions of interpretation which have arisen around it.

The chapter will then move to a discussion of some of the main Marxist theories of law which have emerged since Marx's death. This will include 'crude materialist' theories of law and 'class instrumentalist' accounts of the legal system. Whilst considering the latter I will discuss the way in which law, through the operation of the notion of formal equality, can operate to legitimise the interests of the capitalist class. I will also consider 'relative autonomy' accounts of law and will introduce the idea that law can be constitutive of social relations. This latter point will be further elucidated by considering some of the work of critical legal theorists particularly that of Karl Klare. I will also discuss the work of other critical theorists who have commented on the way in which law helps to shape our view of reality and will consider the development of the notion of legal indeterminacy which challenges formalist understandings of judicial decision-making.

The final section of this chapter will consider the work of theorists who have focused on the form that law takes in modern capitalist society. I will discuss the work of Evgeny Pashukanis who has developed the commodity-form theory of law. I will then highlight the work of a number of theorists who have developed this analysis of the legal form, particularly the work of Robert Knox and Honor Brabazon, who have discussed the implications of this analysis for activist engagement with legal structures. Of particular interest here will be the way in which the legal form leads to individuals being abstracted from the material context in which they are living and the implications that this has for radical left activists who engage with the legal system. I will also note the way in which dissent is understood in the neoliberal period and the role that law plays in creating this understanding. Finally, I will consider some suggestions by Knox and Brabazon as to useful ways in which activists might engage with legal structures.

After the theoretical framework of the study is set out, the thesis will proceed as follows. The case study which examines the campaign to constitutionalise the right to housing in Ireland is set out over a number of chapters. Chapters two, three and four, will set out

some of the groundwork needed for the substantive discussion on the topic which takes place in Chapter seven. For clarity I will discuss the content of these chapters first, and the central argument running through them. I will then give a brief description of the analysis in Chapter five, which covers the case study pertaining to the Home Sweet Home occupation of Apollo House and in Chapter six which contains the discussion on the final case study regarding the work of the Dublin Tenants Association.

The question of whether socialists in Ireland should engage with the campaign to constitutionalise the right to housing immediately leads to another one. How might the radical left and working-class movements in Ireland benefit from having a constitutional right to housing? I noted above that a key aim of radical left activism has been to try and resist the commodification of social life, a process which has intensified in the neoliberal era. One tool available to socialists, which may help to challenge this process, is achieving the legal protection of socioeconomic rights. At their core, socioeconomic rights are based on the idea that certain areas of social life are too important to be exposed to the logic of the capitalist market. Thus, their protection can act as a bulwark against neoliberal commodification. A constitutional right to housing could be useful in two ways, as a legal right and as a political tool. As to the former, a constitutionally protected right could help ensure that progressive housing legislation is not invalidated by the Supreme Court for potentially interfering with other constitutional rights, most notably the right to private property. It could also potentially encourage the courts to place a positive obligation on the State to take more active interventions to ensure the right was vindicated. A constitutional right to housing, and the campaign to achieve its protection, could also be a useful political tool. Public discussion of whether the right should receive constitutional protection would provide socialists with opportunities to highlight the failure of neoliberal capitalism to protect basic social goods and to argue why socialism could ensure that they were protected.

In Chapter seven of this thesis, I will examine both the legal and political aspects regarding the question of whether achieving the constitutional protection of a right to housing would be of benefit to socialists. The groundwork for this examination will begin in Chapter one where I will discuss liberal political theory and its legal counterpart, liberal legalism. I will argue that liberal political theory is based on the idea of negative liberty, with a key corollary of that being the political principle that the State should be restrained from excessively interfering in the lives of individuals in the private sphere. A further consequence of the move to define freedom as independence from others is the

protection of private property, something emphasised in liberal political orders. I will argue that these political principles find legal expression through the framework of liberal legalism, a set of assumptions about the role of law in society. I will discuss liberal legalism's concern with social order and the view that this is best achieved through a particular doctrinal understanding of the Rule of Law. This doctrine posits that a society should be organised around a set of pre-defined legal rules, by reference to which institutions and individuals regulate their behaviour. I will link the Rule of Law to the idea of formal equality – the idea that, in the public sphere, individuals should be considered equally, abstracted from their material circumstances. I will also link it to the notion of legal formalism, the idea that judges can and should disregard material context when adjudicating on disputes between individuals.

In Chapter two I will consider these legal expressions of liberal political theory in relation to the idea of constitutionalism. I will show how liberal legal regimes typically use a constitution as a way of ensuring that the political order is based upon liberal values. I will show how the institutional structures established in liberal constitutional regimes, particularly those relating to the functioning of the courts, are designed to ensure that State interference in the private sphere is regulated, and to ensure the protection of private property. Of particular focus will be the role of the courts and the inclusion of personal rights in liberal constitutions which act as a protective barrier against excessive state interference. I will also highlight the fact that these rights are usually interpreted negatively, as providing a limitation on state action, rather than imposing positive obligations on the state to intervene in the private sphere. I will discuss the role of the judiciary in protecting minority interests, and the general role of the courts in regulating government interference through the protection of constitutional rights. However, I will also note a tension between this role of the courts and the ability of a democratically elected legislature to carry out its mandate, a tension captured in the idea of the 'counter-majoritarian difficulty'. I will note that this tension is mediated by the separation of powers doctrine, which is commonly cited, often by the judiciary themselves, as limiting the extent to which the courts can dictate the actions of the other organs of the State. After making this connection between liberal political theory, liberal legalism and constitutionalism, I will proceed to demonstrate the fact that the Irish Constitution, *Bunreacht na hÉireann*, entrenches a liberal legal order in Ireland. I will highlight the liberal influences which impacted the drafting of the Constitution and will set out its main liberal features. Then I will discuss some of the other social forces which existed in Ireland at

the time of the drafting of the Constitution which could have challenged the creation of a liberal order in the country. I will consider the influence of these forces on the Constitution, discussing why there were ultimately unable to impact it in any radical way. The final section of Chapter two will then show that the rights provision of *Bunreacht na hÉireann* were heavily influenced by the liberal understanding of rights.

In chapters three and four I will consider the Irish caselaw regarding the constitutional right to private property and the caselaw which has emerged in relation to socioeconomic rights, respectively. The rationale for doing so is as follows. There are two key issues which emerge in relation to the question of the utility of a right to housing. One is the relation between progressive housing legislation and the constitutionally protected right to private property. In recent years the Constitution's protection of private property has been repeatedly held up by establishment parties as a barrier to the enactment of progressive housing legislation. This raises two issues. First, whether the right to private property *currently* constitutes a legal barrier to the enactment of progressive housing legislation, in the absence of a constitutionally protected right to housing? Secondly, if a right to housing were inserted into the Constitution would the right to private property act as a counter-right? In other words, would the Irish courts be obliged to invalidate progressive housing legislation if it infringed upon private property rights, even if a right to housing was constitutionally protected? The second issue which is crucial to any consideration of the utility of having a right to housing is whether its constitutional protection would compel Irish governments to enact legislation which would ensure its protection. A key question in this regard is the extent to which the courts would enforce the right, particularly in terms of imposing positive obligations on the State to ensure it was vindicated.

My contention is that these questions can be answered by examining previous caselaw related to these issues. Therefore, in Chapter three I will consider the caselaw which has emerged when individuals and legal entities have sought to invoke the right to private property in order to resist social legislation which has impacted upon that right. Then, in Chapter four, I will consider decisions in which litigants sought to convince the courts to interpret the Constitution as providing protection to socioeconomic rights. The approach the courts have taken in the past towards these issues offers some indication of the attitude they would take towards a constitutional right to housing. The examination of this caselaw will show that the courts, despite some significant exceptions, have generally been reticent to strike down social legislation even if it has had the effect of impacting

certain property rights of individuals. I will argue that this reveals a tension between the liberal aversion to allowing state interference in the rights of individuals and the courts' reticence towards invalidating the legislation of a democratically enacted legislature, a reticence sometimes justified by reference to the separation of powers doctrine. The examination of socioeconomic rights decisions will show that the separation of powers doctrine actually complements the liberal tendency to discourage state intervention in the private sphere. As a result, the Irish Supreme Court has made it clear that *Bunreacht na hÉireann* does not provide expansive protection to socioeconomic rights which impose positive obligations on the State.

This consideration of the caselaw in chapters three and four will lead me to two conclusions as regards the utility of the right to housing from a legal perspective. First, I will argue that the Constitution's private property rights are not an insurmountable barrier to enacting progressive housing legislation as it seems that courts are not eager to strike down legislation even if it does interfere with the property rights of individuals. Further, I will argue that if a right to housing were to be actually inserted into the Constitution it is even more unlikely that the courts would invalidate legislation which sought to ensure its vindication on the basis that it infringed private property rights. I will also highlight a political opportunity that this debate around the right to private property and the right to housing could provide for socialists in Ireland. Secondly, I will argue that the refusal of the courts to interpret the Constitution as providing protection for socioeconomic rights which impose positive obligations on the State means that a right to housing is unlikely to lead to the Irish courts imposing obligations on the Irish state to expend resources in order to ensure the right to housing is vindicated. This will lead me to conclude that the greatest benefit of engaging with a campaign to give constitutional protection to the right to housing may be in the opportunity it provides politically, particularly the possibility of expressing a coherent socialist conception of the political idea of housing as a right and a material necessity, not a commodity.

Before moving on to outline the next case study of the thesis, I will provide a brief note on the methodological considerations relevant to the study of the constitutional right to housing issue. First, the reason for choosing this case study. As noted above, the thesis aims to examine the dynamics and effects of law in a number of contexts, contexts in which it is likely that socialists could find themselves engaging with legal structures. In Ireland in recent years there have been a number of high-profile and successful campaigns to amend the Irish Constitution, campaigns in which socialists have played a prominent

role. In 2015 the *Thirty-fourth Amendment of the Constitution of Irelan*d led to the passing of the *Marriage Act 2015* which provides for same-sex marriage in Ireland. This was followed in 2018 by the *Thirty Sixth Amendment of the Constitution of Ireland*, which led to the passing of the Health (Regulation of Termination of Pregnancy) Act 2018, which permitted abortion in Ireland in certain circumstances. These successes have led many to argue that constitutional politics could provide the most promising terrain upon which the Radical Left in Ireland could carry out its struggles in relation to the housing crisis. Accordingly, an examination of the benefits of campaigning for the constitutional protection of the right to housing in Ireland is relevant both to those engaged in that immediate campaign, and to socialists who may become involved in other constitutional campaigns in the future. Of course, the legal and political dynamics will change from campaign to campaign. However more general issues, for example those pertaining to the symbolic significance of constitutional politics, or to the importance of being familiar with the dynamics of constitutional interpretation, may be relevant beyond the immediate issue of a right to housing. This particular case study therefore may generate lessons that could be applied to other constitutional campaigns in the future.

As was apparent from the outline provided above, this case study involves a variety of methodological approaches. It draws from the theoretical discussion in Chapter one related to liberal legalism and from the discussion regarding critiques of rights discourse carried out later in that chapter. The study also involves a degree of historical research, with the investigation into the drafting of *Bunreacht na hÉireann* and the social dynamics which existed during its formulation providing a basis for the subsequent discussion of the property rights and socioeconomic rights caselaw. The examination of this caselaw, along with a discussion of International human rights law and socioeconomic rights caselaw of other jurisdictions which takes place in Chapter seven, constitutes the doctrinal element of the research. This aspect of the thesis is important as it ensures that the subsequent discussion surrounding the benefits for socialists of engaging in a campaign to secure a constitutional right to housing, is based on an informed understanding of the dynamics of the legal interpretation of socioeconomic rights, and not on lazy assumptions about the motivations behind legal decision-making.

In Chapter five of the thesis, I will consider the occupation of Apollo House by Irish housing activists. In 2016 a coalition of housing groups took over an empty building in Dublin to protest against the homelessness crisis in the country. The building was owned by the National Assets Management Agency (NAMA), the 'bad bank' set up by the Irish

State to acquire the non-performing property loans of Irish banks following the 2008 financial crash. The activists occupied the building, setting up and running a functioning homeless shelter for a number of weeks. The occupation highlighted not only the homelessness crisis but the fact that, through NAMA, the State owned numerous vacant properties that, it was argued, could be used to ease the housing crisis or to provide community and cultural centres for the public. In the chapter I will provide some context to the occupation including background to the different groups involved, a timeline of the main events and an account of the main political discussions which emerged around the occupation.

This will be followed by an examination of the legal action to have the activists removed from the building. There were two hearings involved in the case. At the first the judge granted Mazars, a receivers' firm which controlled the property, an injunction to have the protestors removed but placed a stay on the injunction so that the activists did not have to leave for a number of weeks. I will discuss the arguments put forward by the different parties and the reasoning of the judge in both sets of proceedings. I will then provide an analysis of the political implications of the case for the activists. This will involve a discussion of the fact that the illegality of the protestors' actions was not the focus of attention in the media coverage of the event. It will also involve a discussion of Honor Brabazon's assertion that health and safety claims are increasingly used in legal actions against protestors in order to depoliticise moments of dissent. I will argue that such claims were used not only in legal action to remove the protestors but also in the political discussion which surrounded the occupation, with government politicians using such arguments to try and undermine the occupation. The analysis of the political implications of the legal action will then focus on the failure of the activists to criticise the court's decision to grant the injunction against them. I will argue that this was a mistake as the sense of objectivity associated with a judge's decision means that it is a powerful political tool. The judge's ruling therefore potentially undermined the actions of the activists and so needed to be challenged. I will then discuss the fact it was a receivers' firm that brought the legal action rather than NAMA. I will argue that the legal proceedings could have had a greater symbolic impact if the State had been obliged to bring the action to remove the protestors. Finally, I will draw some conclusions regarding the occupation.

The reason that the Apollo House occupation was chosen as a case study is that it allows an examination of the relationship between political activism and the law from several angles. For instance, the occupation resulted in an injunction being sought in the courts

to have the protesters ejected from the building. The activists involved were therefore faced with a choice. They could refuse to engage with the legal process which would likely result in the injunction being granted and would then possibly lead to the activists being forcefully ejected from the building. Alternatively, they could engage with the courts and present a legal argument which sought to persuade the court not to grant the injunction. The protestors chose the latter. As a result, the occupation provided an opportunity to study a defensive legal action in which the activists had to justify their actions in court. Accordingly, the chapter on Apollo House examines the argument crafted by the protest group and their legal team, the counterarguments put forward by the party seeking the injunction, and the reasoning of the judge in the case.

The occupation also provides the opportunity to examine the impact of the law outside the courtroom. The takeover of the Apollo House building by the activists constituted one of the most prominent protest events related to Ireland's ongoing housing crisis. Although there have been a number of other occupations and protests that have taken place in recent years, none have been of the same scale as the one undertaken by the Home Sweet Home group in terms of media profile and political impact. The event received extensive media coverage and consequently elicited a strong public response as well as comment from politicians. The coverage and attention were likely due the highly symbolic nature of the occupation, being that it tied the issue of homelessness to the 2008 financial crisis and the controversial political choices that were made in its aftermath. These choices have been central to the debates concerning the problems in the country's housing sector. The law played a central role in the public dialogue that surrounded the protest. The occupation therefore also provides an opportunity to investigate the way in which the law is utilised to influence public perception and to provide legitimacy to political arguments.

The primary methodological approach used in the chapter is documentary research. Newspaper coverage from a variety of national newspapers is the primary data source along with some material published by the activists. These sources enabled me to piece together a comprehensive timeline of events and to gather the various public pronouncements from the parties involved. This reliance on newspapers as the main data source allowed me to maintain a certain a degree of objectivity when carrying out the research. The analysis in the chapter focuses on the arguments made in court, and the impact that law had on how the protest was perceived by the general public. I therefore felt it would be useful, in my capacity as researcher, to maintain a certain distance from

the protestors, as my main object of focus was not on the perceptions of the protestors themselves, but on the way in which those outside the protest viewed the occupation. Of course, placing greater focus on the way in which the protestors themselves viewed the occupation, and their interaction with the legal system, would undoubtedly have proved fruitful. And it may be that future research could focus on this aspect of the occupation. However, I felt it best to maintain an objective distance from the protest group in order to carry out the research that is documented in this thesis.

In Chapter six of the thesis, I will provide an account of the legal practice of the Dublin Tenants Association, a tenants' support group of which I was a member. The group assisted tenants who were having difficulties with their rental accommodation. This work often involved members of the group helping tenants in bringing legal actions against their landlord or in resisting actions brought by the landlord against the tenant. These actions were heard by the Residential Tenancies Board, a government agency which adjudicates on disputes between landlords and tenants. In the chapter I will discuss the different activities of the group including its campaigning and policy work. However, the main focus will be on the legal practice of the group. I will discuss the different rationales for engaging in casework. These include having the opportunity to meet tenants who may be motivated to become involved in tenant activism, to gain knowledge of the legislative background to the housing sector in Ireland, and to gain legitimacy with the public by developing legal knowledge. The chapter will then consider the different benefits which came with engaging in legal practice. This includes helping tenants who were in difficulty, building relationship with tenants and gaining knowledge of the difficulties tenants in the private rental sector were facing. The bulk of the discussion in the chapter will consider the difficulties which came with engaging in legal practice. These difficulties will be investigated through an examination of the 'casework procedures' of the group, the regulations which the members developed in order to guide the group's legal practice. As difficulties arose these regulations were altered. Therefore, they provide a map of the different problems the group encountered. This will be followed by a theoretical analysis of the problems encountered, informed by the discussion in Chapter one.

This case study was chosen as it provided an opportunity to look at the interaction between activists and the legal system from a different perspective. In the Apollo House chapter, I examined a situation in which a group of activists were compelled to react to a set of legal proceedings brought against them, either by refusing to engage with them and facing forceful eviction, or, as they chose to, by defending against the legal action in court.

The chapter related to the Dublin Tenants Association provides the opportunity to investigate a different type of engagement as the Association actively sought to engage with the legal system as part of their political mobilisation.

It is important to note that the distinction here is not simply between defensive legal actions and offensive legal actions. The Association assisted tenants who were engaged in a dispute with their landlord. Often these disputes were resolved without recourse to the legal system. Occasionally they resulted in legal action being taken. Sometimes this legal action was defensive, in that it was the landlord that had initiated the action and the tenant was forced to engage with the legal process. Sometimes it was the tenant who decided to bring a case against their landlord. However, the Association, the activists as distinct from the tenants they assisted, had made a choice to incorporate legal practice their broader political strategy. In the Apollo House case study, the activists were compelled to engage with the law in a specific and narrow set of circumstances, an attempt to resist the imposition of an injunction which would likely bring an end to their political intervention. With the Tenants Association the decision to engage in legal practice was made deliberately as the activists felt that doing so might assist them in achieving their aims. The distinction then is between being compelled to engage with the legal system and choosing to incorporate legal practice as part of the group's activities. This allows a different set of dynamics to be investigated. Does the legal form have different effects when activists are choosing how to engage with it? Can negative effects be minimised? Can aspects of the legal form be utilised in ways that can assist activists in achieving their aims? The thesis aims to examine these questions.

The primary method of investigation in the case study is 'participant observation'. I was a member of the group prior to beginning the research for the thesis and was a member for the duration of the period covered in the chapter. This needs to be acknowledged. As noted, in the Apollo House study, I maintained a degree of distance from the protestors. Here, I was centrally involved in the protest group. My position within the group could potentially have significant consequences for how the subject matter of the case study was examined. In particular, the fact that I was involved with the group and had a particular interest in the topic of activist engagement with legal structures, may have impacted the research in a number of ways.

First, my interest in the topic may have led me to influence the direction of the group so that there was a greater focus on engaging in legal practice. It should be noted that the core rationales for engaging in legal practice had been formulated before I joined the

group and so I did not have any influence in that area. Second, it should be highlighted that the decisions of the group were reached through a democratic process. Although there was voting system in place if an agreement could not be reached this system was rarely needed, as a position on a particular topic was almost always found through consensus. Nevertheless, it should be acknowledged that I may have influenced the process of reaching that consensus and so I may have played a part in foregrounding legal practice in the activities of the group. Secondly, my interest in the topic may have impacted my perception of the importance of casework to the group's activities. Relatedly, my particular views about the utility of casework may dominate my analysis, potentially misrepresenting or neglecting the views of the group's other members. In order to counteract this, I conducted an interview with a founding member of the group in order to ascertain his views on the group's legal practice. This provided me with another perspective regarding the Association's legal work which I was able to incorporate into my analysis. Thirdly utilising participant observation allowed me to gain a level of insight that would have been difficult to obtain if I had not been a member of the groups. Although qualitative interviews can give a researcher a sense of the different dynamics at play in an activist group, participant observation enables a much deeper level of understanding of the group's ideology, motivations, and goals. As I have noted, this immersion can lead to issues related to perspective which need to be addressed. However, it can also provide a level of understanding that can enhance the research and analysis that is carried out.

The conclusion of the thesis will offer a brief recap of the different of theoretical, historical and doctrinal work set out in chapters one, two, three and four. It will also provide a summary of the main issues which emerged in the case studies. Finally, it will set out some concluding observations regarding the central research question.

II – Housing, Capitalism, and the Radical Left

In some ways it is obvious as to why struggles over housing and urban development are central to the projects of radical left and anti-capitalist activists. Capitalism is underpinned by a regime of property rights and struggles over housing and urban development can throw the inequities of the system into sharp relief. Housing is an arena of political contestation, the subject of ideological and political conflict, particularly class

antagonism.[1] Therefore it would seem an obvious area in which anti-capitalist activists should focus their attention. And yet, at a theoretical level and specifically within the Marxist canon the importance of urban and housing struggles was for a long period neglected. This is largely because, as Saunders has noted, Marx and Engels saw the urban question as being derivative of underlying capitalist relations, a reflection of them, rather than their cause and so accordingly the city did not for them form a discrete object of analysis.[2] This attitude can be seen in Engels work 'The Housing Question' where he describes the housing shortage seen in modern cities as a secondary problem to the exploitation of workers by their employers under the capitalist mode of production.[3] However, as Katznelson asserts, general capitalist processes not only take place in urban spaces but are intensified within them and therefore the city 'may itself become a constitutive element of these large social processes.[4] The city becomes intertwined with the larger web of capitalist relations. One must also note capitalism is not a static system. As it lurches from crisis to crisis, seeking to overcome its intractable contradictions, capitalism seeks new ways and new areas in which to extract profit and therefore different sectors of the system gain increasing or decreasing importance over time.

In the latter half of the twentieth century, with the rise of neoliberal capitalism, Marxist theorists began to note the increasing importance of real estate to the capitalist system, with Henri Lefebvre, David Harvey and Manuel Castells making particularly noteworthy interventions. For example, Lefebvre[5] and later Harvey[6] theorised the phenomenon of 'capital switching' through which real estate investment acts as a pressure valve by absorbing overaccumulated capital. And real estate has taken an even more central role in the capitalist system in recent decades. In the neoliberal era, rather than simply absorbing surplus value produced in other sectors of the economy, housing and urban development have increasingly become the means through which value is produced.[7] This

[1] David Madden & Peter Marcuse, *In Defense of Housing: The Politics of Crisis* (Verso 2016) 4.

[2] Peter Saunders, *Social Theory and the Urban Question* (2nd edn, Routledge 1986) 12.

[3] Friedrich Engels, 'The Housing Question' in *Marx and Engels Collected works* Vol. 23 (International Publishers 1988) 318.

[4] Ira Katznelson, *Marxism and the City* (OUP 1992) 7-8.

[5] Henri Lefebvre, *The Urban Revolution* (Robert Bonnono (tr), University of Minnesota Press 2003).

[6] David Harvey, *Limits to Capital* (2nd edn, Verso 1999).

[7] David Madden & Peter Marcuse, *In Defense of Housing: The Politics of Crisis* (Verso 2016) 8.

process has been aided by what Madden and Marcuse call the 'hypercommodification' of housing.[8] Housing commodification is the process whereby housing is treated primarily as a means of creating profit and serving the means of private capital, rather than as a social good.[9] Madden and Marcuse argue that this process has accelerated during the neoliberal period in which '…all the material and legal structures of housing – buildings, land, labor, property rights – are turned into commodities.'[10] This trend has been accompanied by several sub-processes all of which have become familiar in the neoliberal era of capitalism and all of which promote the treatment of housing as a commodity rather than a social good. Firstly, housing markets have been deregulated (or reregulated) and privatised in order to ensure their amenability to profit-making.[11] Regulations in planning, home finance and the rental sector are restructured to make investment in property more attractive. At the same time, publicly owned housing is sold off to private firms and individuals. Secondly, the housing market is subject to financialization, whereby financial markets and profit-driven corporations play an increasing role in the housing sector.[12] Thirdly, the housing market has become globalised, leading to a distancing between investor and the property that they own.[13] The results of this trend of hypercommodification, of deregulation, financialization and globalisation, were seen most acutely during the 2008 financial crisis which was kickstarted by the collapse of the US subprime mortgage market with reverberations in European housing sectors, most notably in Spain and Ireland.

It is within this context that housing activists have been operating and it is because of the central position that housing and urban development has taken within the regime of neoliberal capital accumulation that housing activism has become central to radical left organising. Therefore, these struggles should be understood as part of the larger

[8] David Madden & Peter Marcuse, *In Defense of Housing: The Politics of Crisis* (Verso 2016) 26.

[9] Emily Paradise Achtenberg & Peter Marcuse, 'The Causes of the Housing Problem' – in Rachel G. Bratt, Chester Hartman and Ann Meyerson (eds), *Critical Perspectives on Housing* (Temple University Press 1986) 4.

[10] David Madden & Peter Marcuse, *In Defense of Housing: The Politics of Crisis* (Verso 2016) 26.

[11] David Madden & Peter Marcuse, *In Defense of Housing: The Politics of Crisis* (Verso 2016) 28-31.

[12] UNGA, 'Report of the Special Rapporteur on Adequate Housing as a Component of the Right to an Adequate Standard of Living, and on the Right to Non-Discrimination in this Context' (18 January 2017) A/HRC/34/51 3.

[13] David Madden & Peter Marcuse, *In Defense of Housing: The Politics of Crisis* (Verso 2016) 34-35.

resistance to the commodification of social goods and the dismantling of the welfare state seen in the western world since the 1970s. However, this process of neoliberalisation has taken different forms in different countries. And since, as Mayer has noted the struggles of activists are shaped by the particular neoliberal policies they are reacting to[14] we must grasp the specific dynamics of the Irish housing sector and the processes of housing commodification which exist within it in order to understand the actions of activists and how interaction with legal structures may benefit their activities. It is this issue which we will turn to next.

III – Background to the Irish Housing Crisis

The era of neoliberal capitalism has had profound effects on Irish society, the Irish economy and the Irish housing sector. In terms of the latter the process of hypercommodification and its subprocesses deregulation & privatization, financialization and globalisation have all helped to contribute to a severe housing and homelessness crisis which has become one of the main political spaces around which Irish left activism has coalesced. The housing struggles of recent years have been, consciously or unconsciously, directly or indirectly, a reaction to this process. In order to properly theorise the actions of housing activists we must therefore examine the neoliberalising and commodifying processes which have been shaping Ireland's housing sector.

In order to understand housing in Ireland, the particular process of commodification it has experienced and the crisis it is now engulfed in, one must first grasp the extent to which homeownership was promoted by successive Irish governments who viewed it as the preferred mode of tenure.[15] Up until the 1980s it was the State itself that, through a system of mortgage grants and tax reliefs, took the lead role in providing for and funding the buying of homes. This led to Ireland having one of the highest rates of homeownership in western Europe in the latter half of the 20th Century.[16] However, in the 1980s recessionary pressures induced the State to withdraw from this traditional role[17]

[14] Margit Mayer, 'First World Urban Activism: Beyond Austerity Urbanism and Creative City Politics' (2013) 17(1) City 5.

[15] Conor McCabe, 'Sins of the Father: The Decisions that Shaped the Irish Economy' (2nd edn, The History Press Ireland 2013) 9-60.

[16] Michael Byrne, 'Generation Rent and the Financialization of Housing: A Comparative Exploration of the Growth of the Private Rental Sector in Ireland, the UK and Spain' (2020) 35(4) Housing Studies 743, 749.

and engendered the neoliberalisation and commodification of Ireland's housing sector. This process began with the deregulation of Ireland's mortgage market in the 1980s encouraging private providers to take over the role the State had previously played.[18] It was accompanied by a marketized approach to social housing with its provision through rent subsidisation in the private rental sector[19] and its privatisation through policies such as the tenant purchase scheme, whereby social tenants could buy their homes from the state at a reduced price. The 1980s also saw the abolition of rent controls in the private rental sector with the Irish Supreme Court ruling that the arbitrary nature of their application at the time was unconstitutional.[20]

The neoliberalisation of Ireland's economy was accelerated during the 1990s and 2000s, the 'Celtic Tiger' period. This stage of Irish capitalism saw the deregulation of sectors previously dominated by the State and the privatisation of state-owned companies.[21] This period also saw the deepening commodification of Ireland's housing sector with the emergence of a property bubble. The bubble was brought about by several factors including substantial population growth in the early 1990s which led to an increased demand for housing and an increase in economic growth and employment in the same period. But the biggest drivers were the neoliberal policies and accompanying processes which came to dominate Ireland's economy. The key factor was the availability of cheap credit caused by the earlier liberalisation of Ireland's mortgage market and by its entry into the EU.[22] This allowed would-be homeowners to easily obtain mortgage finance and encouraged speculative property buying, particularly in the buy to let sector. It also enabled developers to borrow huge amounts for construction projects[23] aided by tax incentive schemes such as the 1986 Urban Renewal Act which encouraged capital switching into construction and urban development.[24] These processes were accelerated in the context of a

[17] Eoin Ó Broin, 'Home: Why Public Housing is the Answer' (Merrion Press 2019) 48-49.

[18] Eoin Ó Broin, 'Home: Why Public Housing is the Answer' (Merrion Press 2019) 53.

[19] Cian O'Callaghan and Others, 'Topologies and Topographies of Ireland's Neoliberal Crisis' (2015) 19 (1) Space and Polity 31, 35.

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

[21] Cian O'Callaghan and Others, 'Topologies and Topographies of Ireland's Neoliberal Crisis' (2015) 19 (1) Space and Polity 31, 34.

[22] Michael Byrne, 'Generation Rent and the Financialization of Housing: A Comparative Exploration of the Growth of the Private Rental Sector in Ireland, the UK and Spain' (2020) 35(4) Housing Studies 743, 749.

[23] Michelle Norris & Dermot Coates, 'How Housing Killed the Celtic Tiger: Anatomy and Consequences of Ireland's Housing Boom and Bust' (2014) 29 Journal of Housing and the Built Environment 299, 306.

poorly regulated banking sector whose members became engaged in a lending war[25] fuelled by their ability to obtain credit from European Banks. The fact that these processes developed in the context of a corrupt and clientelist planning system further helped to fuel the boom.[26] The result was a massive increase in construction in the State. By 2007 Ireland was producing twice as many housing units per head of population than as any other European country.[27] The Celtic Tiger period saw a massive increase in both land prices which became the most expensive in Europe in 2005/2006,[28] and in house prices with the decade between 1996 and 2006 seeing an increase in nominal house prices of close to 300%.[29] It was a classic property bubble with house and land prices completely disconnected from their use-value.

By 2007 however, the bubble began to deflate, with house prices initially dropping due to the massive oversupply of housing seen during the boom period[30] and with the process accelerated by the 2008 global financial crash. In all from 2007 – 2011 there was a 46% drop in residential property prices.[31] The downturn in the property sector had massive implications. What is key to note is that both in the short and medium term the response of the Irish state has been to deepen its commitment to neoliberal policies[32] and to the hypercommodification of Ireland's housing sector. In the short-term the economic

[24] Cian O'Callaghan and Others, 'Topologies and Topographies of Ireland's Neoliberal Crisis' (2015) 19 (1) Space and Polity 31, 35.

[25] Rob Kitchin and Others, 'Placing Neoliberalism: The Rise and Fall of Ireland's Celtic Tiger' (2012) 44 Environment and Planning 1302, 1315.

[26] Rob Kitchin and Others, 'Placing Neoliberalism: The Rise and Fall of Ireland's Celtic Tiger' (2012) 44 Environment and Planning 1302, 1313-1315.

[27] Rob Kitchin and Others, 'Placing Neoliberalism: The Rise and Fall of Ireland's Celtic Tiger' (2012) 44 Environment and Planning 1302, 1308.

[28] Rob Kitchin and Others, 'Placing Neoliberalism: The Rise and Fall of Ireland's Celtic Tiger' (2012) 44 Environment and Planning 1302, 1308.

[29] Michael Byrne, 'Generation Rent and the Financialization of Housing: A Comparative Exploration of the Growth of the Private Rental Sector in Ireland, the UK and Spain' (2020) 35(4) Housing Studies 743, 749.

[30] Rob Kitchin and Others, 'Placing Neoliberalism: The Rise and Fall of Ireland's Celtic Tiger' (2012) 44 Environment and Planning 1302, 1310.

[31] Rob Kitchin and Others, 'Placing Neoliberalism: The Rise and Fall of Ireland's Celtic Tiger' (2012) 44 Environment and Planning 1302, 1310.

[32] Rob Kitchin and Others, 'Placing Neoliberalism: The Rise and Fall of Ireland's Celtic Tiger' (2012) 44 Environment and Planning 1302, 1319.

downturn post-2008 left many mortgage holders struggling to make repayments, developers defaulting on their loans and banks exposed and unable to pay back their international lenders. The response of the Fianna Fail led government was to guarantee the liabilities of and to recapitalize the Irish banks and then to relieve them of their toxic loans through the creation of the National Asset Management Agency (NAMA) and later the Irish Bank Resolution Corporation (IBRC). These actions ultimately led to Ireland requiring a bailout from the 'Troika', the European Commission, European Central Bank and the International Monetary Fund. The interests of the banks and developers were protected whilst those in mortgage default were left to fend for themselves and the public was obliged to foot the bill for the bank guarantee through years of subsequent austerity. In the medium-term several factors, whose roots are to be found in the 2008 property crisis, have led to the current housing crisis. First was the drop in rates of homeownership. This process had begun during the bubble with buy-to-let investors driving house prices out of the range of many would be homeowners.[33] After the crash a reduction in available credit coupled with years of underinvestment in social housing, meant that an increasing amount of would-be homeowners could not access mortgage credit and prospective social housing tenants were uncatered for. This led to an influx of new renters in the private sector. Despite the oversupply of housing during the property boom, much of this property has been left vacant in the years since the crash in line with market orthodoxies, and this, coupled with larger numbers of private renters and rising property prices has meant that the private rental sector has been unable to absorb the increased demand. The has resulted in skyrocketing rental prices. The rental market is regulated by the Residential Tenancies Act 2004 – 2020. It provides a relatively weak regulatory framework particularly in terms of security of tenure with landlords provided with ample circumstances in which they can evict tenants. Under the 2016 amendment to the Act a form of rent regulation was introduced which limited rent increases to 4% per year in designated parts of the country. It has had some effect on rental prices but was introduced long after the rents in the major urban conurbations had become unaffordable for many people. The combination of escalating rental prices and poor regulation has led to a massive increase in homelessness as thousands of families have been forced out of private rental accommodation.

[33] Michael Byrne, 'Generation Rent and the Financialization of Housing: A Comparative Exploration of the Growth of the Private Rental Sector in Ireland, the UK and Spain' (2020) 35(4) Housing Studies 743, 750.

Again, the solutions have been sought in the neoliberal economic canon, this time by the Fine Gael led governments of the 2010s. Their approach has involved a successful attempt to reinflate the property market, with house prices recovering dramatically after 2013 and the courting of international investors who have been invited to buy assets owned by NAMA and the IBRC, further financializing Ireland's housing sector.[34] This has led to a plethora of hedge funds, real estate investment trusts (REITs) and private equity firms entering the Irish housing market.[35] The ostensible aim of this government policy has been to boost supply in Ireland's overburdened private rental sector by encouraging private investment in the construction of new rental units and therefore helping to lower rental prices.[36] However, this strategy has failed as, unsurprisingly, investors motivated solely by profit have sought to build properties that will achieve the highest return, for example student accommodation and high end rental accommodation with little affordable rental units being built. The government strategy has therefore had little effect on prices. There are around 10,000 people currently homeless in the state. The government response to homelessness has been to place families in hotels, temporary 'family hubs' and transition centers none of which provide adequate living conditions.[37]
We can see therefore that the last forty years have seen an accelerating commodification of the Irish housing sector, through deregulation of credit markets, privatization of social housing and the financialization and globalization of the private rental sector. It is in this context that housing activism has developed in Ireland. The neoliberalising processes of the last forty years have given birth to a particular set of responses from activists. In response to growing homelessness, groups have attempted to provide accommodation for homeless people in order to highlight the crisis. Groups are working with private rental sector tenants helping them to resist eviction both through direct action and

[34] Rory Hearne, 'A Home or a Wealth Generator: Inequality, Financialisaton and the Irish Housing Crisis' – in James Wickham (ed), *Cherishing All Equally 2017: Economic Inequality in Ireland* (TASC 2017) 78.

[35] Michael Byrne, 'Generation Rent and the Financialization of Housing: A Comparative Exploration of the Growth of the Private Rental Sector in Ireland, the UK and Spain' (2020) 35(4) Housing Studies 743, 758.

[36] Rory Hearne, 'A Home or a Wealth Generator: Inequality, Financialisaton and the Irish Housing Crisis' – in James Wickham (ed), *Cherishing All Equally 2017: Economic Inequality in Ireland* (TASC 2017) 87.

[37] Rory Hearne, 'A Home or a Wealth Generator: Inequality, Financialisaton and the Irish Housing Crisis' – in James Wickham (ed), *Cherishing All Equally 2017: Economic Inequality in Ireland* (TASC 2017) 70.

through legal means. Activists have also campaigned for greater provision of social housing and affordable housing.

Having provided the background to the Irish housing crisis, I will now turn to theory. Chapter one will provide the theoretical and conceptual framework which will be used in order to analyse the case studies and to ultimately answer the central research question.

Chapter One – Socialist Engagement with Law: The Theoretical Vista

Introduction

This chapter will provide the theoretical framework within which the subsequent case studies will be examined. This theoretical structure will be grounded in Karl Marx's comments on law, in the work of subsequent Marxist legal theorists who have attempted to interpret Marx's comments and to develop them, and in certain concepts and approaches which were developed by the Critical Legal Studies Movement (hereinafter the latter will be referred to as critical legal theory). However, to begin with, the chapter will consider some of the central tenets of liberal legal thought, as many of the themes of Marxist and critical legal theory have been developed as a response to, and critique of, the liberal view of law's role in society.

Before beginning the discussion, it is necessary to dispose of a few preliminary issues which pertain to the study of Marxist legal theory. The first factor to be noted is the difficulty in identifying a definitive position which Karl Marx himself took in relation to law. This is due to the fact that Marx's analysis of the legal order and engagement with questions of law were fragmentary, emerging sporadically in different writings. He did not produce a comprehensive theory of law and therefore scholars have sought to develop such a theory by piecing together the relevant fragments found throughout his works.[38] Secondly, as Knox notes, Marx's views on law cannot be separated from his wider philosophical and political project.[39] Therefore, a basic understanding of his philosophical, and political outlook are necessary in order to provide context for his comments on law.

The chapter will therefore be divided into four major sections, with subsections in each. The first section will consider the liberal viewpoint on law. Section two will discuss some of Marx's philosophical and political positions. Here I will review his analysis of the public-private dichotomy which marks bourgeois society, and his comments about law

[38] Alan Hunt, 'Marxist Theory of Law', in Dennis Paterson (ed), *A Companion to Philosophy of Law and Legal Theory* (1st edn, Blackwell 2010) 356.

[39] Robert Knox, 'Marxist Approaches to International Law' in Anne Orford, Florian Hoffmann and Martin Clark (eds), *The Oxford Handbook of the Theory of International Law* (Oxford University Press 2016) 307.

and rights which emerge from this analysis. I will also consider his theory of historical materialism as it has provided the basis for subsequent theorisations of a Marxist approach to law. These theorisations will be discussed in the third section of the chapter, as will some of the theoretical developments which have emerged from critical legal theory. I will conclude by identifying some of the major concepts discussed in the chapter which will be of particular relevance when examining the different case studies discussed in the thesis.

I – Liberal Legal Theory

Liberal philosophy emerged as an expression of the ideas of the bourgeois revolutions which took place in Europe and North America in the 17th, 18th and 19th Centuries, and which swept away the despotic feudal regimes which had ruled previously. These ideas were developed, over time, into a coherent philosophy and political theory. This theory is based on a series of assumptions. First is the view that law is needed in order to maintain order in society. Liberal theory accepts the view, expressed by Thomas Hobbes in *Leviathan*[40] that, as humans we naturally live in a state of conflict. Thus, law is needed in order to regulate the relations between individuals. The view that law is needed in order to maintain social order implies the need for a centralised authority such as a state which can publish laws and ensure their enforcement. And liberal theory accepts this need for a centralised authority in order to prevent a 'state of nature'. However, liberalism asserts that such an authority needs to be controlled. This view is based on another assumption of liberal theory, the idea that freedom is best achieved by allowing individuals to go about their lives without interference from others. This approach to freedom is expressed in the term 'negative liberty'. Liberal political theory has translated this concept of negative liberty into the idea that government should be limited or restricted in the extent to which it can interfere in the lives of its citizens. Pursuant to this view, 'the only justification of government is its capacity to provide the conditions by which individuals can define their lives.' [41] Thus, liberalism envisages a government that is capable of enforcing order and guaranteeing the protection of individual citizens, but one that is also limited so that it cannot abrogate the liberal protections afforded to those citizens.[42] The translation of the

[40] Thomas Hobbes, *Leviathan* (Noel Malcolm (ed) Clarendon Press 2012).

[41] Richard S. Kay, 'American Constitutionalism' in Larry Alexander (eds), *Constitutionalism: Philosophical Foundations* (Cambridge University Press 1998) 19.

concept of negative liberty into a political theory also results in the latter taking a particular attitude towards private property. The ability to own property is seen as a corollary of being free and thus liberal political theory places special emphasis on the importance of private property.

Liberal legalism 'refers to a set of assumptions found within law and societies and regimes in which liberalism is the dominant political philosophy.'[43] It transcribes liberal ideas about social order, negative liberty, the regulation of government, and the importance of private property ownership, into a set of legal principles. I will describe the method through which this happens in more detail in Chapter two, where I will link liberal political and legal theory to the idea of a constitution. In terms of maintaining social order, liberal legalism advances the view that society should be governed by legal rules. This view is captured in the principle of the Rule of Law. Heywood defines the concept as,

> 'The principle that the law should 'rule' in the sense that it establishes a framework to which all conduct and behaviour conform, applying equally to all the members of society, be they private citizens or government officials.'[44]

The concept encompasses the idea that the most just way to regulate social relationships is to set out the 'rules of the game' in advance. When this is done, individuals can know whether a particular action they take is valid and so can predict the situations in which state institutions will interfere with their lives and those in which they will not.[45] Thus, social life is imbued with order and certainty. Liberal legalism therefore views law as a method of maintaining social order and ensuring negative liberty through the regulation of government power. A key aspect of this liberal conception of law is the idea of formal equality. I will discuss this idea throughout the chapter as it is the subject of intense critique by Marx and by Marxist and critical legal theorists. Put simply, formal equality expresses the idea that all should be treated equally before the law. In order for this to take place, individuals need to be considered apart from the specific socioeconomic contexts in which they live. The legal subject, the individual recognised by the law, is therefore an abstraction. As abstractions all individuals can be considered and treated

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[42] Russell Hardin, *Liberalism, Constitutionalism, and Democracy* (Oxford University Press 1999) 8.

[43] Rosemary Hunter, 'Contesting the Dominant Paradigm: Feminist Critiques of Liberal Legalism', *The Ashgate Research Companion to Feminist Legal Theory* (1st edn, 2013) 13.

[44] Andrew Heywood, *Politics* (3rd edn, Palgrave MacMillan 2007) 326.

[45] Richard S. Kay, 'American Constitutionalism' in Larry Alexander (eds), *Constitutionalism: Philosophical Foundations* (Cambridge University Press 1998) 23.

equally. Related to this notion of formal equality is the theory of judicial interpretation known as formalism, which is central to liberal understandings of law.[46] In order for individuals to be 'equal before the law', the legal rules need to be applied in an objective and fair manner. Since formal equality is based on an abstraction from material circumstances, these circumstances, or other political considerations cannot be considered when judges are applying legal rules to disputes between individuals. Legal formalism thus posits that when the judiciary are interpreting legal rules, and applying them to particular factual situations, they do so without having regard to political or ideological considerations. Conflict is resolved through the application of pre-defined, objective, rational legal rules to any given situation.[47] On this view, law is 'an autonomous and closed system whose development can be understood solely in terms of its internal dynamic'.[48] The journey from written law to legal outcome can be travelled without referring to any considerations exterior to the law. The judge considers the facts of a case and then selects and applies the objectively applicable rule to these facts, in order to deduce the correct legal judgment. Law is determinate in that it is the legal rule, as applied to the facts of the case, which determines the legal outcome, not any exterior political considerations.

Liberal legalism is thus the translation of liberal philosophy and political theory into a set of legal principles. It seeks to achieve order through the Rule of Law and ensures the protection of negative liberty through the regulation of government power and the protection of private property. It mediates relations between individuals by considering them as abstract legal subjects and by applying a set of objective rules, in a neutral manner, to moments of dispute between them. These concepts will be of relevance to my discussion of Marx's thought and the work of Marxist and critical legal theorists. They will also be relevant to the case studies which I investigate in the thesis.

II – The Philosophical, Political and Legal Thought of Karl Marx

As noted in the introduction to this chapter, in order to understand Marx's views on law, one must have a grasp of some of the main theoretical currents that run throughout his

[46] M.D.A Freeman, *Lloyd's Introduction to Jurisprudence* (Sweet & Maxwell 2001) 1046.

[47] Costas Douzinas, 'A Short History of the British Critical Legal Conference or, the Responsibility of the Critic' 25 (2) Law and Critique 188.

[48] Pierre Bourdieu, 'The Force of Law: Toward a Sociology of the Juridical Field (1987) 38 The Hastings Law Journal 814.

work. Two themes in particular are important for an understanding of the later development of Marxist legal theory. First, his early analysis of the separation between the public and private sphere which emerges in modern society. This will be discussed in subsection one. Subsection two will then consider Marx's theory of historical materialism, a concept which is essential to later Marxist theorisations about law.

II.A – Marx's Early Works

II.A.1 – Marx's Critique of Hegel and the Problem of the Public-Private Divide

The development of Marx's philosophical thought can be traced to his days as a student in Berlin. It was during this period that he began to engage with the work of the German philosopher, Georg Wilhelm Friedrich Hegel. Hegel belonged to the German idealist school. He emphasised the fundamental nature of consciousness and viewed the material world as being derivative of this consciousness. In *Phenomenology of the Mind*[49] he set out his concept of Universal Mind, sometimes call the Spirit or the Universal Idea, usually interpreted as meaning God.[50] This Universal Mind found particular manifestations of itself in the minds of individual human beings.[51] Hegel posited that individual minds were alienated from and in conflict with each other, unaware that they are actually part of a unity, the Universal Mind.[52] The historical progress towards freedom involved the overcoming of this opposition between individual minds and the realisation of the unity of the Universal Mind.[53]

Marx, along with a group of radical intellectuals known as the Young Hegelians began to engage with and critique the work of Hegel. One of these intellectuals, Ludwig Feuerbach, argued that Hegel was wrong in his assertion that human minds were derivative of the Universal Mind. Instead, he contended, the idea of Spirit was one created by human beings themselves.[54] In, *The Essence of Christianity*[55], Feuerbach used this critique of Hegel

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[49] Georg Wilhelm Friedrich Hegel, *The phenomenology of Mind* (James Black Baillie (tr) 2nd edn, Allen & Unwin 1949).

[50] Peter Singer, *Marx: A Very Short Introduction* (1st edn, OUP 2000) 17.

[51] Peter Singer, *Marx: A Very Short Introduction* (1st edn, OUP 2000) 18.

[52] Peter Singer, *Marx: A Very Short Introduction* (1st edn, OUP 2000) 18.

[53] Peter Singer, *Marx: A Very Short Introduction* (1st edn, OUP 2000) 18-20.

[54] Andrew Vincent, 'Marx and Law' (1993) 20(4) Journal of Law and Society 375.

to analyse religion, famously arguing for the interchange of subject and predicate – humanity is not derivative of God, God is derivative of humanity.[56] Thus, Feuerbach had turned Hegel's idealism on its head by emphasising the precedence of material human beings over the thoughts they produce. This insight had a profound impact on Marx, who used it in the development of his materialist philosophy.

The influence of Feuerbach's critique can be seen in Marx's *Critique of Hegel's Doctrine of the State*[57], written in 1843. The *Critique* was a paragraph-by-paragraph response to Hegel's *Philosophy of Right*[58], a work which analysed the nature of the modern state. Hegel identified a separation in modern society between the private and public spheres. Unlike the feudal period in which a person's political status was directly determined by their position in civil society, the modern bourgeois state was marked by a separation between (in the gendered language of the time) man as private individual and man as political citizen. In this state of affairs there is no link between a man's private status and his political status, the two are seen as distinct.[59] In the private sphere man acts egoistically. He focuses solely on furthering his own individual interests and treats other as a means to realise these interests. The political citizen, on the contrary, is interested in promoting the general interest of society. Hegel argued that freedom can only be achieved if the antagonisms and conflict associated with private egoism within civil society finds reconciliation with the general interest associated with the state.[60] Using a similar schema to that which he used in *Phenomenology of the Mind*, Hegel posited that the state, as an ideal or ethical principle, which he identified with reason, freedom and morality, was logically prior to civil society.[61] The state was pure rationality. The man of civil society was a limited manifestation of this rationality. For Hegel the reconciliation of private interests with the general interest came about because private man is rational, and so could discern that

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[55] Ludwig Feuerbach, *The Essence of Christianity* (first published 1854, Cambridge University Press 2012).

[56] Andrew Vincent, 'Marx and Law' (1993) 20(4) Journal of Law and Society 376.

[57] Karl Marx, 'Critique of Hegel's Doctrine of the State' in Rodney Livingstone and Gregor Bents (trs), *Karl Marx: Early Writings* (Penguin 1975).

[58] G.W.F Hegel, *Philosophy of Right* (Sir Thomas Malcolm Knox (ed), first published in 1896, OUP 1952).

[59] C.J. Arthur, 'Editor's Introduction' in C.J Arthur (ed) *The German Ideology* (Students Edition, Lawrence & Wishart 1970) 6.

[60] David McLellan, *Marx Before Marxism* (2nd edn, Penguin 1972) 145.

[61] Sidney Hook, *From Hegel to Marx* (University of Michigan 1972) 21.

freedom is found by following universal rational principles.[62] He would therefore allow his private interests to be subordinated to, though not transcended by the general interest.[63]

In his *Critique of Hegel's Philosophy of Right*, Marx acknowledged this separation in modern society between private interest and the general interest. He asserted that this separation leads to the alienation of man as two parts of his being; his individuality and communality are separated. He therefore agreed with Hegel that this contradiction needed to be overcome. For Marx, however, Hegel's attempt at resolving the contradiction had failed. He argued that Hegel was wrong in his assertion that the private man of civil society was a predicate of the ethical ideal of the State. Instead, employing the Feuerbachian inversion of subject and predicate, Marx asserted that the true subject was civil society, and the derived predicate was the abstract man of the state. Since civil society was the realm of the real subject, and the state, as an ideal, was simply the realm of man abstracted from himself, the former would never be subordinate to the latter. Instead, the ideal of the state existed only as a reflection of civil society. Therefore, the dynamics and inequalities of the private sphere, represented by private property, would necessarily be reproduced at the state level.

II.A.2 – The Public-Private Dichotomy & Law – On the Jewish Question

Marx continued this examination of the dichotomy between the private and public sphere in his 1844 work, *On the Jewish Question*.[64] In the essay, which is frequently cited as a key text for understanding Marx's attitude towards bourgeois legality, two broad points are made. First, Marx highlighted the fact that the political freedoms guaranteed by the modern state were limited. Secondly, he reasserted his argument that the general interest protected by the political state would always be subordinate to the private interests of civil society. Marx developed his first point through a critique of the idea of political emancipation, that is, the civil and political freedoms guaranteed by the modern state to

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[62] C.J. Arthur, 'Editor's Introduction' in C.J Arthur (ed) *The German Ideology* (Students Edition, Lawrence & Wishart 1970) 6.

[63] C.J. Arthur, 'Editor's Introduction' in C.J Arthur (ed) *The German Ideology* (Students Edition, Lawrence & Wishart 1970) 6.

[64] Karl Marx, 'On the Jewish Question' in Robert C. Tucker (ed), *The Marx-Engels Reader* (2nd edn, Norton & Company 1978).

its citizens. Marx characterised this form of emancipation as an improvement on the arbitrary rule of feudal regimes but argued that it constituted only a limited form of freedom. Political emancipation was limited because the political equality guaranteed by the modern state did not extend to the private sphere. Political equality was achieved by abstracting away from the material inequalities of civil society. Consequently, these inequalities remained untouched. Marx elucidated this point through a discussion of the work of Bruno Bauer, one of the Young Hegelians. Bauer had argued that the emancipation of Jewish people, who were denied voting rights by the Prussian state, would be achieved if religion were abolished politically, if the state became a secular state. Marx rejected this approach stating that, '[t]he limits of political emancipation appear at once in the fact that the state can liberate itself from a constraint without man himself really being liberated; that a state may be a free state without man himself being a free man.'[65] Marx highlighted the fact that, in North America, where there was complete political emancipation, religion still existed in the private sphere.[66] Religion could therefore be abolished at state level but would continue to exist in civil society. Likewise, property could be abolished politically, by removing the property qualifications connected to voting rights and the right to enter political life. However, this would not mean that private property was in fact abolished. Therefore, political emancipation, the formal political equality guaranteed by the bourgeois state had no effect on the material inequalities present in civil society.

Marx also reasserted the argument he made in *Critique of Hegel's Philosophy of Right*, namely that the general interest, protected in the political sphere, would always be subordinate to the private interests of civil society. This subordination of the public to the private was a result of the fact that, in bourgeois society, man as a member of civil society, as a private self-interested being, appears as the natural form of man.[67] Man, as communal being is relegated to the notion of abstract citizen, his political and social existence separated from his real existence. Thus, the interests of the 'authentic' man of civil society are prioritized over those of the abstract citizen of civil society. Marx elucidated his position through a

[65] Karl Marx, 'On the Jewish Question' in Robert C. Tucker (ed), *The Marx-Engels Reader* (2nd edn, Norton & Company 1978) 32.

[66] Karl Marx, 'On the Jewish Question' in Robert C. Tucker (ed), *The Marx-Engels Reader* (2nd edn, Norton & Company 1978) 31.

[67] Karl Marx, 'On the Jewish Question' in Robert C. Tucker (ed), *The Marx-Engels Reader* (2nd edn, Norton & Company 1978) 46.

discussion of the rights contained in the French Declaration of the Rights of Man and the Citizen and in the constitutions of the states of North America, and in doing so, provided some insight into his early analysis of law and rights. Marx pointed to a distinction that could be made between what he called the 'Rights of Man' and the Rights of the Citizen'.[68] The distinction reflected the aforementioned dichotomy between civil society and the political sphere. The Rights of the Citizen were civil and political rights. They enabled participation in political life and could only be exercised in community with others. Marx counterposed these participatory rights with the Rights of Man. These were the rights of the 'egoistic' man of civil society who viewed others as means, and who sought to separate himself, as far as possible, from the rest of society.[69] Chief amongst these was the right to liberty. This was conceived of as negative liberty, the right of man be free of the influence of others, to separate himself from society. For Marx, a logical extension of the right to liberty was the right to private property, the right to dispose of one's fortune without regard for the rest of society. He also identified the right to security as a sort of guarantee of protection of the other Rights of Man. Since the political citizen was mere abstraction, whilst the man of civil society was viewed as authentic, the rights associated with the former were viewed as subordinate to those of the latter. Therefore, for Marx, the distinction between the Rights of Man and the Rights of the Citizen and the relationship between the two sets of rights was simply a reflection of the separation of the private and public spheres in modern society, and of the subordination of the general interest to the private interest.

For Marx, man could not be fully emancipated until this separation of his two modes of being was undone, when the separation between private interests and the general interest was abolished.[70] When this happened, political emancipation would give way to a more complete form of 'human' emancipation.

> 'Human emancipation will only be complete when the real, individual man has absorbed into himself the abstract citizen; when as an individual man, in his everyday life, in his work, and in his relationships, he has become a species being;

[68] Karl Marx, 'On the Jewish Question' in Robert C. Tucker (ed), *The Marx-Engels Reader* (2nd edn, Norton & Company 1978) 41.

[69] Karl Marx, 'On the Jewish Question' in Robert C. Tucker (ed), *The Marx-Engels Reader* (2nd edn, Norton & Company 1978) 42.

[70] Karl Marx, *On the Jewish Question* in Robert C. Tucker (ed) *The Marx-Engels Reader* (2nd edn, W.W Norton & Company 1978) 32.

and when he has recognised and organised his own powers as social powers so that he no longer separates this social power from himself as political power.'[71]

At this stage of Marx's intellectual development, his answer to this problem of alienation is the dissolution of the modern state and its replacement with 'true democracy'. The latter concept is not fully developed by Marx in his critique of Hegel or in *On the Jewish Question,* but it involves the dissolution of the modern state and the reorganisation of society in a way that allows for complete human emancipation in which the division between private man and abstract citizen is transcended.

Marx's comments on political emancipation and the emergence of legal rights in *On the Jewish Question* give us an insight into his early understanding of law. The essay can be read as a discussion of the emergence of law as the organising principle of bourgeois society.[72] In this society, with the separation of the private sphere from the public realm, relations between individuals are no longer determined by private status, but instead are mediated by the state through the legal system. Marx criticises this state of affairs as the egoism of civil society, protected by the system of private property, is able to impact and dominate the public sphere. The abstract rights of political citizens are subordinate to the private rights of man in civil society. The general interest is subordinate to private interests. Marx therefore sees a connection between the public-private divide which characterises bourgeois society, and law, as the latter protects the interests of private man. In *The German Ideology,* Marx and his long-time collaborator, Friedrich Engels make a more explicit connection between this legal protection of the private sphere and private property.[73] Here, they explain that the modern bourgeois state emerged simultaneously with the development of private property. As communal property increasingly fell into the private hands of the bourgeoisie, they developed the state in order to ensure 'the mutual guarantee of their property and interests.'[74] The modern legal system also develops

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[71] Karl Marx, 'On the Jewish Question' in Robert C. Tucker (ed), *The Marx-Engels Reader* (2nd edn, Norton & Company 1978) 46.

[72] Robert Knox, 'Marxist Approaches to International Law' in Anne Orford, Florian Hoffmann and Martin Clark (eds), *The Oxford Handbook of the Theory of International Law* (Oxford University Press 2016) 309.

[73] Karl Marx and Friedrich Engels, 'The German Ideology' in Robert C. Tucker (ed) *The Marx-Engels Reader*
(2nd ed, W.W Norton & Company 1978) 187.

[74] Karl Marx and Friedrich Engels, 'The German Ideology' in Robert C. Tucker (ed) *The Marx-Engels Reader*
(2nd ed, W.W Norton & Company 1978) 187.

contemporaneously with this increase in private property ownership and is the tool used to safeguard the property rights of the bourgeoisie.

II.B – The Development of Marx's Materialist Conception of History

II.B.1 – Foundations

Before considering Marx's development of his theory of historical materialism we must also note a contemporaneous shift in Marx's philosophical outlook, outlined in his *Theses on Feuerbach*[75]. As I have noted, Marx broke with the Hegelian tradition after adopting Feuerbach's subject-predicate inversion. However, in the *Theses* Marx argued that Feuerbach had not gone far enough. Feuerbach's critique, Marx argued, lacked a practical element. He stated that, 'The chief defect of all hitherto existing materialism (that of Feuerbach included) is that the thing, reality, sensuousness, is conceived only in the form of the object or of contemplation, but not as sensuous human, activity, practice, not subjectively.'[76] Marx was arguing that Feuerbach, despite introducing a material element into his analysis, was still operating in the realm of mental abstraction.[77] What was needed was the insertion of the practical activity of human beings into this critique. Marx noted that 'Feuerbach resolves the religious essence into the human essence. But the human essence is not abstraction inherent in each single individual. In its reality it is the ensemble of the social relations.'[78] In order to critique religion, it was not enough to simply highlight that religion was created by human beings. One also had to understand why this creative act took place. The answer to this was to be found by examining the practical activities of human themselves and the relations which existed between them.[79] These philosophical insights would influence the next development in Marx's thinking, the concept of historical materialism.

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[75] Karl Marx, 'Theses on Feuerbach' in in C.J Arthur (ed) *The German Ideology* (Students Edition, Lawrence & Wishart 1970).

[76] Karl Marx, *Theses on Feuerbach* in C.J Arthur (ed) *The German Ideology (Students Edition)* (Lawrence & Wishart 1974) 121.

[77] Andrew Vincent, 'Marx and Law' (1993) 20(4) Journal of Law and Society 371, 376.

[78] Karl Marx, *Theses on Feuerbach* in C.J Arthur (ed) *The German Ideology (Students Edition)* (Lawrence & Wishart 1974) 121, 122.

[79] Andrew Vincent, 'Marx and Law' (1993) 20(4) Journal of Law and Society 371, 376.

II.B.2 – Historical Materialism

Although first outlined in *The German Ideology*, Marx's most succinct explanation of his theory of historical materialism was provided in the *Preface to a Contribution to the Critique of Political Economy*.[80] In the *Preface* Marx argues that humans reproduce themselves by interacting with the material world. In this process of interaction humans enter into relations with one another, what Marx calls 'relations of production'.[81] The precise nature of these relations is dependent upon the development of the productive forces, i.e. the material or natural resources available and the efficacy of the technologies used to exploit them.[82] Marx states that 'the sum total of these relations of production constitute the economic structure of society, the real foundation, on which rises a legal and political superstructure to which correspond definite forms of consciousness.' [83] Thus, for Marx, the economic structure of society, the relations of production, give rise to a particular form of consciousness in humans. This consciousness gives rise to specific legal and political institutions. Legal and political ideas are therefore conditioned by the underlying relations of production.

Marx goes on to describe how society develops from one stage to the next. He states that at a certain point, at 'a certain stage of their development, the material productive forces of society come in conflict with the existing relations of production.' [84] He continues, 'from forms of development of the productive forces these relations turn into their fetters.' [85] In other words, the productive forces, the technologies used to exploit natural resources are continually being developed. At a certain point the existing relations of production are not suited to the new technological developments and instead impede

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[80] Karl Marx, 'Preface to A Contribution to the Critique of Political Economy' in Robert C. Tucker (ed) *The Marx-Engels Reader* (2nd ed, W.W Norton & Company 1978).

[81] Karl Marx, 'Preface to A Contribution to the Critique of Political Economy' in Robert C. Tucker (ed) *The Marx-Engels Reader* (2nd ed, W.W Norton & Company 1978) 4.

[82]Karl Marx, 'Preface to A Contribution to the Critique of Political Economy' in Robert C. Tucker (ed) *The Marx-Engels Reader* (2nd ed, W.W Norton & Company 1978) 4.

[83] Karl Marx, 'Preface to A Contribution to the Critique of Political Economy' in Robert C. Tucker (ed) *The Marx-Engels Reader* (2nd ed, W.W Norton & Company 1978) 4.

[84] Karl Marx, 'Preface to A Contribution to the Critique of Political Economy' in Robert C. Tucker (ed) *The Marx-Engels Reader* (2nd ed, W.W Norton & Company 1978) 4.

[85] Karl Marx, 'Preface to A Contribution to the Critique of Political Economy' in Robert C. Tucker (ed) *The Marx-Engels Reader* (2nd ed, W.W Norton & Company 1978) 4-5.

their efficient utilisation. This leads to a revolution in which those who would most benefit from the effective application of the new productive forces struggle to actualise a new set of property relations which better suits the new mode of production. If the revolution is successful and the new relations of production become established, new forms of consciousness develop and with them a new legal and political superstructure. It is the transformations in the material 'economic base' which determine the new forms of consciousness and new superstructure.[86] Marx sets out the historical development of the modes of production: Asiatic, ancient, feudal and bourgeois, with the latter being the final 'antagonistic form' of this social process, which will be followed by a mode of production in which the potential for conflict between forces of production and relations of production no longer exists.[87] This new mode of production will be Communism.

II.B.3 – Interpreting Marx's Theory of Historical Materialism

Marx's theory of historical materialism is often explained through the base-superstructure metaphor. The economic 'base' consists of the forces of production and the relations of production which they give rise to. The 'superstructure' is the legal and political institutions and ideas which emerge as a result of these relations of production. Debate has arisen as to the exact nature of the relationship between the 'base' and the 'superstructure'. At the philosophical level the debate is whether Marx's theory implies a strict materialism or one which allows for an interaction between materiality and ideas. Does the theory of historical materialism imply a one-way relationship between the material world and consciousness, or can humans reflect upon the material world and thus change it? As I noted above, Marx moved away from the idealism of Hegel and other German idealists towards the view that material conditions are prior to and are the foundation of our consciousness.[88] However, in the *Theses on Feuerbach,* he discussed the interactivity between people, their ideas, and the material world. The first view can be termed 'unidirectional materialism' and is often associated with Engels and later Marxist theorists such as Karl Kautsky and Georgii Plekhanov.[89] It puts forward a somewhat

[86] Karl Marx, 'Preface to A Contribution to the Critique of Political Economy' in Robert C. Tucker (ed) *The Marx-Engels Reader* (2nd ed, W.W Norton & Company 1978) 5.

[87] Karl Marx, 'Preface to A Contribution to the Critique of Political Economy' in Robert C. Tucker (ed) *The Marx-Engels Reader* (2nd ed, W.W Norton & Company 1978) 5.

[88] Andrew Vincent, 'Marx and Law' (1993) 20(4) Journal of Law and Society 371, 379.

[89] Andrew Vincent, 'Marx and Law' (1993) 20(4) Journal of Law and Society 371, 379.

fatalistic view of human consciousness, helpless to the influence of the material world around us. The second interpretation is informed by Marx's notion of Praxis, the interdependent relationship between theory and practice. Our thought and reflection can inform our interactions with the material world and these actions can transform that world.

This debate is reproduced at the level of political economy. What is the relationship between economic forces and political and legal ideas? Can the latter react back upon the economic base and cause its transformation? The view associated with the unidirectional materialism discussed above is known as economic determinism. It posits that economic forces are determinative of political and legal structures, which have little or no agency in terms of their relationship with the economic base. It implies that political struggle cannot transform economic structures until the development of the productive forces requires such transformation.[90] The second, interactive viewpoint, again posits a more symbiotic relationship between the economic forces and political and legal ideas, suggesting that the latter can be used to impact the former. We will discuss what this divide in Marxist theory means in terms of viewpoints on law in the next section.

III – Marxist & Critical Theories of Law

Introduction

Marx's theory of historical materialism has also led to the development of a number of Marxist theories of law. Critical legal theories have also been heavily influenced by the base-superstructure metaphor even if commonly they reject its utility as an analytical tool. Much of the debate surrounding the different Marxist approaches to law has centered around the correct reading of the base-superstructure metaphor. Theorists have sought to identify the mechanism by which the economic base determines the legal superstructure. There have also been debates around the level of interactivity between economic forces and legal ideas, noted in the previous section. I will discuss a number of these theories in the following pages. I will also comment on some of the main concepts which have emerged from critical legal theory. However, it is important to note that my discussion is limited to identifying general trends in these areas. It is beyond the scope of this thesis to discuss the different variations which exist, in detail. The aim is merely to

[90] Bob Jessop, *The Capitalist State* (Martin Robertson Oxford 1982) 11.

draw out some of the main analytical insights from these theories, which may be useful in examining the different case-studies.

III.A – Crude Materialism & Class Instrumentalism

The first theory relies on a particularly strict reading of the base-superstructure metaphor. It is reflective of the unidirectional account of Marx's materialism and the 'economic determinism' described in the previous section. This 'crude materialist' [91] account of law posits that legal relations are merely reflections of economic relations. The former therefore directly determine the latter. There is a strict causal relationship between the economic structures in society and the content of law.[92] According to this theory legal ideas have no independence from the economic base and are incapable of influencing it. Hugh Collins argues that Engels, at least for a time, seemed to promulgate this view. However, he states that this theory of law has 'been abandoned by leading Marxist theorists'.[93] He cites its inability to explain how the base determines the superstructure,[94] and its failure to account for the different functions of law which seem independent from economic concerns, as defects in the theory.[95]

The second theory, or set of theories, can be termed as 'class instrumentalist' accounts of law. This view of law is commonly identified with the work of Lenin. It can be traced to Marx's comments in *The German Ideology* and elsewhere regarding the emergence of the state and law as instruments of the bourgeoisie, used in order to safeguard their private property interests. Law is therefore seen as a class-based phenomenon.[96] It is determined by economic forces, but this determination is mediated through the capitalist class who utilise law as an instrument of class rule. Law therefore is not an automatic or direct reflection of the economic base, but helps to reproduce the underlying economic relations in society, as it is utilised by the class which benefits from the structure of these relations,

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[91] This is the term Hugh Collins uses to describe the theory in, Hugh Collins, *Marxism and Law* (OUP 1984) 23.

[92] Alan Hunt, 'Marxist Theory of Law', *A Companion to Philosophy of Law and Legal Theory* (1st edn, Dennis Paterson 2010) 359.

[93] Hugh Collins, *Marxism and Law* (OUP 1984) 23.

[94] Hugh Collins, *Marxism and Law* (OUP 1984) 24-25.

[95] Hugh Collins, *Marxism and Law* (OUP 1984) 23.

[96] Andrew Vincent, 'Marx and Law' (1993) 20(4) Journal of Law and Society 371, 384.

in order to maintain the status quo.[97] The theory again sees little opportunity for the law to influence the economic base, or at least for subordinate classes to utilise it in this manner. The law is used to strengthen class rule, and therefore to protect the underlying relations of production which the capital class benefit from.

Up until the 1970s, class instrumentalist theories of law generally emphasized the coercive aspect of the legal system.[98] Law was characterised as an oppressive instrument of class power which enables economic elites to dominate the other classes in society. However, later versions of this theory have also focused on the ideological aspect of law, viewing the legal system as one based on coercive force, but 'legitimised by the operation of ideals such as "justice" which disguise the process of domination.'[99] Law is therefore an instrument of legitimation. These later theories are based on the insight that the instrumentalization of the state by the bourgeoisie becomes obscured over time. Therefore, the state begins to appear as though it exists independently of the class structures in society. Instead, it seems to represent the general interest. Law has a central role to play in this obfuscation of the real power relations in society.[100] It is used as an ideological cloak which operates to obscure the fact that state power is actually wielded by the ruling class. In doing so, it helps to legitimise this power. This obfuscation is aided by the liberal conception of legal subjectivity.[101] In section one of this chapter I discussed the liberal legal notion of formal equality, the idea that all are equal before the law. The elision of material context which is inherent in the concept of formal equality helps to obscure the fact that the function of law is to help ensure the socioeconomic status quo. Law, through the idea of formal equality helps to create a sense of justice and fairness as all are judged by the same standards. However, it is in fact functioning to ensure that the system of private property upon which capitalism is based is reproduced.

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[97] Hugh Collins, *Marxism and Law* (OUP 1984).

[98] Maureen Cain and Alan Hunt, *Marx & Engels on Law* (Academic Press 1979) x.

[99] Julian Webb, 'A Progressive Critique? The Contribution of Critical Legal Scholarship to a Marxist Theory of Law' (1985) 19(2) The Law Teacher 98, 98.

[100] Maureen Cain, 'The Main Themes of Marx' and Engels' Sociology of Law' (1974) 1(2) British Journal of Law and Society 142.

[101] Maureen Cain, 'The Main Themes of Marx' and Engels' Sociology of Law' (1974) 1(2) British Journal of Law and Society 142.

We can see an example of this class instrumentalist approach, one which demonstrates the ideological aspect of law, in the work of Steven Lukes.[102] Lukes has used the approach to argue that Marxists should not view rights as a potential tool of emancipation. In his essay he begins by identifying the common view of rights as moral norms. They represent basic ideas about human nature and human needs.[103] As such they are presented as being universal and trans-historical. However, he argues that Marx did not view rights in this way. According to his theory of historical materialism the ideas of the ruling class in society are expressions of the relations of production of that society, which in turn express the logic of the underlying mode of production from which that class benefits. These ideas, often expressed in the form of moral norms such as rights, were therefore conditioned by, and assumed the legitimacy of that mode of production. Further, they promote behaviour which was consistent with maintaining its continued existence. However, such norms are presented as being universal, as expressing the interests of the whole of society, and as constraining the behaviour of all who live under that mode of production. Therefore, moral claims, including rights, are nothing more than ideological legitimations of the prevailing economic structure of society and the rule of the dominant class.[104]

Lukes identified a further way in which rights benefit the interests of the capitalist class. He argued that the idea of a rights-based system is predicated on the view that human life is inherently conflictual due to a scarcity of resources and the resultant competition between individuals to survive.[105] Rights are thus supposedly needed in order to maintain order. Lukes asserts that Marxism is based on the view that human life is not inherently conflictual but that conflict results from the fact that capitalists exploit workers. Two things result from the pre-eminence of the view that life is inherently conflictual. First, the promotion of the view that rights abuses occur naturally due to humanity's predicament and human nature, rather than due to the structural imperatives of capitalism. Second, conflicts are superficially resolved in a way that seems to be progressive, but which fails to deal with the underlying structural problems which cause

[102] Steven Lukes, 'Can a Marxist Believe in Human Rights?' (1981) 4 Praxis International 334.

[103] Steven Lukes, 'Can a Marxist Believe in Human Rights?' (1981) 4 Praxis International 334, 336.

[104] Steven Lukes, 'Can a Marxist Believe in Human Rights?' (1981) 4 Praxis International 334, 341-342.

[105] Steven Lukes, 'Can a Marxist Believe in Human Rights?' (1981) 4 Praxis International 334, 342-344.

the abuses. As a result, the structural coordinates of capitalism are left untouched, and the system perpetuated.

III.B – The Relative Autonomy of Law

Another set of Marxist theories of law imagine an even greater distance between the economic base and law. They are described as allowing the state and law a 'relative autonomy' from underlying economic relations. Pursuant to this thesis, the determining effect of the economic base is 'conceived of as a mechanism whereby "limits" are set within which variation may be the result of causal forces other than the economic structure'.[106] Therefore, political or ideological factors may play a role in determining the content of law. Hugh Collins provides one account of this theory in his work *Marxism and Law*.[107] In his version, law is still an instrument used by the capitalist class to further its interests. However, Collins argues against a conspiratorial account of the coherence of those interests.[108] Instead the capitalist class retains a common outlook due to a shared ideology, one which develops in correspondence to the position that capitalists take up in relation to the forces of production. Legal content is determined by this shared ideology.[109] The link between the economic base and law is therefore mediated, not only by the interests of the capitalist class, but those interests expressed through an ideology. This allows space for other factors, political and ideological to impact the formulation of legislation and the way in which the judiciary makes decisions. Therefore, progressive legislation may be enacted in response to political agitation, or a judge may make a decision which goes against the interests of a section of the capitalist class. However, the autonomy of the legal system is limited. The ideology of the capitalist class ensures that the overall coherence of the capitalist system is maintained. Legislation will not be enacted which challenges the underlying structure of capitalist accumulation, nor will legal decisions lead to a genuine challenge to the capitalist order.

Another theorist who has put forward a 'relative autonomy' account of law is Nicos Poulantzas.[110] Poulantzas rejected both crude materialist and class instrumentalist

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[106] Alan Hunt, 'Marxist Theory of Law', *A Companion to Philosophy of Law and Legal Theory* (1st edn, Dennis Paterson 2010) 359.

[107] Hugh Collins, *Marxism and Law* (OUP 1984).

[108] Hugh Collins, *Marxism and Law* (OUP 1984) 41.

[109] Hugh Collins, *Marxism and Law* (OUP 1984) 43.

accounts of law.[111] Instead his structuralist account understands the legal system as part of a wider totality of structures which combine to ensure the reproduction of capitalist relations. However, I would like to focus on another set of theorists, influenced by the ideas of Antonio Gramsci, who put forward a version of the relative autonomy thesis which not only eschewed the ideas that the base strictly determined the legal superstructure, but who further suggested that legal ideas may influence and shape economic relations. Of these theorists, the work of E.P Thompson is probably best known. Thompson was one of a group of historians associated with the University of Warwick who studied the development of the law in 18th century England.[112] In *Whigs and Hunters,* he gave an account of the *Black Act,* a notorious piece of legislation which was used to punish criminals who committed offences against private property. After discussing the history of the act, Thompson provided some reflections on the nature of law. He accepted that law was instrumentalised by the ruling class in order to protect its private property.[113] He also acknowledged that law functioned to mystify class rule.[114] However, he argued that it was a mistake to reduce law to these functions. He asserted that law is a form through which class relations are expressed and legitimised. But this form also has its own logic which exists independently of class rule.[115] This independent logic is concerned with achieving just and equitable outcomes through the application of logical criteria. As a result, law will sometimes actually produce just outcomes which are independent of the will of the ruling class. If it did not, he argues, it would not be of use as a legitimating ideology. Thompson therefore presents law as an instrument which the ruling class has sought to utilise, but which is not under the total control of that class. In fact, law could act as a restraint on the ruling classes who were obliged, to a certain extent

[110] Nicos Poulantzas, *Political Power and Social Classes* (New Left Books: London 1973), Nicos Poulantzas, *State. Power. Socialism.* (New Left Books 1978).

[111] Bob Jessop, 'On Recent Marxist Theories of Law, the State and Juridico-Political Ideology' (1980) 8 International Journal of the Sociology of Law 339, 351.

[112] Douglas Hay and others, *Albion's Fatal Tree: Crime and Society in Eighteenth-Century England* (Verso 2011).

[113] E.P. Thompson, *Whigs and Hunters: The Origin of the Black Act*, (Penguin 1990) 207 & 259.

[114] E.P. Thompson, *Whigs and Hunters: The Origin of the Black Act*, (Penguin 1990) 259.

[115] E.P. Thompson, *Whigs and Hunters: The Origin of the Black Act*, (Penguin 1990) 262.

at least, to conform with the principles of justice and equity upon which the law was grounded.[116]

Another aspect of Thompson's commentary was his view that law should not be regarded as simply part of the superstructure, as it was 'deeply imbricated within the very basis of productive relations which would have been inoperable without [it]'.[117] Economic activities such as farming and quarrying were unimaginable without the legal right to property. This view, that law is constitutive of economic relations as well as being a result of them is known as the 'constitutive' theory of law. This has been developed by theorists associated with the critical legal studies movement and so before discussing that theory it may be useful to add some introductory comments about this movement within legal theory.

III.C – Critical Legal Studies, Constitutive Theories of Law & Legal Indeterminacy

III.C.1 – The Critical Legal Studies Movement – Introduction

Critical Legal Studies (CLS) is a movement which emerged in US law departments in the late 1970s and early 80s.[118] A British variant emerged at a later stage. The movement was comprised of left-wing legal academics and reflected the diversity of left wing thought which appeared after the emergence of the so called 'New Left'. There was a large variation of perspectives within the movement with some scholars identifying with the Marxist tradition, although trying to develop new forms of Marxist legal theory. Others identified with developments in philosophy such as postmodernism and aimed to introduce thinking from the fields of sociology and literary theory into the legal arena.[119] However, the general trend was to move away from the perceived economic determinism of early Marxist theory and the view of law as simply an instrument of the ruling class. Theorists sought to develop a more nuanced approach which considered the broader complexities of society, including its legal institutions and practices.[120] Indeed, there is

[116] E.P. Thompson, *Whigs and Hunters: The Origin of the Black Act*, (Penguin 1990) 264.

[117] E.P. Thompson, *Whigs and Hunters: The Origin of the Black Act*, (Penguin 1990) 261.

[118] M.D.A Freeman, *Lloyd's Introduction to Jurisprudence* (Sweet & Maxwell 2001) 1040.

[119] Alan Hunt, 'The Critique of Law: What is Critical about Critical Legal Theory' (1987) 14(1) Journal of Law & Society 5, 7.

[120] Adam Gearey, 'Change is Gonna Come: Critical Legal Studies and the Legacies of the New Left' (2013) 24(3) Law and Critique 211, 215.

evidence of a complete break with Marx's historical materialism in the work of some critical legal theorists and the development of the idea that law has no necessary link to economic relations or class interests.

III.C.2 – Constitutive Theories of Law

One critical legal theorist, who sought to develop the Marxist understanding of law was Karl Klare.[121] Klare argued that the base-superstructure metaphor was not a useful analytical tool for understanding modern capitalist society due to the interpenetration of the economic and political aspects of social life, and what he saw as the breakdown of the public-private distinction.[122] For example, the state, a political entity. is deeply involved in shaping economic relations. On the other hand, issues usually consigned to the private sphere have increasingly become the focus of public policy.[123] Klare acknowledged that the relative autonomy thesis is an advance on accounts of law which see it solely as an instrument of the ruling class.[124] However, he argued that it fails to explain how class interests are expressed through the state. Instead, he called for the development of a Marxist theory of law that rejects the view that law is merely an instrument of class power, and which instead views the legal process as one which not only reproduces class relationships but helps to create and articulate them.[125] I noted above E.P Thompson's view that law cannot be considered as merely superstructural due to the fact that it helps to define and articulate economic relations. Klare echoes this view, arguing that Marxist theorists should view law as constitutive, as a form which helps to shape our social reality. This view reflects the interpretation of Marx's materialism, outlined above, which draws on his concept of praxis, the idea that our ideas can inform our interactions with the material world and therefore transform it. Thus, the unidirectional materialism of base-superstructure theories of law is rejected in favour of an understanding of legality in which it helps to constitute the material world. Klare's constitutive theory of law does not deny that law is an instrument of the capitalist class. However, he argues, in a similar vein to

[121] Karl Klare, 'Law-Making as Praxis' (1979) 40 Telos 123.

[122]Karl Klare, 'Law-Making as Praxis' (1979) 40 Telos 123, 125.

[123] Karl Klare, 'Law-Making as Praxis' (1979) 40 Telos 123, 126.

[124] Karl Klare, 'Law-Making as Praxis' (1979) 40 Telos 123, 128.

[125] Karl Klare, 'Law-Making as Praxis' (1979) 40 Telos 123, 128-129.

Thompson, that law cannot be reduced to this alone. Law does not merely reflect and reproduce class relations; it actively shapes them.

According to Klare one implication of the constitutive nature of law is that the legal arena must be seen as a potential site of class struggle.[126] Since law is not merely an instrument of the ruling class, but can help to shape our social relations, law-making may register the political struggles of subordinated classes. However, the general tendency of the law is to reproduce the class system. This is because the processes of law are alienated.[127] Alienation is a concept developed by Marx in which he describes the mechanism by which workers are estranged from their labour by the capitalist system and therefore from their essence as human beings.[128] Klare argues that in capitalist society law-making is an alienated process due to its repressive function, as it is used to control subordinate classes; its facilitative function through which it focuses on reproducing the capitalist order; and due to its ideological function by which it masks the exploitative nature of the capitalist system.[129]

A number of critical legal theorists have developed this notion of the constitutive theory of law by focusing on the way in which law shapes our understanding of social reality. Some of these accounts move further away from an understanding of law which views it an instrument of the ruling class, and indeed seem to break completely from an understanding of law as something conditioned by economic relations. For example, Peter Gabel and Paul Harris, in their discussion of radical legal practice[130] have rejected the view that the law is an instrument of the capitalist class.[131] Similarly, Robert Gordon[132] has argued that law is not a machine of the ruling class but 'a plastic medium of discourse that subtly conditions how we experience social life.'[133] Gabel and Harris follow Karl

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[126] Karl Klare, 'Law-Making as Praxis' (1979) 40 Telos 123, 133.

[127] Karl Klare, 'Law-Making as Praxis' (1979) 40 Telos 123, 132.

[128] Karl Marx, *The Economic & Philosophic Manuscripts of 1844* (Dirk J. Struk (ed) International Publishers 1964).106-119.

[129] Karl Klare, 'Law-Making as Praxis' (1979) 40 Telos 123, 131-132.

[130] Peter Gabel and Paul Harris, 'Building Power and Breaking Images: Critical Legal Theory and the Practice of Law' (1982-1983) 11 N.Y.U Review of Law & Social Change 369.

[131] Peter Gabel and Paul Harris, 'Building Power and Breaking Images: Critical Legal Theory and the Practice of Law' (1982-1983) 11 N.Y.U Review of Law & Social Change 369, 370.

[132] Robert Gordon, 'Law & Ideology' (1988) 3(1) Tikkun 15.

Klare in focusing on the concept of alienation. However, they locate the source of this alienation in the hierarchical nature of society rather than in the exploitative nature of capitalist social relations. They argue that this hierarchical structure leads to a sense of powerlessness, both in individuals and in communities.[134] The role of the legal system is both to manage the outcome of this state of affairs but also to lay the foundation for it by justifying authority and by shaping our understanding of social life. This is achieved through a process which treats moments of conflict as isolated instances to be dealt with separately and which expresses this conflict and its resolution through a technical language understood only by figures of authority. Further, the legal system provides concepts and categories which condition the way in which we understand social conflict and encourage us to accept certain outcomes which maintain the status quo.[135]

Gordon also comments on the way in which law shapes our understanding of the social world, stating that it constructs our interpretation of reality, constructing roles such as landlord-tenant and telling us how we should behave in these roles. And, as with Gabel and Harris, Gordon connects this aspect of law with the legitimation of authority and power rather than with capitalist exploitation.[136] For Gabel and Harris legal practice can provide an opportunity to 'crack the façade of legitimacy' that law projects.[137] Lawyers and activists can intervene in the legal process in a way that challenges the understanding of the social world which the law seeks to create and puts forward alternative visions of social life. The authors reject approaches which view legal engagement as an opportunity to seek the vindication of rights, as this allows the state to define how the particular conflict should be viewed, and to co-opt radical demands by reformulating them as rights which aren't antagonistic towards the status quo.[138] This leads to the demobilisation of oppositional activity. Instead, they advocate a 'power-oriented' approach to legal practice

[133] Robert Gordon, 'Law & Ideology' (1988) 3(1) Tikkun 15, 15.

[134] Peter Gabel and Paul Harris, 'Building Power and Breaking Images: Critical Legal Theory and the Practice of Law' (1982-1983) 11 N.Y.U Review of Law & Social Change 369, 372.

[135] Peter Gabel and Paul Harris, 'Building Power and Breaking Images: Critical Legal Theory and the Practice of Law' (1982-1983) 11 N.Y.U Review of Law & Social Change 369, 373.

[136] Robert Gordon, 'Law & Ideology' (1988) 3(1) Tikkun 15, 16.

[137] Peter Gabel and Paul Harris, 'Building Power and Breaking Images: Critical Legal Theory and the Practice of Law' (1982-1983) 11 N.Y.U Review of Law & Social Change 369, 374.

[138] Peter Gabel and Paul Harris, 'Building Power and Breaking Images: Critical Legal Theory and the Practice of Law' (1982-1983) 11 N.Y.U Review of Law & Social Change 369, 375-376.

which seeks to bring the material and political realities of social conflict to the courtroom.[139] This approach refuses to accept the vision of social reality proffered by the legal system and instead puts forward one which emphasises the political aspects of the case. This, they argue helps to build an 'unalienated political consciousness' in those who utilise such an approach, helping to mobilise political activity.

The work of Klare, Gabel and Harris, and Gordon all suggest that the form that law takes, the way in which it situates us in relation to each other and in relation to those in power, is important. In the following section I wish to focus on the form of law. However, I will do this by discussing a theory which, unlike the those put forwards by Gabel & Harris, and Gordon, is situated firmly within the Marxist tradition. However, before this discussion I would like to consider another aspect of the critical legal studies analysis of law, the critique of judicial reasoning.

III.C.3 – Legal Indeterminacy

In section one of this chapter, I noted the theory of judicial interpretation known as formalism. This theory posits that when judges are interpreting and applying legal rules, they are doing so in an objective and neutral manner. The decision is reached solely through the application of the relevant rule to the particular fact scenario, without consideration being given to political factors. The critical legal studies movement is probably best known for its critique of this position through its utilisation of the indeterminacy thesis. The thesis was first developed by the Legal Realists, a movement in legal thought which emerged in the US in the 1920s and 30s through the work of figures such as Karl Llewllyn, Jerome Frank and Felix Cohen. The Realists argued that legal formalism was based on a false set of assumptions, namely the belief that the practices of judges conformed to the rules found in statute books and precedents set out in common law decisions, and that these rules actually regulated the behaviour of laymen.[140] They argued that law should be considered in terms of its actual effects, rather than merely its prescriptions.[141] Whilst not denying that some relation existed between formal rules and

[139] Peter Gabel and Paul Harris, 'Building Power and Breaking Images: Critical Legal Theory and the Practice of Law' (1982-1983) 11 N.Y.U Review of Law & Social Change 369, 375-379.

[140] Karl N. Llewellyn, 'A Realistic Jurisprudence: The Next Step' (1930) 30 Colum. L. Rev. 431, 443-444.

[141] Karl N. Llewellyn, 'Some Realism about Realism: Responding to Dean Pound' (1931) 44(8) Harvard Law Review 1222, 1237.

judicial behaviour, the Realists were sceptical as to whether legal rules were the sole or even main determinant of legal outcomes.[142] The thrust of the Realist argument was that legal rules do not provide a single objectively 'right' answer to any particular legal question. As Llewellyn argued, it can be demonstrated that 'in any case doubtful enough to make litigation respectable, the available authoritative premises – i.e., premises legitimate and impeccable under the traditional legal techniques – are at least two, and that the two are mutually contradictory as applied to the case in hand.'[143] Thus, different legal rules may be applied to a given situation and may lead to contradictory outcomes. This creates an obvious problem for the formalist account of law. If there are two authoritative premises available in order to reach an outcome in a particular case, and those premises lead to contradictory results, how does the judge choose between them? The law itself cannot provide the answer and therefore something outside of the law must be appealed to in order to make the decision. For the Realists that something was social policy. Judges decided what rules to apply and how to apply them by considering broader social polices outside of the law. Therefore, the law wasn't interpreted and applied in a completely objective and neutral manner. Political considerations influenced legal outcomes.

The Realists did not seek to undermine the Rule of Law. Their aim was to gain a greater understanding of how law operates in order to improve judicial reasoning and bring greater certainty to legal decisions.[144] However, the critical legal theorists who rejuvenated this critique in the 1970s, sought to use it in order to make a broader anti-liberal political argument. They argued that the different premises which grounded contradictory legal results correspond to different visions of human nature, one viewing humans as individualistic and self-reliant, the other grounded in a view of humans as sharing and altruistic beings.[145] Further they argued that in each legal controversy, these opposing premises were available and that mainstream legal thought tends to favour those premises that promote an individualistic view of human nature. Critical legal scholars therefore reject formalist claims as to the independence and neutrality of legal reasoning. They argue

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[142] Karl N. Llewellyn, 'A Realistic Jurisprudence: The Next Step' (1930) 30 Colum. L. Rev. 431, 444.

[143] Karl N. Llewellyn, 'Some Realism about Realism: Responding to Dean Pound' (1931) 44(8) Harvard Law Review 1222, 1239.

[144] Karl N. Llewellyn, 'Some Realism about Realism: Responding to Dean Pound' (1931) 44(8) Harvard Law Review 1222, 1242.

[145] Mark Kelman, *A Guide to Critical Legal Studies* (Harvard Univ. Pr. 1987) 3-4.

that the idea of an independent form of judicial reasoning and interpretation is a myth, and that legal decisions are no more neutral than the decisions of the legislature or executive, each involving political decision-making. Therefore, it is impossible to make a clear distinction between legal and political decision making.[146]

Critical legal theorists have used the critique to undermine the view that the legal protection of rights can engender progressive social change. They have contested the assertion that the process through which rights are identified, contested and protected is substantially different from the process through which ordinary political debate takes place. Duncan Kennedy, in his critique of US constitutional rights, argues that liberal legal theory assumes a distinction between rights arguments and other types of argument. [147] In the same way that other legal rules are viewed within liberal legal theory as providing the basis for objective decision-making, rights arguments are seen as possessing an objective quality. For Kennedy, rights operate in between the realm of subjective value judgement and factual truth. This is due to two features of rights. First, the way in which they are presented as being universal, formulated in such a way so as to apply to all citizens, helps to disguise the fact that they are actually the value judgements of particular individuals or groups. Secondly, the 'factoid' nature of rights, the acceptance that their identification necessitates particular actions being taken to protect them, similarly generates a sense of objectivity. However, in reality, the process of identifying, interpreting and enforcing a right is filled with subjective judgments and appeals to political arguments.[148] Like any legal rule, a right, in and of itself, does not tell us enough about what its protection necessitates and how far this protection should go. We need to look outside the right to find answers to these questions. And like legal rules, rights are not the causal force in legal outcomes. Their subjective nature and the fact that their meaning is open to interpretation means that they can be manipulated in order to justify a multitude of contradictory outcomes.

Mark Tushnet has highlighted some of the practical consequences of this critique of rights.[149] First, since rights are not the causal force in legal outcomes the protection of a

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[146] M.D.A Freeman, *Lloyd's Introduction to Jurisprudence* (Sweet & Maxwell 2001) 1040.

[147] Duncan Kennedy,' The Critique of Rights in Critical Legal Studies' in Wendy Brown and Janet Halley (eds), *Left Legalism/Left Critique* (Duke University Press 2002) 184.

[148] Duncan Kennedy,' The Critique of Rights in Critical Legal Studies' in Wendy Brown and Janet Halley (eds), *Left Legalism/Left Critique* (Duke University Press 2002) 195.

[149] Mark Tushnet, 'The Critique of Rights' (1993) 47 (1) SMU Law Review 23.

right does not necessarily lead to political change and thus the pursuit of such protection may constitute a waste of resources.[150] Secondly, and more concerningly for those who wish to pursue a right-based strategy, winning legal protection of a right may in fact hinder political change. Given that rights may be interpreted in different ways, they could be read in a conservative fashion, in a way that impedes progressive politics.[151] Similarly, the articulation of a right can lead to the formulation of a counter-right.[152] Typically, courts attempt to 'balance' these opposing rights and therefore the progressive gain associated with the initial right may be undermined.

III.D – The Commodity Form Theory of Law

III.D.1 – Evgeny Pashukanis

Above, I noted that some of the work of the critical legal theorists has hinted at the importance of the form that law takes. This is an important development, as the Marxist theories of law premised on an interpretation of the base-superstructure metaphor tended to focus on the content of law. Thus, the class-based nature of the law was to be found in legislation and in the decisions emanating from the courts. However, a number of Marxist theories have focused on the nature of the legal form. The most prominent of these is known as the commodity-form theory of law. It was developed by a Soviet legal theorist named Evgeny Paskukanis in his work *Law and Marxism*.[153] In this study Pashukanis argued that law emerges as a way of regulating opposing interests.[154] Other systems of technical regulation can be used to coordinate human behaviour, but law is specific to the regulation of opposing interests. After identifying the underlying factor which gives rise to law, Pashukanis sought to demonstrate that the legal form develops simultaneously with capitalist commodity exchange.

To do this Pashukanis relied on Marx's comments in *Capital* regarding the commodity form, the economic relation which emerges between individuals as they seek to exchange

[150] Mark Tushnet, 'The Critique of Rights' (1993) 47 (1) SMU Law Review 23, 28.

[151] Mark Tushnet, 'The Critique of Rights' (1993) 47 (1) SMU Law Review 23, 26.

[152] Mark Tushnet, 'The Critique of Rights' (1993) 47 (1) SMU Law Review 23, 31.

[153] Evgeny Pashukanis, *Law & Marxism: A General Theory* (Pluto Press 1989) 81.

[154] Evgeny Pashukanis, *Law & Marxism: A General Theory* (Pluto Press 1989) 81.

commodities.[155] Marx demonstrated, that in order for commodity exchange to take place, a series of developments are required. He noted that the commodities that individuals produce have a 'use-value' which expresses the particular utility of the product.[156] In order for commodities which have different use-values to be exchanged, a common measurement must be used, otherwise those exchanging the products cannot decipher whether they are exchanging something of similar value. Therefore, in order to facilitate exchange, it must be possible to create a method by which commodities which have different use-values can be measured against each other. Marx stated that, in order to do this, one must identify a characteristic common to all commodities. He identified this characteristic as the 'value' of commodities.[157] Marx asserted that this value is given to the commodity by the labour used to produce it. But different commodities are produced using different kinds of labour, what Marx called useful labour. In order to create the common measurement, useful labour must become abstract labour. Abstract labour is a measure of the quantity of labour needed to produce a commodity, measured by the length of time needed to produce it.[158] All commodities can be reduced to quantities of abstract labour and therefore all commodities can be quantified for exchange. Whilst useful labour gives a commodity its use-value, its particular utility as a product, abstract labour gives a commodity its value, which is represented by its exchange-value on the market. This process is facilitated by money which, under capitalism, becomes the form under which any commodity can be expressed, and thus enables a massive expansion of commodity circulation.[159]

As Marx noted however, commodities 'cannot themselves go to the market and perform exchanges in their own right.'[160] They need people or 'guardians' to exchange them. Therefore, in a capitalist society marked by commodity exchange, social relations take the form of a relation between people with products at their disposal, as private property

[155] Karl Marx, *Capital Volume 1* (Penguin 1990) 125-177.

[156] Karl Marx, *Capital Volume 1* (Penguin 1990) 126.

[157] Karl Marx, *Capital Volume 1* (Penguin 1990) 128.

[158] Karl Marx, *Capital Volume 1* (Penguin 1990) 132.

[159] Karl Marx, *Capital Volume 1* (Penguin 1990) 162.

[160] Karl Marx, *Capital Volume 1* (Penguin 1990) 178.

owners.[161] In order for the process of exchange to work, the guardians of commodities must freely come to the market to exchange their products. Further, they must respect other commodity owners who do the same. They must recognise each other as formally equal. Here, Pashukanis connects the commodity form, the relation which exists between guardians of commodities, to the emergence of the legal relation or the legal form. When two formally equal property owners meet on the market, each seeks to profit from the transaction. An opposition of interests therefore exists. This is of course what Pashukanis identified as the precursor to law. Law emerges in order to regulate the system of commodity exchange, to resolve any disputes which may arise between the guardians of the commodities. Therefore, the legal form, the relation which exists between individuals in a legal dispute, develops out of the exchange of commodities.

Pashukanis identifies a further link or commonality between the commodity form and the legal form. I noted Marx's observation that a series of abstractions are needed to facilitate commodity exchange. In order for the legal form to develop, and for the legal system to facilitate the numerous transactions which occur under capitalist exchange, a similar set of abstractions are needed.[162] Here, instead of concrete labour becoming abstract labour and use-value becoming value, individual guardians with a right to a specific piece of property, become abstract legal subjects with the general capacity to hold legal rights.[163] Law thus creates the abstract legal subject, potentially representative of any individual. Thus, real individuals who are unequal, who have distinct needs and exist within different structures of social relations are all treated as formally equal by the legal system.[164] The needs and interests of an individual are abstracted into the legal concepts of will and rights and the specific social relations within which the individual is enmeshed are abstracted into the legal subject.[165]

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[161] Evgeny Pashukanis, *Law & Marxism: A General Theory* (Pluto Press 1989) 112.

[162] Evgeny Pashukanis, *Law & Marxism: A General Theory* (Pluto Press 1989) 112.

[163] Evgeny Pashukanis, *Law & Marxism: A General Theory* (Pluto Press 1989) 115.

[164] Isaac Balbus, 'Commodity Form and Legal Form: An Essay on the "Relative Autonomy" of the Law (1977) 11(3) Law & Society Review 571, 577.

[165] Isaac Balbus, 'Commodity Form and Legal Form: An Essay on the "Relative Autonomy" of the Law (1977) 11(3) Law & Society Review 571, 577.

III.D.2 – The Commodity Form Theory of Law and the Base-Superstructure Metaphor

The commodity form theory of law thus establishes a formal link between the basic economic relation which constitutes the capitalist mode of production and law. It therefore has a similarity to base-superstructure theories of law in that it identifies a link between the economic and the legal. However, it does not locate this link in the particular determination of legal content but in the fact that the economic relation and the legal relation emerge simultaneously and have similar formal characteristics. Indeed, as China Miéville argues, the commodity form theory sees the legal form as part of both the base and the superstructure.[166] The legal from, the relation between legal subjects, arises simultaneously with the relations of exchange, which are inextricably linked, Miéville argues, to the relations of production.[167] It is therefore part of and partly constitutive of the economic base.[168] However this form only becomes visible as 'actually existing law' as part of the legal superstructure. The legal form therefore is part of the base and is therefore constitutive of the material world. Legislation and court decisions however form part of the superstructure.

III.D.3 – Development of the Commodity Form Theory of Law – Implications for a Socialist Engagement with Law

Miéville is one of a number of theorists who have utilised and developed the commodity form theory of law. In his book *Between Equal Rights,* he applies the theory to the realm of international law. He adds to Pashukanis' analysis by noting that the commodity form, although ostensibly concerned with formally equal guardians, cannot be understood without recognising that any relation between property owners with opposed interests must contain an element of force or violence. For something to be considered 'my property' there must be an implication that I can defend it from expropriation by others.[169] He argues that this violence also inheres in the legal form[170] and applies this

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[166] China Miéville, *'Between Equal Rights: A Marxist Theory of International Law* (Brill 2005).

[167] China Miéville, *'Between Equal Rights: A Marxist Theory of International Law* (Brill 2005) 93-95.

[168] China Miéville, *'Between Equal Rights: A Marxist Theory of International Law* (Brill 2005) 96.

[169] China Miéville, *'Between Equal Rights: A Marxist Theory of International Law* (Brill 2005) 126.

[170] China Miéville, *'Between Equal Rights: A Marxist Theory of International Law* (Brill 2005) 132.

insight to the system of international law. Grietje Baars has also utilised the commodity form of law in their important study of the legal form of the corporation.[171]

However, I would like to focus on two theorists who have considered the legal form and its implications for activist engagement with legal structures. One of these theorists is Robert Knox. He has drawn attention to the way in which the legal form impacts the ability of activists to use law to achieve progressive social change.[172] He notes that the nature of the legal form makes it difficult to challenge the structural problems caused by capitalism, arguing that the abstractions which constitute the legal subject mean that the law is concerned only with the actions of individuals, rather than the motivations behind those actions. Thus, the specific context which has caused individuals or groups to act in a particular way is ignored. The courts are only concerned with whether the actions taken have contravened the law. Similarly, legal argument is concerned with specific moments of dispute, rather than the structural issues which may have led to them.[173] Therefore the courts are only concerned with the immediate disturbance and legal action is unlikely to result in the courts intervening in order to resolve broader structural issues.

Despite this however, he suggests that legal tactics can still be harnessed by radical left groups. He proposes an approach based on the idea of 'principled opportunism'.[174] This approach recognises the limiting nature of pursing radical change through legal means, but also proposes that legal practice, utilitsed as a tactic within a broader political struggle, may be useful for activist groups. Here, law is utilised, not because of a utopian belief in its ability to transform the capitalist social structure, but because in certain circumstances it may be of limited utility in advancing particular claims which might benefit radical movements and the causes they are engaged with.[175] What is key for Knox is that any legal action must fit within the coordinates of the broader political strategy that the radical

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[171] Grietje Baars, '*The Corporation, Law, and Capitalism: A Radical Perspective on the Role of Law in the Global Political Economy'* (Haymarket 2020).

[172] Robert Knox, 'Marxism, International Law, and Political Strategy' (2009) 22(3) Leiden Journal of International Law 413, 430.

[173] Robert Knox, 'Marxism, International Law, and Political Strategy' (2009) 22(3) Leiden Journal of International Law 413, 430-431.

[174] Robert Knox, 'Marxism, International Law, and Political Strategy' (2009) 22(3) Leiden Journal of International Law 413, 433.

Robert Knox, 'Strategy & Tactics' (2010) 21 Finnish Yearbook of International Law 193, 222

[175] Robert Knox, 'Marxism, International Law, and Political Strategy' (2009) 22(3) Leiden Journal of International Law 413, 433-434.

movement is pursuing. If it does not, there is a risk that legal strategy can operate to undermine broader political goals and to demobilize oppositional activity. He differentiates between strategy and tactics, arguing that the former is concerned with broader questions of how to overcome the dominant order, whilst the latter focus on smaller movements which can be used in furtherance of the overall strategy.[176] The key question, when engaging in tactical legal manoeuvres, is whether the strategic goal is being considered. Does the tactic enhance the probability of achieving the overarching aim, or does it undermine it?

Honor Brabazon has also commented on the nature of the legal form and its impact on social relations in the neoliberal period. Brabazon advances a constitutive view of law, arguing that the legal form not only legitimates the status quo, but helps to shape the way in which individuals view the world, and the way in which they relate to one another.[177] She states that, in the neoliberal period the legal form performs 'an important modelling function, as the subjectivities and social relations at the core of neoliberal thought mirror those produced through the legal form.'[178] Thus, the legal form plays a key role in shaping social relations in a manner which corresponds to the neoliberal view of social life. Private law, which best embodies the characteristics of the legal form, is increasingly employed to mediate social relations.[179] Brabazon draws attention to the key aspect of the legal form, the notion of formal equality. It 'abstracts legal subjects from their historical and political contexts of substantive inequality and frames social relations through the lens of atomised equals.'[180] Thus, social relations which are mediated through the legal form are depoliticised, abstracted from their specific

[176] Robert Knox, 'Strategy & Tactics' (2010) 21 Finnish Yearbook of International Law 193, 197-200.

[177] Honor Brabazon, 'Introduction: Understanding Neoliberal Legality' in Honor Brabazon (ed), *Neoliberal Legality: Understanding the Role of Law in the Neoliberal Project* (Routledge 2017) 2.

[178] Honor Brabazon, 'Dissent in a Juridified Political Sphere' in Honor Brabazon (ed), *Neoliberal Legality: Understanding the Role of Law in the Neoliberal Project* (Routledge 2017) 169.

[179] Honor Brabazon, 'Dissent in a Juridified Political Sphere' in Honor Brabazon (ed), *Neoliberal Legality: Understanding the Role of Law in the Neoliberal Project* (Routledge 2017) 173.

[180] Honor Brabazon, 'Introduction: Understanding Neoliberal Legality' in Honor Brabazon (ed), *Neoliberal Legality: Understanding the Role of Law in the Neoliberal Project* (Routledge 2017) 7.

socioeconomic context.[181] Individuals are viewed in the image of legal subjects, atomised, isolated and in competition with one another.[182]

Brabazon has also discussed the implications of the legal form for activist engagement with the law in the neoliberal period. She argues that dissent has become increasingly juridified, as political action is increasingly mediated through the legal form.[183] There is increased repression of dissent under neoliberalism and a 'hyper-regulation' of protest.[184] She asserts that the constitutive nature of the legal form influences how dissent is understood, with the atomised view of social relations it promotes leading to a reframing of the legitimate means of dissent. Collective action is seen as illegitimate as it diverges from the individualist view of social relations envisioned by neoliberal theory. Modes of dissent which are rooted in disobeying the law are also viewed as invalid.[185] Protest is judged in respect of a 'procedural morality' whereby its validity is determined, not by whether the wrong that is being exposed is legitimate, but by whether the dissent is expressed using appropriate means and following approved procedures.[186] Instead, dissent is channelled into specific forms, for example human rights claims and court actions.[187] Once dissent is directed into legal channels, a second impact of the legal form becomes apparent as the notion of formal equality functions to depoliticise the issues in question. Activists are forced to follow a 'judicial rationality' which circumscribes the way in which it can be expressed.[188]

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[181] Honor Brabazon, 'Dissent in a Juridified Political Sphere' in Honor Brabazon (ed), *Neoliberal Legality: Understanding the Role of Law in the Neoliberal Project* (Routledge 2017) 173.

[182] Honor Brabazon, 'Dissent in a Juridified Political Sphere' in Honor Brabazon (ed), *Neoliberal Legality: Understanding the Role of Law in the Neoliberal Project* (Routledge 2017) 181.

[183] Honor Brabazon, 'Dissent in a Juridified Political Sphere' in Honor Brabazon (ed), *Neoliberal Legality: Understanding the Role of Law in the Neoliberal Project* (Routledge 2017) 175.

[184] Honor Brabazon, 'Dissent in a Juridified Political Sphere' in Honor Brabazon (ed), *Neoliberal Legality: Understanding the Role of Law in the Neoliberal Project* (Routledge 2017) 175.

[185] Honor Brabazon, 'Dissent in a Juridified Political Sphere' in Honor Brabazon (ed), *Neoliberal Legality: Understanding the Role of Law in the Neoliberal Project* (Routledge 2017) 175

[186] Honor Brabazon, 'Dissent in a Juridified Political Sphere' in Honor Brabazon (ed), *Neoliberal Legality: Understanding the Role of Law in the Neoliberal Project* (Routledge 2017) 175.

[187] Honor Brabazon, 'Dissent in a Juridified Political Sphere' in Honor Brabazon (ed), *Neoliberal Legality: Understanding the Role of Law in the Neoliberal Project* (Routledge 2017) 176.

[188] Honor Brabazon, 'Dissent in a Juridified Political Sphere' in Honor Brabazon (ed), *Neoliberal Legality: Understanding the Role of Law in the Neoliberal Project* (Routledge 2017) 174.

Brabazon notes, in a similar vein to Knox, that the legal form ensures that instances of political protest are considered as individual cases, separated from the political context in which they take place.[189] Power dynamics are ignored, and activists are viewed as formally equal to other more powerful actors.[190] This depoliticisation is aided by formalist accounts of judicial decision-making. Legal decisions 'appear to be technical matters of the interpretation of universal and fixed legal texts…'[191] Thus, the political aspect of the protest is disregarded, and the matter appears as though it has been resolved through the neutral application of legal rules.

However, like Knox, Brabazon does envisage a place for legal engagement in the activist's toolkit. She distinguishes between using 'law for politics' by which the legal form is engaged with in order to legitimise the political goal being sought, and viewing 'law as politics' whereby the use of law itself is a subversive political tool.[192] With the former approach activists engage with the legal system due to a genuine belief in the legitimacy of law and its potential to engender social change. With the latter approach the activists do not believe in the legitimacy of law. However, they recognise that law is viewed as legitimate by a significant proportion of people. Therefore, they engage with the law in order to exploit this legitimacy.[193] For example, a movement may engage with a law in ways other than what was officially intended. They might take a law which wasn't initially envisaged as a tool for social change and develop an interpretation of it which potentially converts it into such a tool. Thus, they are harnessing the legitimacy of the legal form in order to further their particular political goal. This subversive engagement with the law forces the authorities to either agree with the movement's interpretation of the law, in which case the group achieves a political victory, or to reject the movement's

[189] Honor Brabazon, 'Dissent in a Juridified Political Sphere' in Honor Brabazon (ed), *Neoliberal Legality: Understanding the Role of Law in the Neoliberal Project* (Routledge 2017) 174.

[190] Honor Brabazon, 'Dissent in a Juridified Political Sphere' in Honor Brabazon (ed), *Neoliberal Legality: Understanding the Role of Law in the Neoliberal Project* (Routledge 2017) 177.

[191] Honor Brabazon, 'Introduction: Understanding Neoliberal Legality' in Honor Brabazon (ed), *Neoliberal Legality: Understanding the Role of Law in the Neoliberal Project* (Routledge 2017) 7.

[192] Honor Brabazon, 'Occupying Legality: The Subversive Use of Law in Latin American Occupation Movement' (2017) 36 (1) Bulletin of Latin American Research 21.

[193] Honor Brabazon, 'Occupying Legality: The Subversive Use of Law in Latin American Occupation Movement' (2017) 36 (1) Bulletin of Latin American Research 21.

interpretation, exposing the fact that the notion of formal equality is a sham.[194] This approach to law is grounded in the belief that legal action itself is insufficient for generating meaningful social change. It is similar to Knox's idea of 'principled opportunism' in that it views legal action as a tool to be used to achieve a broader political goal. The decision to engage with law is based on whether it might help achieve this broader aim.[195]

Conclusion

This chapter has sought to lay the theoretical foundation for the rest of the thesis by examining some of the key concepts of legal liberalism, Marxism and critical legal theory. Here, I would like to draw together these concepts in order to provide a framework which will be used to interrogate the case-studies. What has been the key concern in laying out these theories is to try and understand what potential problems might arise for activists who engage with legal structures and what opportunities, if any, might emerge from such encounters. What is clear from the Marxist and critical legal theories examined, is that the law operates to either benefit particular sections of society or to reproduce a particular set of relations, or indeed to help constitute a set of relations.

For the Marxist theorists the beneficiaries are the capitalist class, and the relations produced or constituted are those which correspond to the capitalist mode of production. For critical legal theories the beneficiaries may simply be those who have influence and power, and the social relations which are reflected or shaped are those which stem from a society marked by a hierarchical and alienated structure. This alienating aspect of legal processes can also be linked to the legal form and to the fact that it is based on a competitive, opposition of interests.

Although some of these theories are, as a whole, incompatible with one another, different insights can be drawn from each in order to produce a coherent theoretical framework. However, in my opinion the commodity-from approach to law provides the most insight into the nature of law, particularly as it provides the most elucidation to the key aspect of law, the abstract legal subject and the connected idea of formal equality. There are a

[194] Honor Brabazon, 'Occupying Legality: The Subversive Use of Law in Latin American Occupation Movement' (2017) 36 (1) Bulletin of Latin American Research 21.

[195] Honor Brabazon, 'Occupying Legality: The Subversive Use of Law in Latin American Occupation Movement' (2017) 36 (1) Bulletin of Latin American Research 21.

number of observations which can be made about the impact of the concept. First, is that it involves a process of abstraction. In order to create the legal subject, individuals need to be treated as interchangeable, as formally equal. The main implication of this, for our purposes, is that relations that are mediated by the legal form are depoliticised. The socioeconomic context in which individuals are embedded is disregarded. Above, I noted Robert Knox's comments that legal action will rarely lead to significant structural change in society, as the courts do not consider the structural inequalities which lie behind moments of dispute or dissent. He also noted that when activists are before the courts, the judge or jury will not consider the motivations behind their actions, a factor which will impact their ability to gain a favourable result. As Gabel and Harris have pointed out, this means that engagement with the courts can lead to political demobilisation, as radical demands are co-opted and the issue at question is depoliticised. I noted Karl Klare's comments about the alienating nature of the legal process. I highlighted similar comments by Gabel and Harris. The latter locate this alienating effect in the hierarchical nature of the courtroom and the technical language used.

Another insight which emerged from the preceding discussion was the fact that the law can be constitutive of social relations. This has important ramifications for activists. As Brabazon noted, the atomised view of social life which the law helps to shape, influences the way dissent is viewed. This insight was also developed by the critical legal theorists who noted that legal concepts and categories shape our understanding of the world, and therefore of whether protest is legitimate. As a result, collective action and other forms protest which don't fit within the coordinates of what is considered reasonable are deemed to be off limits. Finally, another important aspect of law which is connected to formal equality is its ability to legitimate the status quo. Since it appears as though everyone is treated equally, it seems that the neutral application of laws is a fair and just approach to resolving disputes. Formal equality mystifies the exploitative nature of capitalist society, presenting socioeconomic inequality as natural. Again, this has implications for activist engagement with law. If the legal process is viewed as just and fair, the mediation of dissent through the courts can lead to the legitimation of the social relations and structural inequalities which the activists are trying to address, and the delegitimising of the protestors' actions. This process is aided by the formalist view of law, the idea that legal decisions involve the neutral application of objective rules. Although this view is challenged by the indeterminacy thesis it is still highly influential both in the courts and amongst the general public.

Chapter Two - Constitutional Theory & Irish Constitutionalism

Introduction

This chapter begins my investigation of whether Irish socialists should engage with attempts to gain constitutional protection for the right to housing in Ireland. As I noted in the introduction to this thesis, given that the core aim for radical left groups in Ireland is to bring about a socialist system of economic, social and political organisation in the country, how would the protection of the right help to achieve this? One tactic which has been utilised in order to achieve this is to attempt to undermine the current capitalist political system through a combination of popular mobilisation, political argument and legal claims. As I noted, housing activists' efforts to resist the commodification of the Irish housing sector can be viewed as such an attempt. Therefore, one criterion for measuring the utility of a right to housing is the extent to which it aids this resistance to neoliberal commodification of the Irish housing sector. In Chapter three and Chapter four of this thesis I will examine the caselaw of the Irish courts pertaining to the constitutional right to private property and to the extent to which *Bunreacht na hÉireann* provides protection to socioeconomic rights. This, in turn will inform my analysis in Chapter seven as to the utility of a right to housing as I argue that the approach the courts have taken in the property rights and socioeconomic caselaw will be reproduced in any litigation which arises around a constitutional right to housing. Part of my argument is that the approach that the courts have taken to these issues and will, I predict, take towards the right to housing, are reflective of the underlying principles of liberal legalism, particularly the concepts of formal equality and negative liberty which are both captured in the doctrine of the Rule of Law. These principles have influenced the judiciary's attitude towards these issues.

In this chapter I aim to provide the link between liberal legalism and the attitude taken by the Irish courts towards the protection of the right to property and socioeconomic rights through the lens of constitutionalism. I will show how the institutional structures established in liberal constitutional regimes, particularly those relating to the functioning of the courts, are designed to ensure that State interference in the private sphere is regulated. I will discuss the inclusion of personal rights in liberal constitutions and the way in which they are interpreted by the courts. However, I will also note the influence

of the separation of powers doctrine which restrict the extent to which the courts are willing to restrain the actions of the other branches of the State.

I will continue my discussion in this chapter by providing some background to the drafting and enactment of *Bunreacht na hÉireann*. I will show that the Irish Constitution is essentially liberal and thus expresses liberalism's attitude towards private property, social order and justice. Drawing on the scholarship of Thomas Murray,[196] I will contend that there were forces in existence at the time of the drafting of *Bunreacht na hÉireann* which acted as a countervailing force to the liberal influence on the Constitution. These forces included radical left actors and groups which were involved in social agitation in the years leading up to the enactment of the Constitution and which offered alternative visions of a future Irish society. These forces impacted the Irish constitutional order which registered their presence through the adoption of an Irish version of social constitutionalism, a doctrine which sought to pacify social dissent by providing some concessions to working class people in order to temper their enthusiasm for more radical social change. However, this impact was distorted by the influence of a powerful Catholic Church which was able impose its own vision of social justice unto the constitutional text. This chapter will finish with a discussion of the debates surrounding the relationship between the right to private property and socioeconomic rights which existed around the time of the drafting of *Bunreacht na hÉireann*. I will argue that these debates and the ultimate protection provided to private property and to socioeconomic rights, reflect the balance of social forces existing in Ireland in the 1930s.

This chapter will therefore be divided into four major sections. The first will consider the link between liberalism and constitutionalism and will detail some of liberal constitutionalism's basic institutional features and doctrines. Section two will provide some background to the Irish constitutional tradition, the drafting of *Bunreacht na hÉireann* and some of the features of the enacted Constitution. Section three will discuss the different influences which shaped the drafting of the Constitution, particularly its social provisions. Finally, section four will discuss the debates around the protection of private property and socioeconomic rights which emerged during the drafting process.

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[196] Thomas Murray, 'Socioeconomic Rights and the Making of the 1937 Irish Constitution', (2016) 31:4 Irish Political Studies 502.

Thomas Murray, 'Contesting a World-Constitution? Anti-systemic Movements and Constitutional Forms in Ireland, 1848-2008', (2016), 22:1 Journal of World-System Research 77.

I – Liberal Constitutionalism

In this section I will discuss liberal constitutionalism. I will begin by describing the link between liberal political theory and the use of a constitution as a tool for organising the political structure of a society. I will then highlight some of the institutional features of liberal constitutionalism and some of the doctrine associated with it. The discussion will be used to ground my assertion that *Bunreacht na hÉireann* is a liberal constitution, a fact that has influenced the approach that has been taken towards the protection of the right to private property and that of socioeconomic rights.

I.A – The Link Between Liberalism & Constitutionalism

In Chapter one I discussed liberal legal theory. I noted how it transcribed the liberal ideas around negative liberty, restraint on government action, and the protection of private property into a set of legal principles. I also noted its emphasis on social order, a concern captured in the doctrine of the Rule of Law. This doctrine links the idea of social order to the notion that society is best organised around a set of pre-defined legal rules, by reference to which, institutions and individuals can regulate their behaviour. I also noted the liberal legal principle of formal equality and the theory of judicial interpretation known as formalism. In this section, I will show that liberal legal principles find expression in liberal democracies through the use of a constitution.

A simple definition of a constitution is provided by Chubb who states that it is 'a selection of the legal rules which govern the government of a country which have been embodied in a document.'[197] Alexander states that constitution-making is concerned with political morality, governance and institutional arrangement.[198] Constitutions are therefore concerned with the rules which apply to governing institutions. They describe the ways in which the institutions of the state are structured and the ways in which they should operate.[199] This involves, inter alia, setting out the positions of authority in government, the way in which the officials who occupy these positions are elected, and the different roles of state institutions, their powers and the limitations on this power. In essence the constitution sets out 'meta-rules' for the political system of the state.[200] In addition, a

[197] Basil Chubb, *The Politics of the Irish Constitution* (Institute of Public Administration 1991) 1.

[198] Larry Alexander, 'Introduction' in Larry Alexander (eds), *Constitutionalism: Philosophical Foundations* (Cambridge University Press 1998) 1-2.

[199] Andrew Heywood, *Politics* (3rd edn, Palgrave MacMillan 2007) 316.

constitution sets out the relationship between these governmental institutions and their citizens, delineating the powers and duties of each.

The link between the idea of a constitution and the liberal legal concepts discussed in Chapter one is captured in the term 'constitutionalism'. While regimes that do not adhere to liberal values may have a constitution, constitutionalism refers to the particular liberal understanding of the role of law in society, grounded in a foundational legal document. It illuminates the simple idea of a constitution, a set of rules, with the particular notion of 'negative' freedom and the idea of a limited government associated with liberal political thought. It encapsulates liberalism's attitude towards political power.[201] Hardin argues that in order to be effective, liberalism needs a government that is capable of enforcing order and guaranteeing the protection of individual citizens, but also that this government be limited so that it cannot abrogate the liberal protections afforded to those citizens.[202] Similarly Chubb asserts that both liberalism and constitutionalism are based on the idea of free, rights-bearing individuals who establish a governmental structure over which they ultimately have control.[203] Liberal constitutionalism also reflects liberalism's attitude towards private property, with the right to private property invariably included as a key element of the constitutional order. The use of a constitution in liberal political orders also gives expression to liberalism's view that social order is best maintained through the Rule of Law. The constitution provides the foundation for the system of legal rules, by reference to which institutions and individuals regulate their behaviour.

I.B – The Institutional Structures of Liberal Constitutionalism

Constitutions may take various forms and may set out a variety of liberal institutional arrangements. As to the constitution itself, the rules it sets out fall under two broad forms – conventions and legal rules, with the balance between the two varying, depending on the particular system.[204] Conventions are not laws but are instead rules based on custom and precedent.[205] They 'fill in the blanks' of a constitutional system when the legal rules

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[200] Andrew Heywood, *Politics* (3rd edn, Palgrave MacMillan 2007) 316.

[201] Basil Chubb, *The Politics of the Irish Constitution* (Institute of Public Administration 1991).

[202] Russell Hardin, *Liberalism, Constitutionalism, and Democracy* (Oxford University Press 1999) 8.

[203] Basil Chubb, *The Politics of the Irish Constitution* (Institute of Public Administration 1991) 6.

[204] Andrew Heywood, *Politics* (3rd edn, Palgrave MacMillan 2007) 316.

[205] Andrew Heywood, *Politics* (3rd edn, Palgrave MacMillan 2007) 318.

are unclear, giving guidance to how a particular action should be taken.[206] Legal rules are those provisions written in the constitution. These rules are not only binding but constitute the supreme law of the state, to which all other enacted laws are subordinate. Such legislative enactments must not be in contradiction with the provisions of the constitution. If they are in contradiction to those provisions, they can be struck down as unconstitutional. However, one qualifier to the supremacy of constitutional rules is the existence of regional and international treaties, to which constitutional rules may be subordinate. Although constitutional provisions are supreme this does not mean they are unchangeable. Most constitutions provide a mechanism, whereby constitutional provisions can be amended or removed, or new constitutional provisions enacted. One such mechanism is the referendum, by which citizens of a state can vote on the amendment, repeal or enactment of constitutional rules.

Chubb's definition, set out above, implies that the constitutional rules are contained in a single document. But this is not always the case. Here a distinction can be made between codified constitutions in which the written legal rules of the constitution are gathered in a single document and uncodified constitutions where a variety of sources, for example, the aforementioned conventions or other legal rules in the state's legal system, provide the basis for the constitution.[207] The majority of constitutions are now codified, with the British constitution providing the most prominent example of an uncodified constitution. It must be noted however, that even in systems which have written constitutions, conventions of custom and precedent may still exist to flesh out the written legal bones.

Amongst liberal constitutional systems there can be institutional and structural variations. Although liberal constitutionalism arose in opposition to monarchical rule, in some states monarchies still have a role within the political system, albeit often in a purely ceremonial sense. Such states are usually termed constitutional monarchies with power effectively being vested in a representative body.[208] In the republican tradition the monarchical aspect is absent with political authority solely vested in the body representing the will of the

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[206] Andrew Heywood, *Politics* (3rd edn, Palgrave MacMillan 2007) 318.

[207] Andrew Heywood, *Politics* (3rd edn, Palgrave MacMillan 2007) 318.

[There is also a sub-distinction within constitutions that are not codified in a single document: (i) Those that are based largely on 'unwritten' conventions (e.g., Britain & New Zealand), (ii) Those that consist of written laws, but laws which are contained in a series of documents rather than a single document (e.g., Israel, Saudi Arabia)].

[208] Andrew Heywood, *Politics* (3rd edn, Palgrave MacMillan 2007) 321.

people.[209] Liberal constitutional systems may also differ in the composition of government. Some states prefer a unitary model where a single national body governs, some a federal model that disperses power between two levels of government.[210] Liberal constitutional states may have parliamentary or presidential systems. In the former the executive is accountable to the legislature whilst in the latter the two branches of government function separately.[211]

Finally, the role of the courts must be considered. In liberal constitutional regimes, power is also vested in the judiciary which plays an important role in terms of ensuring adherence to constitutional provisions. Commonly an 'apex' court is entrusted with ensuring that legislative enactments do not run contrary to constitutional rules and these courts have the power to invalidate such enactments when they are. This process is commonly termed 'judicial review'. The power of judicial review can extend to legislative bills, legislation, and decisions or actions of government and state bodies, depending on the particular system. It is most often concerned with the protection of the individual rights of citizens and individuals in the state's jurisdiction. Liberal constitutions typically contain a list of personal rights which are protected. The judiciary is entrusted with ensuring that these rights are not unfairly or excessively infringed by legislation. The rights are typically viewed in the negative sense, in that they are seen as providing barriers to state intervention in the lives of individuals, rather than acting as reasons to compel the State to intervene in the lives of individuals by providing for their material welfare. Typically, the right to private property is included in this list of rights and is given considerable protection.

One view of the function of the courts, particularly as regards their role in ensuring the protection of the personal rights of citizens, is that they have a role in protecting the interests of minorities which might otherwise be disregarded in democratic systems. Here, the argument is that citizens bear certain inalienable rights that should not be threatened even if a majority in society seeks or acquiesces to such. The interests of groups or sections of society that are unable to wield power are thus protected.

Within liberal constitutional regimes, the courts therefore have a role to play in limiting government interference in the lives of citizens by ensuring the protection of

[209] Andrew Heywood, *Politics* (3rd edn, Palgrave MacMillan 2007) 321.

[210] Andrew Heywood, *Politics* (3rd edn, Palgrave MacMillan 2007) 321.

[211] Andrew Heywood, *Politics* (3rd edn, Palgrave MacMillan 2007) 321.

constitutional rights. However, there is a tension between the role of the courts in this regard, and the functioning of democracy in liberal constitutional orders. This tension is captured in the idea of 'the counter-majoritarian difficulty'.[212] The question here is whether or not the courts, in protecting the rights set out in the constitution, should be empowered to strike down legislation enacted by a democratically elected legislature, if that legislation infringes upon those rights. If allowed to do so, the courts are essentially frustrating the will of the citizenry, who, through their elected officials, have sought legislative change. It is also relevant to the question of whether the courts can interpret the Constitution as imposing obligations on the other institutions of government to take particular actions in order to ensure that those institutions fulfil their constitutional obligations. The critique is particularly applicable in situations in which judges use creative interpretations of constitutional provisions in order to invalidate legislation which has been passed by a democratically elected legislature, or to impose positive obligations on State institutions.

One approach to tempering the counter majoritarian difficulty is for the courts to adhere to the principle of the separation of powers. The principle is concerned with the idea that the power of governance in a polity should be divided amongst the different branches: legislature, executive and judiciary. The principle has been assigned various rationales, from acknowledging that the different institutions of government play independent roles,[213] to ensuring efficiency in governance by dividing the workload between those institutions, to creating a system of checks and balances so that no branch of government wields excessive power.[214] With respect to the judiciary, as we shall see in the caselaw set out in Chapter three and Chapter four, it is often raised as a justification for judicial deference towards the legislature, with judges often citing the principle as precluding them invalidating a piece of legislation or interpreting the Constitution as imposing positive obligations on the other branches of government. It is often linked to the question of whether such action essentially amounts to the court 'engaging in policy considerations' and thus acting ultra vires. However, the demarcation between judicial and legislative

[212] For an overview of liberal approaches to the problem see: Nimer Sultany 'The State of Progressive Constitutional Theory: The Paradox of Constitutional Democracy and the Project of Political Justification' (2012) 47 Harv CR-CL L Rev 371.

[213] Jeremy Waldron, 'Separation of Powers in Thought and Practice' (2013) 54 BC L Rev 433.

[214] Paul R Verkuil, 'Separation of Powers: The Rule of Law and the Idea of Independence' (1989) 30 Wm & Mary L Rev 301, 303.

competence is not an exact one and there is little consistency regarding the situations in which judges will or will not decide to intervene as regards invalidating legislation or imposing obligations.

Liberalism and the use of a constitution is therefore closely linked. A constitution is the way in which the liberal attitude towards liberty, government power, private property and social order is expressed. As the foundational document upon which the State's authority rests it is extremely influential in terms of how law and politics are viewed by state officials and by the public. Therefore, it will help determine the attitude taken towards concepts such as private property and socioeconomic rights.

In this section I have described the link between liberal political theory and the utilisation of a constitution as a tool to organise the political structures of a society. I have highlighted the protection given to private property in liberal constitutional orders and have set out some of the basic institutional structures and doctrines associated with liberal constitutionalism, noting the typical inclusion of a set of rights, perceived as tools for restraining state interference. I have also noted the tension between the role of the courts in protecting the Constitution and the ability of a democratically elected legislature to carry out its mandate, a tension mediated by the separation of powers doctrine. My contention is that the liberal attitude towards political power and law influences the way in which constitutional rights are construed. Rights are viewed as providing protection against state interference, rather than as imposing obligations on the State to take positive actions. The role of the courts is to ensure these rights are respected. However, this role is mediated by the separation of powers doctrine which limits the extent to which the courts can control the actions of other State institutions. In the next section I will provide an oversight of the Irish constitutional tradition. I will then discuss the drafting process leading to the enactment of *Bunreacht na hÉireann* and will set out some of the Irish Constitution's key features. The aim here is to show that an overarching liberal approach to liberty, politics, property, law and rights is incorporated into the Irish constitutional system.

II – Irish Constitutionalism

II.A – Historical Background to Irish Constitutionalism

In this section I will discuss the Irish Constitution of 1937, *Bunreacht na hÉireann*. I will begin this discussion by noting the broader Irish constitutional tradition, which includes the creation of the Constitution of Dáil Éireann in 1919 and the adoption of the

Constitution of the Irish Free State (Saorstát Éireann), which came into force in 1922. This will be followed by a consideration of the process leading up to the drafting of *Bunreacht na hÉireann* and a discussion of the Constitution's main features.

The Irish constitutional tradition is intimately connected to Ireland's relationship with its closest neighbouring island of Britain. With the Acts of Union in 1800[215] Ireland became part of a United Kingdom of Great Britain and Ireland and for the following century, until Irish Independence in 1922, Ireland's socio-political landscape was dominated by attempts to gain some form of autonomy or independence for the Irish nation. After the Acts of Union, Ireland developed a peripheral status in the United Kingdom. Controlled by Westminster through an Anglo-Irish Protestant elite, the indigenous and majority Catholic population suffered political and economic exclusion. The Irish constitutional tradition was first institutionalised in 1919 when members of the republican Sinn Féin party who had refused to take up their sets in Westminster after the elections of the previous year, set up the first Dáil as an independent, non-colonial parliament. The Dáil convened until 1921. Despite the fact the body was limited in its effectiveness after being banned by the British authorities in September 1919, it was significant for Irish constitutional history due to the structures that it put in place.[216] The Constitution of Dáil Éireann was adopted on 21st January 1919.[217] It followed the basic framework of the British model of 'responsible governance'; the fusion of executive and legislature, majority government, cabinet government, and a strong Prime Minister.[218] This model, which the republican leaders were most familiar with,[219] provided the bedrock for subsequent exercises in Irish constitutionalism, highlighting the legacy of British influence in Ireland which kept Irish political structures within the confines of liberal constitutionalism.

After Ireland's War of Independence and the ensuing Civil War, the Anglo-Irish Treaty was signed in 1921. This led to the establishment of the Irish Free State. It was an

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[215] Basil Chubb, *The Politics of the Irish Constitution* (Institute of Public Administration 1991) 10.

[216] Alan J. Ward, *The Irish Constitutional Tradition: Responsible Government and Modern Ireland, 1782-1992* (Irish Academic Press 1994) 156.

[217] Alan J. Ward, *The Irish Constitutional Tradition: Responsible Government and Modern Ireland, 1782-1992* (Irish Academic Press 1994) 156.

[218] Alan J. Ward, *The Irish Constitutional Tradition: Responsible Government and Modern Ireland, 1782-1992* (Irish Academic Press 1994) 156-158.

[219] Alan J. Ward, *The Irish Constitutional Tradition: Responsible Government and Modern Ireland, 1782-1992* (Irish Academic Press 1994) 158.

internally sovereign entity but a dominion within the British Commonwealth.[220] The Constitution of the Irish Free State (Saorstát Éireann) came into force on December 6th 1922.[221] The 1922 Constitution included a number of provisions which reflected Ireland's dominion status: the creation of the post of Governor General (King's representative), an oath of allegiance whereby members of the Oireachtas were required to swear allegiance to the Constitution and fidelity to the British Crown, and an appeal to the Privy Council.[222] It effectively created a constitutional monarchy in Ireland but included republican elements such as the principle of popular sovereignty and entrenched civil rights.[223] It also introduced the concept of judicial review whereby the High Court and Supreme Court could review the constitutionality of legislation, a departure from the British tradition.[224] Finally it introduced the novel feature of a referendum for constitutional amendment. Despite these novel elements, the 1922 Constitution was heavily influenced by British political traditions. Chubb argues that the articles in the 1922 Constitution dealing with the operation of governmental institutions were essentially an attempt to fit the features of the British model of cabinet government into constitutional form.[225] The 1922 Constitution, therefore, whilst including some republican concepts, largely endorsed the British model of governance. Indeed, it can be seen as a reflection of the particular liberal tradition and values that had evolved across the Irish Sea.[226]

II.B – The Drafting of Bunreacht na hÉireann

The early 1930s saw an attempt by the newly formed Fianna Fáil party, under the stewardship of Éamon de Valera, to dismantle the Anglo-Irish Treaty by legal means. Uncertainty over the extent to which these efforts had been successful or could be sustainable led De Valera to consider enacting a new constitution. This process was aided by the establishment of a Constitutional Review Committee in 1934. The Committee was

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[220] Gerard Hogan, *The Origins of the Irish Constitution, 1928-1941* (Royal Irish Academy 2012) 1.

[221] Gerard Hogan, *The Origins of the Irish Constitution, 1928-1941* (Royal Irish Academy 2012) 1.

[222] Gerard Hogan, *The Origins of the Irish Constitution, 1928-1941* (Royal Irish Academy 2012) 1-2.

[223] Gerard Hogan, *The Origins of the Irish Constitution, 1928-1941* (Royal Irish Academy 2012) 2.

[224] Gerard Hogan, *The Origins of the Irish Constitution, 1928-1941* (Royal Irish Academy 2012) 3.

[225] Basil Chubb, *The Politics of the Irish Constitution* (Institute of Public Administration 1991) 12.

[226] Basil Chubb, *The Politics of the Irish Constitution* (Institute of Public Administration 1991) 26.

tasked with reviewing the 1922 Constitution in order to see what elements should be retained or dispensed with. The Committee produced a report laying out a number of articles they thought should be considered fundamental including classic liberal political rights such as freedom of conscience, the right of free expression of opinion, and peaceable assembly.[227] Other notable provisions considered fundamental were the power of the courts to engage in judicial review, which could aid the protection of fundamental rights.[228] Another interesting recommendation, which anticipated the attitude that the Irish state towards the question of socioeconomic rights, was concerned with the right to education contained in Article 10 of the 1922 Constitution. This article provided that all citizens had the right to free elementary education. The Committee recommended amending this article due to fears that it could place an excessive financial burden on the state.[229] Instead, they argued, the article should provide that the state has an obligation to provide *for* free primary education, thus diluting the state's obligations.[230] The Committee also considered deficiencies in the provisions of the 1922 Constitution. They examined twenty-two articles and highlighted ten which should be amended.[231] Some of these articles were not consistent with the idea of Irish autonomy, others had simply been poorly drafted.[232] Given the poor drafting of a number of the provisions of the 1922 Constitution the question arose as to the best way to remedy these deficiencies. There were two options, a complete revision of the 1922 Constitution which opened the question of whether or not such a large-scale revision would undermine the Constitution's status as the fundamental law of the state, or the drafting of a new constitution.[233]

In April 1935 De Valera instructed John Hearne, a senior civil servant, to begin drafting a new constitution.[234] Hearne had a legal background and had worked as a parliamentary

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[227] Gerard Hogan, *The Origins of the Irish Constitution, 1928-1941* (Royal Irish Academy 2012 38-40.

[228] Gerard Hogan, *The Origins of the Irish Constitution, 1928-1941* (Royal Irish Academy 2012) 46.

[229] Gerard Hogan, *The Origins of the Irish Constitution, 1928-1941* (Royal Irish Academy 2012) 46.

[230] Gerard Hogan, *The Origins of the Irish Constitution, 1928-1941* (Royal Irish Academy 2012) 46.

[231] Donal K. Coffey, 'The Need for a New Constitution: Irish Constitutional Change 1932-1935', (2012), 48 Irish Jurist 275, 283.

[232] Donal K. Coffey, 'The Need for a New Constitution: Irish Constitutional Change 1932-1935', (2012), 48 Irish Jurist 275, 283.

[233] Donal K. Coffey, 'The Need for a New Constitution: Irish Constitutional Change 1932-1935', (2012), 48 Irish Jurist 275, 284-287.

draftsman and diplomat and was a central figure in the drafting process. [235] Hearne sought to maintain continuity with the 1922 Constitution in order to retain stability.[236] By March 1937 another parliamentary draftsman, Arthur Matheson had contributed to the drafting process and a formal drafting committee was set up, made up of Maurice Moynihan, Michael McDunphy and Philip O'Donoghue.[237] The drafting process took over two years and produced a document which set out the institutional structure of the state.

A formal publication was also circulated to government ministers in March 1937.[238] The governmental departments supplied responses to the formal publication. I will discuss the reaction to the potential inclusion of socioeconomic rights in the Constitution in section IV of this chapter. The other main issue which the departments had concerns with was that of judicial review. James J. McElligott of the Department of Finance objected to the extent of the power of judicial review that had been granted to the courts, arguing it would bring uncertainty into the legislative system.[239] This criticism was echoed by Stephen Roche of the Department of Justice.[240] However the criticisms of the powers of judicial review contained in the draft Constitution were largely ignored by the Drafting Committee.[241] On the 14th of June 1937 the Dáil approved the new Constitution and on the 1st of July a plebiscite was held amongst the citizens of Ireland who approved of it.[242] The new Constitution was enrolled in the Supreme Court on the 6th February 1938.[243]

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[234] Donal K. Coffey, 'The Need for a New Constitution: Irish Constitutional Change 1932-1935', (2012), 48 Irish Jurist 273, 283.

[235] Dermot Keogh, 'The Constitutional Revolution: An Analysis of the Making of the Constitution' in Frank Litton, *The Constitution of Ireland 1937 - 1987* (Institute of Public Administration 1987) 8.

[236] Dermot Keogh, 'The Constitutional Revolution: An Analysis of the Making of the Constitution' in Frank Litton, *The Constitution of Ireland 1937 - 1987* (Institute of Public Administration 1987)

[237] Gerard Hogan, *The Origins of the Irish Constitution, 1928-1941* (Royal Irish Academy 2012) 270 & 359.

[238] Gerard Hogan, *The Origins of the Irish Constitution, 1928-1941* (Royal Irish Academy 2012) 270.

[239] Gerard Hogan, 'Directive Principles, Socioeconomic Rights and the Constitution', (2001), 36 Irish Jurist 175.

[240] Gerard Hogan, *The Origins of the Irish Constitution, 1928-1941* (Royal Irish Academy 2012) 332.

[241] Gerard Hogan, *The Origins of the Irish Constitution, 1928-1941* (Royal Irish Academy 2012) 334.

[242] Gerard Hogan, *The Origins of the Irish Constitution, 1928-1941* (Royal Irish Academy 2012) 520.

[243] Gerard Hogan, *The Origins of the Irish Constitution, 1928-1941* (Royal Irish Academy 2012) 520.

II.C – The Main Features of Bunreacht na hÉireann

Bunreacht na hÉireann sets out a unitary parliamentary system. The national parliament is known as the Oireachtas which consists of a President, a House Representatives known as Dáil Éireann, and a Senate knows as Seanad Éireann.[244] The legislative power of the State lies exclusively with the Oireachtas.[245] The head of state is the President,[246] and executive power is exercised by the Government which is headed by the Taoiseach.[247] Under Article 34 of the Constitution the courts are tasked with administering justice in the State. The courts are comprised of Court of First Instance, a Court of Appeal[248], and a Court of Final Appeal, known as the Supreme Court.[249] Article 34 empowers the courts to judicially review legislation and actions of the government or other states bodies for compatibility with the Constitution. Under Article 26, the President may refer legislative Bills, with some exceptions[250], to the Supreme Court in order to determine if their provisions are consistent with the Constitution. *Bunreacht na hÉireann* does not contain a provision explicitly acknowledging the doctrine of the separation of powers. However, it is commonly accepted that the doctrine is implied by Article 6 which acknowledges a distinction between the legislative, executive and judicial functions of governance.[251] The provisions dealing with rights in the 1937 Constitution are Articles 40 – 45. Consistent with the liberal conception of rights, they are largely negative rights, restraining state intervention. Article 45, which I will discuss in the final section of this chapter, is the obvious exception to this with the Directive Principles of Social Policy covering material elements that would normally imply socioeconomic rights which impose obligations on the State. As we shall see however, these principles are non-justiciable and therefore don't

[244] Article 15 Bunreacht na hÉireann.

[245] Article 15 Bunreacht na hÉireann.

[246] Article 12 Bunreacht na hÉireann.

[247] Article 28 Bunreacht na hÉireann.

[248] The allowance for a Court of Appeal was included after the thirty-third amendment of the Constitution in 2013. The Court of Appeal sits between the High Court and Supreme Court and was introduced to lessen the workload of the latter.

[249] Article 34 Bunreacht na hÉireann.

[250] These exceptions include Bills which intend to have the effect of amending the Constitution.

[251] David Gwynn Morgan, *The Separation of Powers in the Irish Constitution* (Round Hall Sweet & Maxwell 1997) 26.

receive the same protection as the other rights in the Constitution. Article 40 which, according to Hogan, is the most important of the rights articles contains a number of civil and political rights including equality before the law, the protection of liberty and the right to free speech, assembly and association.[252] Article 40.3, which I will discuss further in the next chapter imposes an obligation on the state to vindicate the personal rights of citizens. Article 43, which will also be discussed in detail in Chapter three, guarantees the right to private property, providing it with significant protection, whilst Article 44 guarantees the right to religious practice.

II.D – Bunreacht na hÉireann: A Liberal Constitution

Bunreacht na hÉireann, is clearly influenced by liberal principles. John Hearne's early drafts were largely secular and despite later changes caused by Church influence, the early framework of those drafts, which followed a liberal constitutional model, was retained.[253] It is a written, codified constitution which sets out the relationships between state institutions, details their powers and the limits to this power and, through its section on fundamental rights, delineates the relationship between the state and its citizens. The rights provisions include strong protection for the right to private property and include classic negative rights, with the socioeconomic principles set out in Article 45 not being given judicial protection. The Constitution retains the principles of 'responsible government' inherited from the British system and reproduced in the 1919 and 1922 Constitutions. It therefore follows the liberal model of a constitution as a set of norms which command the government through the establishment of pre-defined legal rules and the provision of fundamental civil political rights which ensure the limitation of government power. The courts are given the role of protecting these constitutional rights, but this power is mediated by the separation of powers doctrine.

One might ask: if the drafters of the new Constitution wanted to create a new order, why are the imprints of British liberalism so apparent in the 1937 Constitution? One factor was the absorption of British political customs and traditions by the Irish throughout the period of British rule, particularly in the second half of the 19th century when ideas around mass democracy were taking hold.[254] Secondly, the leaders of the dominant segment of

[252] Gerard Hogan, *The Origins of the Irish Constitution, 1928-1941* (Royal Irish Academy 2012) 223.

[253] Gerard Hogan, *The Origins of the Irish Constitution, 1928-1941* (Royal Irish Academy 2012) 156.

[254] Basil Chubb, *The Politics of the Irish Constitution* (Institute of Public Administration 1991) 11.

the Irish nationalist movement were largely conservative.[255] Their aim was territorial independence, not radical socioeconomic transformation.[256] Liberal constitutionalism was a tradition with which they were familiar and they saw no reason to pursue a different path.

This section has discussed Ireland's constitutional tradition, including the creation of the Constitution of Dáil Éireann in 1919 and the adoption of the Constitution of the Irish Free State (Saorstát Éireann), enacted in 1922. This was followed by a consideration of the process leading up to the drafting of *Bunreacht na hÉireann*, a consideration of its main features and a discussion of why it should be considered a liberal constitution, incorporating the liberal attitude towards politics and the protection of rights. In the next section I will consider the countervailing social forces which existed in Ireland at that time of the drafting of *Bunreacht na hÉireann* and discuss their impact on the Constitution.

III – The Constitution in Context

In this section I will discuss the social forces which could potentially have challenged the creation of a liberal constitution in Ireland. I will argue, following the work of Thomas Murray, that these forces led to the adoption of an Irish version of social constitutionalism, a doctrine which sought to use constitutionalism as a way of registering and pacifying social dissent. I will highlight Murray's thesis that the influence of the Catholic Church in Ireland ensured that Irish social constitutionalism took a particularly conservative form and did little to challenge underlying economic relations in Ireland.

III.A – The Radical Left & Challenges to the 1937 Constitution

Thomas Murray has noted that, despite the acceptance of British liberal political values by the Irish political class, there was also opposition to these ideals visible in Ireland in the first third of the 20th century.[257] Ireland in this period was a divided society and numerous examples of social unrest highlight the oppositional movements which existed in the country. As noted above, throughout the period of union between Ireland and Great Britain, there existed a core-periphery relationship between the two regions, with

[255] Bryan Fields, *The Catholic Ethic and Global Capitalism* (Ashgate 2003) 158.

[256] Basil Chubb, *The Politics of the Irish Constitution* (Institute of Public Administration 1991) 17.

[257] Thomas Murray, 'Socioeconomic Rights and the Making of the 1937 Irish Constitution', (2016) 31:4 Irish Political Studies 502.

Ireland occupying a subordinate position to the rest of the United Kingdom, especially England.[258] This dynamic continued to exist throughout the 1920s and 1930s. Particular sections of society benefitted from this arrangement. Indeed, Fields argues that the formation of the Free State in the 1920s can actually be seen as a move to accommodate capitalist accumulation in Ireland and Great Britain as national economic determination allowed the continuance of market relations between the two countries whilst at the same time dissipating revolutionary impulses within the population.[259] Cumann na nGaedheal, the dominant party in the Irish Free State, drew support from groups who benefitted from the existing economic situation: the large graziers who exported livestock to the UK, the banks and the Catholic hierarchy.[260] They therefore adopted policies which maintained the social position of such groups, such as ensuring the Free State remained linked into the sterling area's market conditions.[261] Fianna Fáil drew support from different strata of Irish society: small farmers, organised labour and the unemployed.[262] As a result they attempted to alter the structure of capital accumulation by introducing some socioeconomically progressive measures including the improvement of working conditions, the provision of collective bargaining agreements, increased housing provision and forms of social welfare.[263] However, attempts at reform were limited due to the conservative nature of the Catholic Church and because of economic and institutional factors, such as the country's economic reliance on the cattle trade and resistance to progressive measures within the civil service.[264] Therefore welfare provision remained comparatively low in the 1930s, with conservative forces able to control the

[258] Thomas Murray, 'Socioeconomic Rights and the Making of the 1937 Irish Constitution', (2016) 31:4 Irish Political Studies 502, 507.

[259] Bryan Fields, *The Catholic Ethic and Global Capitalism* (Ashgate 2003) 162.

[260] Thomas Murray, 'Socioeconomic Rights and the Making of the 1937 Irish Constitution', (2016) 31:4 Irish Political Studies 502, 507.

[261] Thomas Murray, 'Socioeconomic Rights and the Making of the 1937 Irish Constitution', (2016) 31:4 Irish Political Studies 502, 507.

[262] Thomas Murray, 'Socioeconomic Rights and the Making of the 1937 Irish Constitution', (2016) 31:4 Irish Political Studies 502, 507-508.

[263] Thomas Murray, 'Socioeconomic Rights and the Making of the 1937 Irish Constitution', (2016) 31:4 Irish Political Studies 502, 508.

[264] Thomas Murray, 'Socioeconomic Rights and the Making of the 1937 Irish Constitution', (2016) 31:4 Irish Political Studies 502, 509.

political and economic agenda due to the relative lack of socialist opposition.[265] In the context of the core-periphery relationship between Ireland and Britain, these dynamics resulted in the proliferation of a number of instances of social unrest from the early 1900s up until the time of the drafting of the 1937 Constitution. This included the 1913 Dublin Tramways strike which led to the Dublin 'lockout'. The period between August 1918 and August 1923 witnessed five general and eighteen local strikes.[266] This period also saw workplaces being taken under worker control and a number of soviets established in different parts of the country.[267] The 1930s also saw disturbances with another Dublin Tram strike in 1935 and a building sector strike in 1937.[268] There was also agitation around land distribution and a campaign against slum landlordism in Dublin organised by the Irish Women Workers' Union.[269]

Central to many of these disputes were radical left-wing actors and formations. Ireland has not had a tradition of socialist activism to rival that of some of its European counterparts. However, a radical left current has existed in the country dating back to the early 1900s with worker and republican groups challenging the capital-labour and core-peripheral relations which existed within and between Ireland and Britain.[270] In 1908 James Larkin attempted to organise the labour movement in Ireland by setting up the Irish Transport and General Workers Union which instigated the 1913 tramways strike.[271] Socialist republicans linked the struggle for nationalism with socialist revolution. James Connolly, one of the leaders of both the 1913 strike and the 1916 rising, is probably the most well-known actor in this vein. He developed a philosophy of 'Hibernicised Marxism'

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[265] Thomas Murray, 'Socioeconomic Rights and the Making of the 1937 Irish Constitution', (2016) 31:4 Irish Political Studies 502, 508.

[266] Thomas Murray, 'Contesting a World-Constitution? Anti-systemic Movements and Constitutional Forms in Ireland, 1848-2008', (2016), 22:1 Journal of World-System Research 77, 88.

[267] Thomas Murray, 'Contesting a World-Constitution? Anti-systemic Movements and Constitutional Forms in Ireland, 1848-2008', (2016), 22:1 Journal of World-System Research 77, 88.

[268] Thomas Murray, 'Contesting a World-Constitution? Anti-systemic Movements and Constitutional Forms in Ireland, 1848-2008', (2016), 22:1 Journal of World-System Research 77, 91.

[269] Thomas Murray, 'Contesting a World-Constitution? Anti-systemic Movements and Constitutional Forms in Ireland, 1848-2008', (2016), 22:1 Journal of World-System Research 77, 91.

[270] Thomas Murray, 'Contesting a World-Constitution? Anti-systemic Movements and Constitutional Forms in Ireland, 1848-2008', (2016), 22:1 Journal of World-System Research 77, 87.

[271] Thomas Murray, 'Contesting a World-Constitution? Anti-systemic Movements and Constitutional Forms in Ireland, 1848-2008', (2016), 22:1 Journal of World-System Research 77, 87.

and attempted to link the struggle for socialism with the nationalist movement by arguing that the latter was a precursor for the former.[272] Two notable instances of socialist organisation subsequently emerged from this legacy during the 1930s. Saor Éire was established in 1931 by Communist-leaning members of the IRA. The Republican Congress of 1934 to 1936 was a republican Marxist-Leninist organisation.[273] These groups, in contrast to the mainstream nationalist groups, aimed to radically transform the property relationships within the country, relying on a class analysis in their rejection of the Irish Free State and using the Bolshevik revolution in Russia as a model.[274]

III.B – Social Constitutionalism & the Catholic Church

Murray has also noted that these moments of social unrest and the activities of socialist actors in the years leading up to the drafting of *Bunreacht na hÉireann* coincided with a development in legal-political thought, identified by Duncan Kennedy as 'social constitutionalism'.[275] This doctrine of social legal thought was used to justify state intervention in the market system and the emergence of welfare regimes. The aim was to subdue the class politics which was emerging as a result of the social transformations of the late 19th century. In Ireland, social constitutionalism was used to register and domesticate the forces whish lay behind the social agitation which existed in Ireland in the years leading up to the Constitution's enactment. However, as Murray highlights, social constitutionalism in Ireland took a particular form. Unlike in some other states, in which countries were forced to make significant concessions to workers, the Irish state's gesture towards social justice was heavily influenced by a conservative Catholic Church.

The Catholic Church was a powerful force in Ireland in the early 20th Century. Its influence could be seen throughout the lifetime of the Irish Free State, with the Catholic moral code being given expression in the law of the state.[276] Legislation such as the Censorship of Films Act 1923 and the Censorship of Publications Act 1929 reflected

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[272] Bryan Fields, *The Catholic Ethic and Global Capitalism* (Ashgate 2003) 142.

[273] Thomas Murray, 'Socioeconomic Rights and the Making of the 1937 Irish Constitution', (2016) 31:4 Irish Political Studies 502, 510.

[274] Thomas Murray, 'Socioeconomic Rights and the Making of the 1937 Irish Constitution', (2016) 31:4 Irish Political Studies 502, 510.

[275] Duncan Kennedy, 'Three Globalizations of Law and Legal Thought: 1850 – 2000' – in David M. Trubek and Alvaro Santos (eds), *The New Law and Economic Development: A Critical Appraisal* 37-63.

[276] Bryan Fields, *The Catholic Ethic and Global Capitalism* (Ashgate 2003) 6.

Catholic values.[277] These values could also be seen in S17 Criminal Law Amendment Act 1935 which banned the import and sale of contraceptives.[278] Catholicism had a significant influence on the 1937 Constitution. De Valera was a devout Catholic,[279] and members of the clerical community offered him their advice regarding the drafting of the Constitution.[280] One such group was the Jesuit Order which appointed a committee, which included Fr. Edward Cahill, to advise the Fianna Fail government on constitutional matters.[281] Cahill is often described as having a particularly strong influence over De Valera. However Keogh argues that his influence has been exaggerated, although the submission of the Jesuits was influential.[282] The Committee drafted a Preamble and articles dealing with matters such as family, education and marriage.[283] Much of their draft was based on provisions from the 1921 Polish Constitution whose influence can be seen in the Preamble.[284] Their influence can also be seen in certain Jesuit wording in the Constitution, in Article 44 (the religious rights article) and in the general Catholic social principles which underlie the document.[285] However, it was the Holy Ghost Fathers and particularly John Charles McQuaid who had a more substantial influence on De Valera.[286] McQuaid was close to De Valera, advising him on spiritual matters.[287] The two were in correspondence throughout the drafting period and McQuaid is thought to have had

[277] Basil Chubb, *The Politics of the Irish Constitution* (Institute of Public Administration 1991) 39.

[278] Basil Chubb, *The Politics of the Irish Constitution* (Institute of Public Administration 1991) 39.

[279] Basil Chubb, *The Politics of the Irish Constitution* (Institute of Public Administration 1991) 26.

[280] Dermot Keogh, 'The Constitutional Revolution: An Analysis of the Making of the Constitution' in Frank Litton, *The Constitution of Ireland 1937 - 1987* (Institute of Public Administration 1987) 10-11.

[281] Dermot Keogh, 'The Constitutional Revolution: An Analysis of the Making of the Constitution' in Frank Litton, *The Constitution of Ireland 1937 - 1987* (Institute of Public Administration 1987). 11.

[282] Dermot Keogh, 'The Constitutional Revolution: An Analysis of the Making of the Constitution' in Frank Litton, *The Constitution of Ireland 1937 - 1987* (Institute of Public Administration 1987) 11

[283] Dermot Keogh, 'The Constitutional Revolution: An Analysis of the Making of the Constitution' in Frank Litton, *The Constitution of Ireland 1937 - 1987* (Institute of Public Administration 1987) 11.

[284] Gerard Hogan, *The Origins of the Irish Constitution, 1928-1941* (Royal Irish Academy 2012) 211.

[285] Dermot Keogh, 'The Constitutional Revolution: An Analysis of the Making of the Constitution' in Frank Litton, *The Constitution of Ireland 1937 - 1987* (Institute of Public Administration 1987) 18.

[286] Dermot Keogh, 'The Constitutional Revolution: An Analysis of the Making of the Constitution' in Frank Litton, *The Constitution of Ireland 1937 - 1987* (Institute of Public Administration 1987) 19.

[287] Gerard Hogan, *The Origins of the Irish Constitution, 1928-1941* (Royal Irish Academy 2012) 12.

influence on a number of articles and aspects of the Constitution.[288] In his correspondence with De Valera, McQuaid sent numerous drafts on issues such as the family, marriage and private property and was involved in the drafting of the rights articles of the Constitution.[289] He was also involved in the drafting of Article 44.[290]

The Catholic Church therefore had direct influence over the drafting the *Bunreacht na hÉireann*. The Preamble provides probably the most explicit example of this influence, with the Constitution being given to the people 'in the name of the most Holy Trinity'. The influence of Catholic social teaching was particularly important. It can be seen in Articles 18 and 19, related to vocational representation in the Seanad and Article 15.3.1 which permitted the establishment of vocational councils in the national parliament.[291] The other area of the Constitution most associated with Catholic social teaching is the section containing fundamental rights. I will discuss the influence the Church hierarchy had on Article 43 (private property) and Article 45 (Directive Principles of Social Policy) in section IV of this chapter below. In addition, it is generally accepted that Article 41 (the family) and Article 42 (education) were influenced by Catholic social teaching, and particularly by the submissions made by McQuaid.[292] The emphasis in Article 44 on the special position of the Catholic Church was also a result of pressure from the Catholic hierarchy.[293]

The socially minded elements of *Bunreacht na hÉireann,* which registered the forces of social agitation present in 1930s Ireland, were therefore influenced by the teachings of a conservative Catholic Church. Catholic social discourse expressed a particular view of social relationships, one which placed an emphasis on family law construed through patriarchal Catholic social norms.[294] The Constitution failed to expand welfare provision,

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[288] Gerard Hogan, *The Origins of the Irish Constitution, 1928-1941* (Royal Irish Academy 2012) 212-213.

[289] Dermot Keogh, 'The Constitutional Revolution: An Analysis of the Making of the Constitution' in Frank Litton, *The Constitution of Ireland 1937 - 1987* (Institute of Public Administration 1987) 20.

[290] Dermot Keogh, 'The Constitutional Revolution: An Analysis of the Making of the Constitution' in Frank Litton, *The Constitution of Ireland 1937 - 1987* (Institute of Public Administration 1987) 21.

[291] Basil Chubb, *The Politics of the Irish Constitution* (Institute of Public Administration 1991) 27.

[292] Thomas Murray, 'Socioeconomic Rights and the Making of the 1937 Irish Constitution', (2016) 31:4 Irish Political Studies 502, 516.

[293] Basil Chubb, *The Politics of the Irish Constitution* (Institute of Public Administration 1991) 28.

articulating a model of 'paternalist charity' with welfare largely outsourced to the Catholic Church rather than being provided through state intervention.[295] As a result, the Irish Constitution can be viewed as a mixture of liberal norms and Catholic social teaching. In terms of market law, the Constitution did little to alter the pre-existing structure of free market capital accumulation, facilitating the pre-existing class relations in Ireland and the core-peripheral relationships that had existed between Ireland and Great Britain through an emphasis on the traditional liberal legal protection of property rights.[296] This arrangement suited the dominant economic actors within the country, the large graziers and financiers who benefitted from the economic status quo.[297] The impact of radical social forces on the *Bunreacht na hÉireann* was therefore successfully neutered.

In the final section of this chapter, I will discuss what this particular constellation of social forces meant for the position of private property rights in *Bunreacht na hÉireann* and for the Constitution's protection of socioeconomic rights. I will argue that the debates around these issues which emerged during the drafting process and the ultimate result in terms of what was included in the constitutional text, reflect the balance of forces present in 1930s Ireland.

IV – Property Rights & Socioeconomic Rights in Bunreacht Na hÉireann

The degree to which socioeconomic rights were secured in *Bunreacht na hÉireann* was intimately connected to the question of private property. As I have noted, the right to property was given significant protection in the Constitution. This is unsurprising given the importance of the issue of property in post-independence Ireland and given the influence of liberal principles on the drafters. The right to private property was included

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[294] Thomas Murray, 'Socioeconomic Rights and the Making of the 1937 Irish Constitution', (2016) 31:4 Irish Political Studies 502, 504 & 520.

[295] Thomas Murray, 'Contesting a World-Constitution? Anti-systemic Movements and Constitutional Forms in Ireland, 1848-2008', (2016), 22:1 Journal of World-System Research 77, 100.

Thomas Murray, 'Socioeconomic Rights and the Making of the 1937 Irish Constitution', (2016) 31:4 Irish Political Studies 502, 504.

[296] Thomas Murray, 'Socioeconomic Rights and the Making of the 1937 Irish Constitution', (2016) 31:4 Irish Political Studies 502, 519.

[297] Thomas Murray, 'Contesting a World-Constitution? Anti-systemic Movements and Constitutional Forms in Ireland, 1848-2008', (2016), 22:1 Journal of World-System Research 77, 92.

as a natural right, early in the process of drafting the Constitution.[298] Discussion of socioeconomic rights was also present in 1930s Ireland. The radical left groups mentioned above saw such rights as an instrument which could potentially challenge the existing material relations within the Irish Free State.[299] For example, the Saor Eire Constitution contained provisions calling for the end of landlordism, the creation of a state monopoly in the banking sector, and the creation of industrial worker co-operatives. The Republican Congress argued for a minimum wage and equal pay for women.[300] However, discourse surrounding socioeconomic rights was not confined to the radical left. Various proposals regarding, inter alia, social credit and land distribution were considered by the drafters of *Bunreacht na hÉireann*.[301]

It was initially envisaged that the right to private property would be contained within a general provision which would also include 'principles of social policy'. These principles would provide guidance on the regulation of the right to property, with the Article aimed at reconciling the protection of that right with (Catholic) notions of social justice. This general provision would thus provide an 'overall vision of distributive justice' for the country.[302] It seems the Church hierarchy was in favour of such a formulation. The contributions of McQuaid, the Jesuit Committee and Edward Cahill emphasised the importance of protecting private property. For example, the Jesuit Committee highlighted the need to create a property-owning middle class in order to provide social stability.[303] However, they also sought the inclusion of provisions concerned with social justice, albeit influenced once again by Catholic social teaching. The motivation behind the Church's enthusiasm for the inclusion of social principles also seems to have stemmed from their concern for social cohesion, particularly their interest in tempering class-based agitation

[298] Rachael Walsh, 'Private Property Rights in the Drafting of the Irish Constitution: A Communitarian Compromise (2011) 33 Dublin University Law Journal 86, 89.

[299] Thomas Murray, 'Socio-Economic Rights and the Making of the 1937 Irish Constitution', (2016) 31:4 Irish Political Studies 502, 503.

[300] Thomas Murray, 'Socio-Economic Rights and the Making of the 1937 Irish Constitution', (2016) 31:4 Irish Political Studies 502, 510.

[301] Thomas Murray, 'Socio-Economic Rights and the Making of the 1937 Irish Constitution', (2016) 31:4 Irish Political Studies 502, 502.

[302] Rachael Walsh, 'Private Property Rights in the Drafting of the Irish Constitution: A Communitarian Compromise (2011) 33 Dublin University Law Journal 86, 93.

[303] Thomas Murray, 'Socio-Economic Rights and the Making of the 1937 Irish Constitution', (2016) 31:4 Irish Political Studies, 515.

and the danger posed by the Communist 'threat'.[304] Edward Cahill argued that provisions concerning land redistribution and credit reform were necessary to quell agitation.[305] McQuaid also worried about the proliferation of class-based conflict in Ireland. He warned De Valera of the dangers of strike action, arguing that it needed to be controlled,[306] and argued for a social policy influenced by Christian principles.[307]

However, when a draft was circulated to government departments on 16th March 1937, a different view on the inclusion of the principles of social policy in the Constitution emerged, albeit one motivated by same the underlying fears articulated by the Church leaders regarding the question of social cohesion. Whilst the Church seemed to believe the inclusion of socioeconomic rights would help to temper class agitation, some of Ireland's leading civil servants viewed their constitutional protection as a potential threat to the security of the State. They were concerned that if the rights could be read as imposing obligations on the State to expend resources, they could become a source of social conflict. McElligott of the Department of Finance objected that they would place too large a burden on the state, could become a source of disaffection and agitation and could lead to unintended consequences and instability.[308] Roche of the Department of Justice was also unhappy with the breadth of the guarantees contained in the principles.[309] These criticisms were echoed by Gavan Duffy, later to become President of the High Court. Duffy suggested separating fundamental rights, which would carry legal redress, from other rights which the state would strive to secure (by for example taking them into consideration in the legislative process) but which would not be justiciable.[310] Ultimately this is the path the drafters decided to take. In April 1937 two drafts were produced in

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[304] Ronan Keane, 'Property in the Constitution and in the Courts' – in Bryan Farrell (ed), *De Valera's Constitution and Ours* (Gill and Macmillan 1988) 139.

[305] Thomas Murray, 'Socio-Economic Rights and the Making of the 1937 Irish Constitution', (2016) 31:4 Irish Political Studies, 502, 514.

[306] Thomas Murray, 'Socio-Economic Rights and the Making of the 1937 Irish Constitution', (2016) 31:4 Irish Political Studies, 502, 514.

[307] Thomas Murray, 'Socio-Economic Rights and the Making of the 1937 Irish Constitution', (2016) 31:4 Irish Political Studies, 502, 513.

[308] Gerard Hogan, 'Directive Principles, Socioeconomic Rights and the Constitution', (2001), 36 Irish Jurist 172, 175.

[309] Gerard Hogan, *The Origins of the Irish Constitution, 1928-1941* (Royal Irish Academy 2012) 355.

[310] Gerard Hogan, 'Directive Principles, Socio-economic Rights and the Constitution', (2001), 36 Irish Jurist 174, 176.

which the property rights provision was separated from the principles of social policy.[311] This was part of larger move to separate legally enforceable fundamental rights, from the social policy principles which would not be justiciable. There was some opposition to the separation of justiciable rights from the principles of social policy, with TDs[312] James Douglas and Alfred O'Rahilly criticising attempts to include articles in the Constitution which would be precluded from judicial cognisance.[313] However, the majority favoured Duffy's approach.

In the enacted Constitution, the right to private property is included in the section entitled 'Fundamental Rights', which also includes a raft of classic civil and political rights. It is given significant protection, described in Article 43 as being a 'natural right, antecedent to positive law.'

This section also contains some 'social' provisions including articles relating to the family, religion, education and the welfare of vulnerable children. Of these, the last two could potentially be viewed as socioeconomic rights. However, as we shall see in Chapter four, the Irish Supreme Court has refused to interpret them as being capable of imposing positive obligations on the State. The rest of the Constitution's provisions which are broadly related to socioeconomic rights are included in Article 45. The Article makes reference to the need to promote the welfare of the people through the creation of a just and charitable social order. It also refers to the right to an adequate means of livelihood, the need to control free competition so that ownership of the country's material resources is not vested in a small elite, and the need to safeguard the economic interests of 'weaker' sections of society. However, the text of the Article makes it clear that the principles are for guidance purposes only and are not justiciable as rights.

The debates around the relationship between the right to private property and socioeconomic rights, and the protection ultimately afforded to each in *Bunreacht na hÉireann*, reflects the broader balance of social forces which existed in Ireland around the time of its enactment. Although radical left actors put forward articulations of socioeconomic rights which, if vindicated, could have led to significant material change in Irish society, the impact of these calls for social change was negligible. Instead, private

[311] Rachael Walsh, 'Private Property Rights in the Drafting of the Irish Constitution: A Communitarian Compromise (2011) 33 Dublin University Law Journal 86, 95.

[312] Teachta Dála or Member of Parliament.

[313] Gerard Hogan, *The Origins of the Irish Constitution, 1928-1941* (Royal Irish Academy 2012) 330-332.

property was given significant protection in the Constitution, whilst socioeconomic rights, which could potentially have been a tool for compelling social redistribution, were articulated in a manner which was consistent with conservative Catholic social teaching and were for the most part rendered non-justiciable by the liberal elite.

Conclusion

In this chapter I have discussed the link between liberal political theory and the use of a constitution as a tool for organising the political institutions of a society. I have noted the importance of the protection of private property in the liberal constitutional order. I also have discussed some of the main institutional features and doctrines associated with liberal constitutionalism, including the protection of rights designed to limit state intervention in the lives of individuals and the separation of powers doctrine. I have given some background to the Irish constitutional tradition and have set out some of the key features of *Bunreacht na hÉireann*. I have argued that the Constitution of 1937 is a liberal one which provides significant protection to the right to private property. Further, I have argued that the countervailing social forces present in Irish society around the time of its drafting were registered and pacified through an Irish variety of social constitutionalism, heavily influenced by a conservative Catholic Church. Finally, I have shown how this balance of forces in Irish society was reflected in debates around the right to private property and the position of socioeconomic rights in *Bunreacht na hÉireann.*

In Chapter three I will consider the jurisprudence which has developed in relation to the protection of the right to private property and socioeconomic rights. In terms of the former, we shall see the tension which exists between the courts' role as protector of constitutional rights and the separation of powers doctrine which limits the courts' jurisdiction. However, it will also be evident that the protection of property rights right has generally not posed an automatic barrier to socially minded legislation. The courts, relying on the separation of powers principle, have generally refused to invalidate such legislation even if it does interfere with private property rights, showing that liberal impulse towards the protection of private property against state interference is not absolute.

In Chapter four I will consider the socioeconomic rights decisions which have emerged from the Irish courts. I will consider the caselaw that has emerged in relation to Article 42 (education and Article 45.2 (welfare of vulnerable children) – the two socioeconomic rights which were made enforceable before the courts. I will also discuss attempts to

convince the courts to give protection to a wider set of socioeconomic rights. As we shall see, the courts have refused to give meaningful protection to socioeconomic rights. They have rejected most attempts made to utilise such rights and to impose positive obligations on the State to expend resources. Again, this position was justified by reference to the separation of powers doctrine. Therefore, as regards to socioeconomic rights, the liberal aversion to state intervention, ensured through the courts' protection of constitutional rights is aligned with the separation of powers doctrine which constrains the courts' ability to place positive obligations on the other branches of government.

Chapter Three - Irish Liberal Legalism Examined: Property Rights and the Irish Courts

Introduction

In the previous chapter I discussed the classic liberal rights contained in Bunreacht na hÉireann, most notably the right to private property. In this chapter I will examine caselaw which has emerged around the Constitution's property rights provisions. This extended discussion of the place of property rights in the Irish Constitutional order will provide a necessary foundation for the discussion in Chapter seven about the utility, for the radical left in Ireland, of pursuing the amendment of the Constitution to include a right to housing.

The reason for examining the property rights caselaw is that, in recent years successive governments have blocked various pieces of legislation designed to regulate the housing market on the basis that they would infringe the constitutional right to private property. This has given rise to a number of questions. First, is it accurate to state that the constitutional right to private property *currently* constitutes a barrier to the enactment of progressive housing legislation, in the absence of a constitutionally protected right to housing? Secondly, if a right to housing were inserted into the Constitution would its effectiveness be restricted by the countervailing right to private property? In other words, would the Irish courts be obliged to invalidate progressive housing legislation if it infringed upon private property rights, even if a right to housing was constitutionally protected? For many proponents of a constitutional right to housing, the concern that the right to private property might act as a limiting counter-right to the right to housing, means that any proposed referendum should not simply be concerned with inserting that right into the Constitution, but should also provide the opportunity to clarify, and possibly increase the extent to which the exercise of private property rights can be curtailed in the name of the public good.

The property rights legislation examined here will provide some insight into the question of whether the right to private property constitutes a barrier to progressive housing legislation. The key question that arises in the caselaw is whether legislation, which restricts the exercise of property rights but purports to do so in order to achieve a common social goal, is constitutionally valid. The discussion will therefore examine the attempts made by the Irish courts to answer this question.

I - Property Rights Jurisprudence

I.A – Introduction

The right to private property is enshrined in three provisions in Bunreacht na hÉireann. The most important of these for our discussion are Article 40.3 and Article 43. The third, Article 44.5, which protects the private property rights of religious denominations will not be examined here.

As a whole, Article 40 is concerned with the protection of the personal rights of citizens, with the right to private property included in these.

The relevant subsections of Article 40.3 provide that:

> (1°) The State guarantees in its laws to respect, and, as far as practicable, by its laws to defend and vindicate the personal rights of the citizen.
>
> (2°) The State shall, in particular, by its laws protect as best it may from unjust attack and, in the case of injustice done, vindicate the life, person, good name, *and property rights* [my emphasis] of every citizen.

Article 43, entitled 'Private Property', states that:

1)

> (1°) The State acknowledges that man, in virtue of his rational being, has the natural right, antecedent to positive law, to the private ownership of external goods.
>
> (2°) The State accordingly guarantees to pass no law attempting to abolish the right of private ownership or the general right to transfer, bequeath and inherit property.

2)

> (I°) The State recognises, however, that the exercise of the rights mentioned in the foregoing provisions of this Article ought, in civil society, to be regulated by the principles of social justice.
>
> (2°) The State, accordingly, may as occasion requires delimit by law the exercise of the said rights with a view to reconciling their exercise with the exigencies of the common good.

The key question that has emerged from the caselaw in this area is whether legislation which restricts private property rights but does so in pursuit of a common social goal is accepted as constitutional. Over the past 80 years, the courts have adopted a variety of approaches in trying to answer this question. The following paragraphs will examine these approaches with the ultimate aim of shedding some light on the question of whether the

constitutionally protected right to private property constitutes a barrier to progressive housing legislation, and whether it would continue to do so if a right to housing was inserted into *Bunreacht na hÉireann*.

One point to note before beginning this discussion is that there have been two broad approaches taken by the Irish courts to interpreting property rights provisions.[314] The first, beginning in the late 1930s and continuing up until the 1990s, involved a close examination of the constitutional text and a very formalist process of deciphering the meaning behind the provisions. The second approach, emerging at the end of the 20th century involved the use of a proportionality test in order to decide when it would be appropriate to invalidate legislation restricting property rights. The latter approach did not involve an abandoning of textual discussion by the courts but provided a framework within which the judiciary could also consider broader issues at play. I will therefore begin by discussing the first period up until the 1990s and then discuss the caselaw after the introduction of the proportionality test.

I.B – Textualist Approaches to Property Rights: 1930s-1990s

I.B.1 – Introduction

As noted, this section will discuss the property rights caselaw that emerged after the enactment of the Constitution up until the 1990s. In these cases, two major issues had prominence. The first was concerned with the extent of the protections provided by Article 40.3 and Article 43 and the correct interpretation of the relationship between the two articles. Article 40.3.1 states that the right to property is a personal right and therefore can be invoked by individual citizens. Further, it states the extent of the obligation imposed on the State to defend the right is to do so 'as far as practicable'. Article 40.3.2 also comments on the extent of the obligation placed on the State, this time specifying that the duty is to defend the right to private property against 'unjust attack' and to 'vindicate' the right in a situation in which injustice is deemed to have occurred. If we turn to Article 43, one is struck by the strength of protection afforded to the right laid out in section one when it declares that the right to private property is a 'natural right' which is 'antecedent to all positive law'. Section two of the article then appears to temper this robust protection somewhat by setting out that the property rights may be 'regulated by principles of social justice', and therefore may be limited in order to reconcile 'their

[314] Gerard Hogan, 'The Constitution, Property Rights and Proportionality' (1997) 32 Irish Jurist 373, 377.

exercise with the exigencies of the common good'. The exact relationship between Article 40.3 and Article 43 has been the source of debate within Ireland's courtrooms, as judges have given conflicting opinions as to whether they provide two separate sources of protection for private property rights or whether the protections provided by both are the same.

The second issue which has occupied the judiciary is whether the courts have jurisdiction to inquire into whether legislation meets the requirements set out in Article 43.2, namely that it is an attempt to reconcile the exercise of private property rights with the exigencies of the common good in accordance with the principles of social justice. The judiciary has not always agreed on whether it has the power to make such an inquiry or at least the extent to which it can. I have discussed in the previous chapter that the Irish judiciary have relied on Article 6 of the Constitution to ground the view that the separation of powers is an important concept within Irish constitutionalism. Indeed, as we shall see in the caselaw examined in this chapter, the Irish courts have interpreted this concept in a rather strict fashion, limiting the extent to which they can interfere with the enactment of the legislature. One way in which that doctrine is most visible in Irish caselaw is through the notion that the courts should not be seen to be obliging government to follow particular policy prescriptions. This concern has been central to the question of whether the judiciary can impose its own interpretation of what accords with principles of social justice and the way in which the exercise of property rights may be reconciled with the exigencies of the common good.

I.B.2 – The Caselaw

The first case to consider is the High Court action in *Pigs Marketing Board v Donnelly* [315] (hereinafter *Donnelly*), the first reported judgment dealing with Article 43. What is notable about the judgment of Justice Hanna is his view on the role of the courts in determining whether the legislation was in keeping with the requirements of Article 43.2. The case involved an attempt by the defendant firm to argue that levies imposed on it by the Pigs Marketing Board were unconstitutional as they were contrary to social justice and infringed the guarantee of private property under Article 43. Justice Hanna, in considering the phrase 'social justice' made several remarks outlining his view that the subjective nature of the phrase meant that it could not be given legal definition and therefore its

[315] [1939] IR 413.

meaning was a matter not for the courts but for the Oireachtas. He noted that opinions of what this 'nebulous' [316] phrase meant would differ from individual to individual and amongst different States. The judge stated that the term involved 'no question of law for the courts, but questions of ethics, morals, economics and sociology' which were 'beyond the determination of a Court of law', but 'within the consideration of the Oireachtas' when drafting legislation. Speaking on the extent to which property rights could be restricted under Article 43.2 he stated that, 'I am of the opinion that the Oireachtas must be the judge of whatever limitation is enacted. [317]

The next case of note was that of *Buckley and Others v Attorney General and Others* [318] (hereinafter *Buckley*). In the case the Supreme Court considered a dispute regarding funds held in trust on behalf of the Sinn Féin political organisation. After splits in the party caused by the Civil War it was unclear who was entitled to the fund and in 1924 the money was lodge in the High Court. In 1942 a group claiming entitlement to the fund brought an action claiming the money. However, in 1947 the Oireachtas passed the *Sinn Féin Funds Act* which, inter alia, empowered the Attorney General to apply to the High Court to have the action dismissed. Such an application was made, and the issue eventually reached the Supreme Court. Mr. Justice O'Byrne considered whether or not the legislation infringed the constitution's property rights provisions.

The first point of interest in the case is the way in which the judge interpreted the relationship between the two regulating principles in Article 43.2, the 'principles of social justice' and the 'exigencies of the common good'. He stated that Article 43.2,

> 'recognises in the first instance, that the exercise of the rights of private property ought, in a civil society such as ours, to be regulated by the principles of social justice and, *for this purpose, (i.e. to give effect to the principles of social justice)* the State may, as occasion requires, delimit by law the exercise of such rights so as to reconcile their exercise with the exigencies of the common good.'[319] [my emphasis]

Therefore, according to Justice O'Byrne, the principal limitation on the exercise of property rights according to Article 43.2 is the principles of social justice. Reconciling the

[316] *Donnelly* at Page 418.

[317] *Donnelly* at Page 422.

[318] [1950] I.R. 67.

[319] *Buckley* at Page 83.

exercise of property rights with the exigencies of the common good is derivative of that primary restriction, pursued in order to ensure the principles of social justice are accorded with. Barrington notes that this interpretation conforms with the language of the Article as the word 'accordingly' in Article 43.2.2 indicates the primacy of the principles of social justice. The result of this is that the State may delimit property rights with a view to reconciling their exercise with the exigencies of the common good only insofar as doing so aids the pursuit of the principles of social justice.[320] Since *Donnelly* this has been the settled interpretation of this issue.

Justice O'Byrne then considered the claim put forward by the Attorney General, that Article 43.1 was aimed at preventing the total abolition of the right to property in the State but was not designed to prohibit the State from taking away the property rights of individual citizens. The judge began by acknowledging that the right to private property was included in the personal rights of citizens protected under Article 40.3. However, rather than dealing with the issue at hand under Article 40.3 he focused his attention on Article 43.1, insisting that it too was concerned with individual property rights subject to the State's right to regulate their exercise under Article 43.2. He therefore rejected the Attorney General's claim that Article 43.1.2 was directed solely towards preventing the total abolition of private property in the State. Since Justice O'Byrne stated that Article 43.1 was concerned with the property rights of individuals, and since he did not give any real consideration to the protection provided under Article 40.3, it seems that he did not consider the protections provided under the two articles to be distinct. Therefore, the early position taken by the courts on this issue seems to be that Article 43.1 and Article 40.3 both protected the right of an individual to private property.

Justice O'Byrne also considered the question of the court's role in ensuring the provisions of Article 43.2 were met. In contrast with the decision in *Donnelly* he stated that had the drafters of the Constitution intended to exclude the question of the exigencies of the common good from judicial cognisance 'it would have been done in express terms as it was done in Art. 45 with reference to the directive principles of social policy, which are inserted for the guidance of the Oireachtas, and are expressly removed from the cognisance of the Courts.' [321] Since this was not the case, the courts were free to examine whether legislation which restricted property rights had been enacted with a view to

[320] Donal Barrington, Private Property under the Irish Constitution (1973) 8 (1) Irish Jurist (NS) 1.

[321] *Buckley* at Page 83.

reconciling the exercise of such rights with the common good. Ultimately Justice O'Byrne found that there was no evidence that the exercise by the plaintiffs of their property rights in the monies would lead to a conflict with the exigencies of the common good. Since the legislation could therefore not be interpreted to be reconciling such a conflict, it could not be justified and was repugnant to the Constitution.

Consideration was also given to the Constitution's property rights provisions in *Attorney General v Southern Industrial Trust and Simons* [322] (hereinafter *SIT*). The case involved the forfeiture of a car belonging to a hire purchase company after the individual who was in the process of purchasing the vehicle, illegally exported it to the UK. After Irish customs seized the car, the company, which was still the legal owner, sought to have it returned, but the customs authorities sought to have the vehicle forfeited. In the High Court Southern Industrial Trust argued, inter alia, that they had not acted illegally and that the provisions in the legislation which authorised the forfeiture of goods of an innocent party, contravened the property rights provisions of the Constitution.

In the High Court Justice Davitt considered the relationship between Article 40.3 and Article 43. He began his discussion of the property issue by stating what his interpretation of the property provisions would be if he were not constrained by the judgment on the Sinn Féin funds in *Buckley*. He noted a distinction between (a) the 'general and natural rights of man to own property', (b) the 'right of the individual to the property which he does own', and (c) the right of an individual 'to make what use he likes of that property'.[323] Justice Davitt stated that in his opinion this distinction could be seen in the property rights provisions. Article 40.3 dealt with issue (b), protecting an individual's right to property which he/she does own. Pursuant to this provision the State was obliged to protect the property rights of individuals from unjust attack. Article 43.1 was linked with (a) as it was concerned, not with the property rights of an individual citizen towards a particular piece of property, but with the right to hold property as a general concept. It provided an 'absolute guarantee' that the State would not attempt to pass any law prohibiting the private ownership of property in general. It was not, Justice Davitt contended, a guarantee that the State would not pass legislation that may result in depriving a particular individual of the property he/she does own. Article 43.2 dealt with issue (c) the right of an individual to make us of the property he/she owns in the manner

[322] [1960] 94 I.L.T.R 161.

[323] *SIT* (HC - Davitt) at Page 167.

he/she wishes. The article asserted this right of an individual to use his/her property as he/she so wishes could be regulated by the principles of social justice and could be delimited in order to reconcile its exercise with the common good. Therefore Article 43.2 was not concerned with the right of an individual to own a particular piece of property, but with the way in which an individual *makes use of* the property he/she does own. In Justice Davitt's view the powers granted to the State in Article 43.2 were confined to *limiting* the rights of individuals to use their property but did not extend to depriving an individual of his/her property completely. However, he contended, since there was nothing in the Constitution precluding the State from such deprivation, the State had the power to do so, subject to the conditions set out in Article 40.3., i.e., as long the individual was not deprived of their property unjustly. Despite having his own views on the matter, Justice Davitt recognised that he was constrained by the decision in *Buckley*. He therefore considered whether the legislation, which sought to deprive Southern Industrial Trust of its property completely, could be justified by the fact that the customs legislation was attempting to reconcile the rights of the company to own the particular property with the exigencies of the common good. Ultimately, he held that the legislation was enacted with a view to reconciling the property rights of individuals with the exigencies of the common good and was therefore constitutionally valid.

The matter was appealed to the Supreme Court. Here Justice Lavery delivered the lead judgment. As regards the question of the relationship between Article 40.3 and Article 43, Justice Lavery seemed to return to the position set out in *Buckley*. He stated that it was the court's opinion that 'the property rights guaranteed are to be found in Article 43 and not elsewhere and the rights guaranteed by Article 40 are those stated in Article 43.' [324] Therefore, one looked to Article 43.1 for the property rights guaranteed by the Constitution. Justice Lavery noted that these included the right to private ownership of external goods as well the general right to transfer, bequeath and inherit property. He stated that these rights could be delimited under Article 43.2. The judge asserted that the legislation in question did not abolish any of the rights set out in Article 43.1 and rejected the assertion that legislation which had the effect of depriving an individual of a particular piece of property had to be seen as abolishing rather than delimiting the rights in question. Therefore, Justice Lavery saw Article 43.1 and Article 40.3 as providing identical protections and consequently did not think it necessary to consider whether the

[324] *SIT* (SC - Lavery) at Page 175.

restriction on property rights caused by the legislation consisted of an unjust attack under Article 40.3

Justice Lavery also responded to the contention that the courts had the exclusive competence in examining whether legislation was in accordance with Article 43.2. He noted that the courts had an important role to play as in determining if legislation was repugnant to the Constitution. However, he also stated that 'the Oireachtas has the primary function in securing that the laws enacted by it have regard to 'the requirements of the common good' and are 'regulated by the principles of social justice." [325] Linking the issue to the proper determination of social policy and the separation of powers Justice Lavery stated that it was for the Oireachtas to determine policy and was it 'not the function of the courts to determine these matters or to criticise or invalidate the decisions of the Oireachtas.' Therefore, in order for the court to determine that a piece of legislation failed to meet the requirements of Article 43.2, it must be clearly established that this was the case. Justice Lavery ultimately found that such repugnance had not been established in this instance and therefore the legislation was constitutionally valid.

The next case of note was that of *Central Dublin Development Association Limited v Attorney General* [326] (hereinafter *CDDA*). The case involved a group of businesspeople who had premises in the Capel Street area of Dublin and who brought an action challenging various provisions of the Planning and Development Act 1963 which gave powers to Planning Authorities in respect of planning and development. These powers included enabling authorities to compulsorily purchase land in order to further the development of the area. The plaintiffs, who may potentially have been affected by any compulsory purchase orders in the Capel Street area argued, inter alia, that the provisions of the act contravened Article 40.3 and Article 43 of the Constitution. In his judgment, Justice Kenny of the High Court considered the caselaw which had emerged in relation to constitutional property rights. He noted the contradictory nature of previous judgements as regards the court's role in examining the requirements of Article 43.2 He rejected the view of Justice Lavery in *SIT* that the court had only a very limited role to play in such an examination, stating that if this interpretation was correct the Oireachtas would have free reign to enact legislation which restricted property rights and the courts would be powerless to examine its constitutionality as long the legislature enacted it 'under the

[325] *SIT* (SC - Lavery) at Page 175.

[326] [1975] 108 ILTR 69.

disguise of a claim that they were promoting the common good.'[327] This was an unacceptable position and therefore Justice Kenny asserted that in his view, 'The Courts have jurisdiction to inquire whether the restriction is in accordance with the principles of social justice and whether the legislation is necessary to reconcile their exercise with the demand of the common good.[328]

As regards the relationship between Article 40.3 and Article 43 Justice Kenny stated that he held the same view as that of Justice Davitt in *SIT*, namely that they provide distinct protections. He then set out a number of observations as regards the Constitution's property rights, some of which are particularly relevant to the question of the relationship between the two articles. First, he stated that, 'The state cannot pass any law which abolishes all the bundle of rights which we call ownership or the general right to transfer, bequeath and inherit property.' [329] Secondly, he asserted that, 'The exercise of these rights ought to be regulated by the principles of social justice and the State accordingly may restrict their exercise with a view to reconciling this with the demands of the common good.' [330] Finally, he stated that, 'If any of the rights which together constitute our conception of ownership are abolished or restricted (as distinct from the abolition of all the rights), the absence of compensation for this restriction or abolition will make the Act which does this invalid if it is an unjust attack on the property'. [331] Justice Kenny therefore seems to have followed Justice Davitt in differentiating between a general right to ownership, protected by Article 43.1, the exercise of property rights, which may be regulated by Article 43.2, and the right of an individual to his/her property, regulated by Article 40.3. For Justice Kenny, if a piece of legislation was challenged on the grounds that it infringed the property rights provisions, the courts must inquire (a) 'whether the legislation has been passed with a view to reconciling the exercise of property rights with the exigencies of the common good',[332] (b) 'whether the Oireachtas may reasonably hold

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[327] *CDDA* at Page 85.

[328] *CDDA* at Page 85.

[329] *CDDA* at Page 85.

[330] *CDDA* at Page 85.

[331] *CDDA* at Page 85.

[332] *CDDA* at Page 83.

[Later in the judgment, at page 85, Kenny J seems to also include inquiring into whether the restriction is in accordance with the principles of social justice, as part of this first leg of the test].

that view', and (c) 'whether the restriction would be unjust without the payment of compensation'. As to the last of these requirements Justice Kenny noted that 'while some restrictions on the exercise of some of the rights which together constitute ownership do not call for compensation because the restriction is not an unjust attack, the acquisition by the State of all the rights which together make up ownership without compensation would in almost all cases be such an attack.' [333] On the facts of the case Justice Kenny found that none of the provisions of the Planning and Development Act 1963 were unconstitutional as they were either not an unjust attack on property rights or allowed for compensation in cases of where individuals were deprived of their property.

The property rights provisions were also considered in *Blake v Attorney General* [334] (hereinafter *Blake*). The case concerned two separate actions which, cumulatively, sought to challenge Part II and IV of the Rent Restrictions Act, 1960, as amended by the Rent Restrictions (Amendment) Act 1967 and the Landlord and Tenant (Amendment) Act, 1971, on grounds that the provisions infringed Articles 40.3 and 43 of the Constitution. The act, inter alia, placed limits on increases in the rent payable in respect of the letting of certain 'controlled dwellings' which were erected prior to 1941 and which sat within certain valuation limits. The act also prevented the landlord from recovering possession of the dwelling as long as the tenant was paying the rent and observing other conditions of the tenancy. Surviving members of the tenant's family were offered the same protection against dispossession after the death of the tenant and, in certain circumstances, the tenant was allowed to make a voluntary assignment of the dwelling. The actions were heard together in the High Court in which Justice McWilliam declared that both parts of the act challenged were invalid.

The Attorney General appealed this decision to the Supreme Court where Chief Justice O'Higgins delivered the lead judgment. He began by dealing with the issue of the relation between Article 40.3 and Article 43. Chief Justice O'Higgins asserted that Article 43 'prohibits the abolition of private property *as an institution'* [335] [my emphasis] whilst also allowing the 'regulation of the exercise of that right'. He continued, 'In short, it is an Article directed to the State and to its attitude to these rights…' However, Article 43 did

[333] *CDDA* at Page 83.

[334] [1982] IR 117.

[335] *Blake* at Page 135.

not 'deal with a citizen's right to a particular item of property…' Such rights were protected by Article 40. The consequence of this interpretation was that,

> 'There exists, therefore, a double protection for the property rights of a citizen. As far as he is concerned, the State cannot abolish or attempt to abolish the right of private ownership as an institution or the general right to transfer, bequeath and inherit property. In addition, he has the further protection under Article 40 as to the exercise by him of his own property rights in particular items of property.'[336]

Chief Justice O'Higgins therefore seemed to also endorse the positions of Justice Davitt in *SIT*. Article 43 protected the general right to private property, or, in other words, private property as an institution. Article 43.2 allowed the regulation of the exercise of the right to property. Article 40.3 protected the right of a citizen as regards a particular item of property. Indeed, Chief Justice O'Higgins went on to explicitly endorse the interpretation put forward by Justice Davitt in *SIT* and to reject the suggestion by Justice Lavery in the same case that the rights guaranteed in Article 40.3 and Article 43 were the same. However, Chief Justice O'Higgins then made a statement that seems to be at odds with the view of Justice Davitt. In the latter's judgement Article 43.2 was relevant if an individual's property rights were being restricted, but not if they were being extinguished entirely. However, in *Blake,* Chief Justice O'Higgins stated that since the legislation in question could not 'be regarded as regulating or delimiting the property rights comprehended by Article 43' [337], it should only be considered under Article 40.3. It seems therefore that Chief Justice O'Higgins believed that Article 43.2 was never relevant to the question of an individual's right to property and was only to be considered if the legislation in question was proposing to restrict or abolish property as an institution. After stating that it was Article 40.3.2 which was relevant to the facts before him, Chief Justice O'Higgins then gave consideration to the effects of its application. He stated that the provisions of the legislation constituted an attack on the property rights of the affected landlords. The question to examine was therefore whether that attack was unjust and therefore contrary to Article 40.3. In deciding whether the attack was unjust, Chief Justice O'Higgins first considered the provisions restricting rent levels and secondly the provisions restricting the ability of the landlord to recover possession of the dwelling

[336] *Blake* at Page 135.

[337] *Blake at Page* 137.

from the tenant. As regard the first heading, the Chief Justice focused on several issues. First, he considered the arbitrary application of the rent restriction measures, which only affected dwellings which were built prior to 1941 and which sat within certain valuation limits. No reason for this arbitrary application was evident in the legislation or advanced by the Attorney General. The Chief Justice then noted that the basis for selecting the dwellings which should have their rents controlled was not related to the means of either the tenant or landlord as neither could be considered in determining the rent. Thirdly, Chief Justice O'Higgins could find no other 'social necessity' by which the legislation could be justified, nor could it be linked to a temporary or emergency situation as it was not limited in duration. He also noted that the legislation offered no facility to review the rent levels after a specific period. Chief Justice O'Higgins stated that, 'such legislation, to escape the description of being unfair and unjust, would require some adequate compensatory factor for those whose rights are so arbitrarily and detrimentally affected.' [338] Since this part of the legislation made no facility for offering compensation to landlords, the Chief Justice found it to be an unjust attack on property rights and therefore contrary to Article 40.3. In terms of the part of the legislation which restricted the circumstances in which a landlord could recover possession of his/her property, Chief Justice O'Higgins stated that this restriction on property rights was not unconstitutional in and of itself and such legislation could be found valid provided it was not unfair. However, he said that this part of the legislation could not be extricated from the overall arbitrary and unfair nature of the provisions regarding rent restrictions and was therefore also in contravention of Article 40.3.

Finally, it is worth noting the judgment set out by the Supreme Court in *Jorg Dreher v Irish Land Commission* [339](hereinafter *Dreher).* This case involved the compulsory purchase of the plaintiff's lands by the Irish Land Commission. As compensation, the plaintiff had been offered Land Bonds, valued at £30,000 at the time of offering. The plaintiff wanted to be paid in cash instead and refused to give up possession. After the Land Commission was granted possession by the courts, Mr. Dreher brought an action which, inter alia, sought an order declaring that the statutory provisions which allowed the Land Commission to pay the compensation in Land Bonds were unconstitutional due to their infringement of Article 40.3 and Article 43 which he claimed protected him from having

[338] *Blake* at Page 138.

[339] [1984] ILRM 904.

his property acquired by the Land Commission save at a just price. As regards the relationship between Article 40 and Article 43, Justice Walsh, in delivering the lead judgment, contradicted the reasoning in *Blake* and seemed to return to the interpretation set out by Justice Lavery in *SIT,* namely that Article 40 and Article 43 provided the same protections. Walsh stated that, 'I think it is clear that any State action that is authorised by Article 43 of the Constitution and conforms to that Article cannot by definition be unjust for the purpose of Article 40.3.2.'. The judge also considered the issue of compensation, noting the relevance of the concept of justice that is present in both Article 43.2 and Article 40.3. He stated that, in some cases justice may not require the payment of compensation even where there is compulsory acquisition of property. Further, he noted that just compensation will not always be equivalent to payment of market value for the property in question. It was dependent on the particular circumstances of the case. It seems therefore that Justice Walsh considered the key requirement in relation to any examination of whether legislation contravened Article 40.3 or Article 43 was to consider whether there had been injustice, and that this requirement stemmed both from Article 40.3 and Article 43. Ultimately, he found there was nothing unjust about the legislation and therefore found it to be constitutionally sound.

I.C – Proportionality Test Approaches to Property Rights since the 1990s

I.C.1 – Introduction

The 1990s saw a discernible change in the approach taken by the judiciary towards constitutional property rights, with the introduction of a proportionality test and a more explicitly contextual approach. The test was first introduced into Irish caselaw, albeit implicitly in *Cox v Ireland.*[340] Two years later in the High Court decision in *Heaney v Ireland* [341] (hereinafter *Heaney*) Justice Costello explicitly laid out the intricacies of the test, endorsing the version set out by the Canadian Supreme Court in *Chaulk v R*[342]

> 'The objective of the impugned provision must be of sufficient importance to warrant overriding a constitutionally protected right. It must relate to concerns pressing and substantial in a free and democratic society. The means chosen must pass a proportionality test. They must:

[340] [1992] 2 IR 503.

[341] [1994] 3 IR 593.

[342] [1990] 3 SCR 1303.

(a) be rationally connected to the objective and not be arbitrary, unfair or based on irrational considerations;

(b) impair the right as little as possible, and

(c) be such that their effects on rights are proportional to the objective.'[343]

If we look closely, it becomes clear that the proportionality test is actually a subpart of a larger test. The first part of this test is concerned with examining the objectives behind the legislation. It/they must be of a sufficient level of importance and must relate to what would be substantial and pressing concerns in a free and democratic society. The second part of test, the actual proportionality test is concerned with examining the means that the legislation sanctions as the way to meet the objective(s). This contains three legs. The means must be rationally connected to the objective and not be arbitrary or unfair. They must impair the affected right as little as possible and therefore will be invalid if a different means may achieve the same objective whilst infringing less upon the right. Finally, the ultimate effects that the means have on the right must be proportionate to the objective. Before considering the caselaw which involved the use of this test, it is important to note that when the Irish judiciary have referred to a 'proportionality test' they have usually meant the entire test set out by Justice Costello in *Heaney*. To avoid confusion in the following discussion I will use the term '*Heaney* test' to refer to instances in which the judges are alluding to the complete test and instances in which I am doing so. However, in my analysis of the judgments I will sometimes wish to discuss the distinct parts of the test and will therefore refer to the 'preliminary step' to indicate the first part of the *Heaney* test, related to the objective of the legislation, and to the 'proportionality test' when referring to the second part of the *Heaney* test, which investigates the means used to achieve the objective. One caveat to this general approach is where I am quoting from a judgement. In such instances I will quote the actual wording used by the judge. I will indicate in a footnote the step of the test I believe the judge is referring to.

What is interesting to note in the caselaw in which the *Heaney* test was utilised, either explicitly or implicitly, is the extent to which the courts continued to refer to the actual text of the constitutional property rights provisions. Writing in the late 1990s, not long after the introduction of the *Heaney* test into constitutional property rights jurisprudence, Gerard Hogan argued that the judiciary was moving away from focusing on the text of the property rights provisions and instead considering the question of constitutional

[343] *Chaulk* at Pages 1335-1336.

property rights through the prism of the *Heaney* test. [344] However, in the cases considered below, the judiciary, to varying degrees, tried to combine the steps of the *Heaney* test with the wording of Article 40.3 and Article 43. What this means is that the issues which I have considered in the caselaw prior to the introduction to the *Heaney* test did not disappear from consideration. They merely took on a slightly different form as they were mediated through the new test.

I.C.2 – The Caselaw

After *Heaney v Ireland*, the *Heaney* test was subsequently referred to in the case of *Iarnród Éireann v Ireland* [345] The case concerned the derailment of a train operated by Iarnród Éireann (the operator), caused by a herd of cattle, owned by a Mr. Diskin, encroaching upon the track. Pursuant to S12 and S14 of the Civil Liability Act 1961 which provided for a rule of joint and several liability, the operator and the Mr Diskin were held to be jointly liable for the damages. As Mr. Diskin did not have significant means, it fell to the operator to pay the entire compensation. The operator sought to challenge the constitutionality of S12 and S14 Civil Liability Act 1961 on a number of grounds, including the fact that the provisions infringed Article 40.3 and Article 43. The operator's central argument as regards the infringement of the property rights provisions was that the obligation imposed on them by S12 and S14 of the Act to pay the entire damages represented an unjust attack on their property rights under Article 40.3, as it constituted a disproportionate interference with those rights.

In the High Court, Justice Keane commented on the role of Article 43 and Article 40.3 with regards to the application of the *Heaney* test. He stated that if 'the State elects to invade the property rights of the individual citizen, it can do so only to the extent that this is required by the exigencies of the common good. If the means used are disproportionate to the end sought, the invasion will constitute an 'unjust attack' within the meaning of Article 40.3.2.' [346] Therefore, it seems that Justice Keane was implicitly suggesting that the court must first look at the objective of the impugned legislation in light of Article 43.2, examining whether the restriction on property rights necessitated by

[344] Gerard Hogan, 'The Constitution, Property Rights and Proportionality' (1997) 32 Irish Jurist 373, 377.

[345] [1995] 2 ILRM 161.

[346] *Iarnród Eireann* at Page 198.

this objective was required by the exigencies of common good. Article 40.3.2 was relevant to the means used to achieve this objective. If the means were disproportionate to the objective, the restriction on property rights would be considered an unjust attack and the legislation would be constitutionally invalid. Justice Keane went on to explicitly endorse the test set out in *Heaney*. In respect of the objective Justice Keane stated that it was clear that concerns behind the legislation were those of 'a responsible legislature in a free and democratic society.' [347] In respect of the means, he asserted that they were not 'disproportionate to the ends sought or arbitrary, unfair or irrational.'[348] The legislation was therefore constitutionally valid. The Supreme Court upheld this decision on appeal although without attempting any significant analysis of the relationship of the *Heaney* test to the consideration of constitutional property rights.[349]

The *Heaney* test was subsequently adopted in another High Court decision, that of *Daly v Revenue Commissioners.*[350] In the case a medical doctor challenged the constitutionality of an amendment to the Finance Act 1987 (the 1987 Act) which impacted the tax regime for self-employed persons. The application of the act ultimately resulted in the plaintiff essentially being double taxed in the same year. This, he argued caused him significant economic hardship and thus constituted an 'unjust attack' on his property rights. In giving judgment, Justice Costello recognised the duty of the State, under Article 40.3 to protect citizens' property rights from unjust attack. He stated that, a citizen could establish that the effect of the operation of a piece of legislation was such that it constituted an unjust attack on property rights, if he/she could show that 'the law which has restricted the exercise of this rights or otherwise infringed them has failed to pass a proportionality test...' [351] After quoting the test set out in *Heaney*, Justice Costello applied it to the facts before him. First, he considered the objective of the legislation. He stated that it was to avoid the payment of a windfall gain to taxpayers due to a change in the period in which tax liability was assessed. He then stated that if the plaintiff could show that the means

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[347] *Iarnród Eireann* at Page 205.

[348] *Iarnród Eireann* at Page 205.

[349] [1996] 2 ILRM 500.

[350] [1996] 1 ILRM 122.

[351] *Daly* at Page 131.

[Justice Costello seems to be referring to the entire *Heaney* test].

chosen to achieve the objective failed the proportionality test then the infringement on the plaintiff's property rights was impermissible. Ultimately Justice Costello found that the legislation failed the proportionality test for two reasons. First, the effect of the amendment was to cause hardship to the taxpayers affected as it impacted their ability to pay income tax and amounted to a double taxation. Secondly, the impact on the taxpayers' property rights was disproportionate to the objective sought to be achieved. This was due to the arbitrary application of the amendment. It was designed to deal with a temporary situation (to avoid the windfall gain) but had imposed a permanent measure. Further, the measure affected not only those who may have benefitted from the windfall gain but any subsequent entrants into the tax regime for self-employed persons. Whilst Justice Costello accepted that the court could not interfere with policy matters, for instance, the best way to deal with the windfall situation, it did have jurisdiction to consider whether the method relied upon was proportionate to the objective having regard to the impact on the property rights of individuals. Justice Costello therefore followed the *Heaney* test in first considering the objective of the legislation and then the means used to achieve that objective. However, what is interesting to note is that the judge made no attempt to link the preliminary step of the *Heaney* test to the language of Article 43.2. The judge actually gave little consideration to the objective of the legislation, simply stating what he felt it was. As regards the means he did make reference to the steps of the proportionality, noting the arbitrary application of the legislation and the disproportionate nature of the means, and he linked these to the idea of an unjust under Article 40.3

In *Re Article 26 and the Employment Equality Bill 1996* (hereinafter the *Employment Equality Reference*),[352] the Supreme Court considered the constitutionality of a piece of legislation referred by the President under Article 26 of the Constitution. The Bill was concerned with prohibiting discrimination in employment and the promotion of equality between employed persons. It set out rules outlawing discrimination on various grounds including by reason of a person's disability. The controversy in this regard emanated from S16.3 and S35.4 of the Bill which proposed placing an obligation on employers to provide for treatments and/or facilities which would enable persons with a disability to undertake their employment duties. The key question to be considered was whether the imposition of potentially significant costs on employers by way of an obligation to provide treatment and/or facilities for employees without payment of compensation by the State,

[352] [1997] 2 IR 321.

constituted an unjust attack on their property rights under Article 40.3. The court also considered whether the contention, that the legislation was proposed with a view to reconciling the private property rights of employers with the exigencies of the common good (in this instance the promotion of equality) under Article 43.2, saved the particular provisions from invalidation.

Chief Justice Hamilton endorsed the position in *Blake*, insofar as it separated the protections set out in Article 40.3 and Article 43.1. He stated that Article 43 'prohibits the abolition of private property as an institution but at the same time permits, in particular circumstances, the regulation of the exercise of that right.' [353] Article 40.3 protected a citizens' right to a particular item of property from unjust attack. In applying this interpretation to the facts before him he stated that the relevant provisions of the Bill constituted a delimitation of the rights protected by Article 40.3 and that this delimitation was imposed with a view to reconciling those rights with the exigencies of the common good. The question therefore was whether the restriction of property rights constituted an unjust attack on those rights. Chief Justice Hamilton stated that in examining this question, regard must be paid to whether the restriction of rights was consistent with the requirements of social justice under Article 43.2 as social justice was the primary regulatory principle set out in that Article. Chief Justice Hamilton then noted that the consideration of what was required by the principles of social justice and the exigencies of the common good was primarily a matter for the Oireachtas. However, he also stated, endorsing the view put forward in *Buckley*, that the courts did have some role to play in this regard, as consideration of Article 43.2 had not been explicitly removed from judicial cognisance. Chief Justice Hamilton went on to apply these dicta to the Bill.

What is notable about the judgment is that although Chief Justice Hamilton does not explicitly endorse the use of the *Heaney* test when considering the provisions on disability (he does when considering other aspects of the Bill), the decision as regards these provisions does seem to be influenced by proportionality principles. For instance, the judge begins by examining the importance of the objective behind the Bill, noting that it has the 'totally laudable aim of making provision for such of our fellow citizens as are disabled.' [354] Chief Justice Hamilton then notes that 'it is in accordance with the principles of social justice that society should do this.' [355] It seems here that Chief Justice Hamilton

[353] *Employment Equality Reference* at Page 366.

[354] *Employment Equality Reference* at Page 367.

was linking the principles of social justice and thus Article 43.2 to the preliminary leg of the *Heaney* test. Following the schema of the *Heaney* test, Chief Justice Hamilton then focuses on the means used to achieve this objective. Again, he does not explicitly use the language of the test but found that the means were not suited to the objective. He stated that the problem with the section of the Bill on disability was that, by requiring employers to pay for all the treatment or facilities that a disabled employee may require, it 'attempts to transfer the cost of solving one of society's problem on to a particular group.' [356] Chief Justice Hamilton ultimately found therefore, that the provisions related to disability were repugnant to the Constitution.

The first case in which the Supreme Court explicitly utilised the proportionality test as set out in *Heaney*, in a property rights context, was another reference under Article 26 to examine the constitutionality of a Bill. In *Re Article 26 and Part V of the Planning and Development Bill 1999* (hereinafter the *Planning Reference*)[357] the court considered whether the provisions of the Planning and Development Bill, which essentially provided for the compulsory purchase of portions of land belonging to individuals who were applying for planning permission, infringed the constitutional protections of private property. Under the Bill planning authorities were obliged, in their development plans, to ensure that the housing needs of various categories of vulnerable people were catered for. Secondly, they were to ensure that 'affordable housing' was provided so that those whose income was insufficient to secure a mortgage could access housing. Finally, the housing strategy had to take account of the need to avoid undue segregation in housing as regards people from different social backgrounds. These objectives were to be achieved through a system whereby a specified percentage (up to 20%) of the land zoned for residential use had to be reserved for the provision of affordable housing or housing designated to accommodate the various categories specified in the legislation. Under S96 of the Bill, the planning authority was able, as a condition of granting planning permission, to require an applicant developer to enter an agreement as regards the percentage of land designated for the uses specified under the Bill. The applicant could choose to transfer land to the planning authority, to build a certain number of houses compatible with the designated uses under the Bill which would then be transferred to the planning authority, or, to

[355] *Employment Equality Reference* at Page 367.

[356] *Employment Equality Reference* at Page 367.

[357] [2000] 2 IR 321.

transfer fully or partially serviced sites to the planning authority. The Bill also made provision for compensation to be paid to any applicant. The amount to be paid was dependent on, inter alia, the particular agreement reached with the planning authority and whether the land had been purchased by the applicant prior to or subsequent to date of publication of the Bill. In general, the applicant was to be paid the 'use-value' of the land, which was normally the agricultural value, rather than the 'market value' which would be the value of the land after planning permission was granted.

Justice Keane delivered the judgment of the court. He began by rejecting the position set out in *Blake* in which the Supreme Court had stated that, when considering the rights of an individual to their property, Article 40.3 was the only provision relevant to that consideration, Article 43.2 not being applicable. He accepted that the key requirement for an individual challenging the constitutionality of a piece of legislation which had the effect of infringing his/her property rights was to show that the infringement constituted an 'unjust attack' on those rights pursuant to Article 40.3. However, he stated that it was inevitable, in cases where the State contends that the particular piece of legislation is required by the exigencies of the common good pursuant to Article 43, that the courts will examine whether that is indeed the case and will then examine whether the infringement on individual property rights was proportionate to the objective pursued. Having thus established that an examination of the objectives of a piece of legislation which infringed individual property rights should make reference to the provisions of Article 43.2, Justice Keane considered the objectives of the Bill before the court. He identified two aims behind the Bill. First, to enable those on moderate or low incomes to buy a home in an economic climate which made it difficult for such people to do so. Secondly, to avoid the situation in which low-income groups were ghettoised in large scale housing developments. The judge found that 'it was within the competence of the Oireachtas to decide that the achievement of these objectives would be socially just and required by the common good.' [358] Further, he stated the objective was 'entirely within the competence of the Oireachtas to decide to attain, as best it could, by the use of planning machinery.' [359]

After examining the objectives of the Bill in light of the provisions of Article 43.2, Justice Keane switched to an investigation of the means used to attain these objectives. This

[358] *Planning Reference* at Page 349.

[359] *Planning Reference* at Page 349.

involved an analysis of whether those means constituted an unjust attack on property rights under Article 40.3. After noting that the correct approach to this question was to apply the test set out in *Heaney*, Justice Keane focused on the issue of whether the compensation to be awarded under the Bill was adequate. He stated that the generally accepted position was that when a property was subject to a compulsory purchase order, the compensation offered should be equivalent to the market value of the property. However, he then referred to the aforementioned decision in *Dreher* and the later Supreme Court decision in *O'Callaghan v Commissioners of Public Works* [360] as authorities for the proposition that any right to compensation equivalent to market value was not absolute and may be departed from in special circumstances. The judge found that such circumstances existed in this instance. Since it was the granting of planning permission itself which created an enhancement in market value of the land, it was justifiable that the landowner be obliged to cede part of this enhanced value to the State, in advance of an important social purpose.

Justice Keane then stated that the legislation passed the proportionality test and explained how he had reached this conclusion. First, he stated that the provisions of the legislation (i.e., the means used to achieve the legislation's objectives) were 'rationally connected to an objective of sufficient importance to warrant interference with a constitutional right…' [361] Thus they satisfied the first step of the proportionality test. He then stated that the means related to 'concerns which in a free and democratic society, should be regarded as pressing and substantial.' [362] This language here, of course, comes from the preliminary step of the *Heaney* test which is used to assess the objective of the legislation and not the means and therefore it seems that Justice Keane may have confused the steps of the *Heaney* test. The judge then returned to the proportionality test finding that the second and thirds steps of that test were satisfied, given that the provisions of the legislation impaired the rights affected as little as possible and did so a in manner proportionate to the objective pursued. Finally, he returned to the first step of the proportionality test and held that the means used could not be regarded as 'arbitrary, unfair or based on irrational considerations.[363] In relation to this aspect of the proportionality test he returned to the

[360] [1985] IR 486.

[361] *Planning Reference* at Page 354.

[362] *Planning Reference* at Page 354.

[363] *Planning Reference* at Page 354.

issue of compensation and stated that the differential treatment given to applicants depending on whether they had purchased the land in question before or after the Bill was published or whether they had purchased or inherited the land, was not unreasonable. The Supreme Court therefore held that the provisions of Part V of the Planning and Development Bill were constitutionally sound.

The final ruling for consideration in relation the Constitution's property rights provisions is yet another reference under Art 26, namely the case of *Re Article 26 and the Health (Amendment) (No 2) Bill 2004* (hereinafter the *Health Reference*).[364] Here the Supreme Court considered whether the Health Amendment (No. 2) Bill 2004, which amended S 53 Health Act 1970, ran contrary to certain provisions of the Constitution, including the property rights protections contained in Article 40.3 and Article 43. The Bill essentially sought to retrospectively validate charges which had been unlawfully imposed on certain individuals who had availed of 'in patient services' in hospitals and other care settings. If the Bill were enacted, it would have been impossible for those who had been unlawfully charged to recover the money they paid. Chief Justice Murray delivered the decision of the Supreme Court. He considered a number of constitutional issues in relation to the Bill including any potential infringement of the right to private property. In this regard the judge began by highlighting that the right to recover money expended to satisfy the unlawfully imposed fees was a chose in action and therefore a property right. He continued by reviewing the relevant caselaw as regards the relationship between Article 40.3 and Article 43. He noted Chief Justice Keane's view in *Re Article 26 and Part V of the Planning and Development Bill 1999* that Article 43 was relevant to a consideration of the private property rights of an individual. Further, he highlighted the view in *Dreher* that if legislation is in conformity with Article 43, it could not be unjust for the purposes of Article 40.3. However, it is unclear if Chief Justice Murray fully endorsed this view. He simply stated that it 'remains a correct statement of the close relationship between the two articles.' [365] Chief Justice Murray then considered the viewpoints regarding the proper judicial approach to examining whether the terms of Article 43.2 had been met and the various positions the courts have taken as regards compensation for property rights infringement. After this review Chief Justice Murray concluded that the correct approach to the matter was,

[364] [2005] 1 ILRM 401.

[365] *Health Reference* at Page 448.

> 'firstly, to examine the nature of the property rights at issue, secondly, to consider whether the Bill consists of a regulation of those rights in accordance with the principles of social justice and whether the Bill is required so as to delimit those rights in accordance with the exigencies of the common good; thirdly, in light of its conclusions on these issues, to consider whether the Bill constitutes an unjust attack on those property rights.' [366]

The judge noted the particular vulnerability of the cohort of people whose property rights would be abrogated by the legislation as many would be of limited means. He stressed the need to protect the property rights of such persons given that such abrogation would have disproportionately severe effects.

He went on to consider the proposition that the courts should be slow to interfere with legislative attempts to reconcile the property rights of individuals with the principles of social justice in the interests of public policy. Chief Justice Murray stated that the extent of the interference with the rights in question was relevant to whether the courts had standing to intervene. He stated that in this instance there was no attempt at reconciliation. Instead, the rights of one group were being extinguished in order to protect the State's financial interests. He noted that it would be 'straining the meaning of the reference in Art. 43.2.1 of the Constitution to 'the principles of social justice' to extend it to the expropriation of property solely in the financial interests of the State.' [367] He did not deny that in some cases individual property rights could be restricted in the interests of public policy but stated that it would require extraordinary circumstances in instances where the rights of vulnerable individuals were being completely extinguished. In a situation where the sole motive of restricting individual property rights in the interests of the common good was the financial health of the State, such restrictions could only be justified to avoid 'an extreme financial crisis or a fundamental disequilibrium in public finances.' [368] Ultimately Chief Justice Murray found that the Bill constituted an unjust attack on the property rights of individuals contrary to Article 43 and Article 40.3. He found it unnecessary therefore to consider any argument based on the principle of proportionality.

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[366] *Health Reference* at Page 450.

[367] *Health Reference* at Page 454.

[368] *Health Reference* at Page 455.

I.D – Analysis: The Property Rights Caselaw – Discernible Trends or Judicial Muddle?

The preceding discussion has demonstrated the difficulty the Irish courts have had with developing a coherent and consistent interpretation of *Bunreacht na hÉireann's* property rights protections. As I noted in the introduction to this section there have been two broad controversies. First, the question of the extent of the protections provided by Article 43 and Article 40.3 and the correct interpretation of the relationship between the two articles. The core issue here has been whether Article 43 is solely concerned with the abolition of private property as an institution and consequently whether Article 40.3 is the only provision dealing with the property rights of individuals. If that were the case, the proviso set out in Article 43.2 which allows the regulation of property rights in light of social justice principles, would not be applicable to instances in which the property rights of individuals were being considered. The second issue was concerned with whether the courts, having ruled that Article 43.2 is applicable to the property rights of individuals, have jurisdiction to consider whether the requirements of that article have been met.

In terms of the first issue, two broad approaches were seen in the caselaw that emerged prior to the proportionality test. The first approach contended that the protections provided in Article 43 and Article 40.3 were the same, meaning that Article 43.1, Article 43.2 and Article 40.3 were all relevant to the question of the property rights of individuals. This view was first espoused in the *Buckley case* and was endorsed in Justice Lavery's Supreme Court decision in the *SIT* case. These judgments tended to focus on the requirements of Article 43 and de-emphasised the importance of Article 40.3. Justice Walsh' judgment in *Dreher* also suggested that Article 43.1 was relevant to the property rights of individuals with the judge asserting that any legislation restricting those rights could not be considered unjust under Article 40.3 if it was authorised by Article 43.

The second approach contended that Article 43 and Article 40.3 set out distinct protections. We saw this in Justice Davitt's High Court decision in *SIT* when he distinguished between the general right of man to own property which he associated with Article. 43.1, the right of and individual to own property, which was protected by Article 40.3, and the right of an individual to make use of his/her property which came under the remit of Article 43.2. Justice Davitt's position was endorsed by Justice Kenny in the *CDDA* case. It was also explicitly endorsed by Chief Justice O'Higgins in *Blake*. However, there seems to have been some confusion as to Justice Davitt's position. The confusion seems to stem from the exact meaning of his distinction between the right of an individual

to own property and the right of an individual to make use of his/her property. In the *CDDA* case Justice Keane seems to be stating that anytime the property rights of individuals are being interfered with, both Article 43.2 and Article 40.3 are relevant. However, Chief Justice O'Higgins decision implies that he believed Justice Davitt's approach meant that only Article 40.3 should be applied.

It is clear from the caselaw prior to the introduction of the proportionality test that courts' position on the relationship between Article 43 and Article 40.3 was not settled. However, in the caselaw I considered which involved the application of the *Heaney* test it seems that a general trend can be discerned. As I noted, the emergence of the *Heaney* test did not mean that the question of the relevance of Article 43 and Article 40.3 disappeared. In the cases considered after its emergence, the courts have still made reference to the articles, within the framework of that test. And, in those cases the courts have generally ascribed to the position that Article 43.1 is not concerned with the property rights of individuals, but property as an institution. However, Article 43.2 and Article 40.3 are relevant to the consideration of interference with the rights of individuals towards their property. Thus, the court must first consider whether the proposed legislation was enacted in order to regulate property rights in light of the principles of social justice and whether, in pursuit of this aim, it was reconciling the exercise of property rights with the exigencies of the common good. Then it must examine whether the restriction constituted an unjust attack. This approach can be seen in the *Iarnród Éireann case*, the *Employment Equality Reference*, the *Planning Reference* and the *Health Reference*.

The exact approach taken to this consideration of whether the requirements of Article 43.2 and Article 40.3 have been met was conditioned by the different readings of the *Heaney* test put forward by the different judges. The general approach has been to divide the question between a consideration of the objective of the legislation and means used to achieve that objective. The objective has been considered either in light of the requirements of Article 43.2 or by reference to the requirements of the *Heaney* test, that is whether it is of sufficient importance and relates to concerns pressing in a free and democratic society. In the *Iarnród Éireann* case, Justice Keane made reference to both Article 43.2 and the requirements of the *Heaney* test. In the *Employment Equality Reference*, the *Planning Reference* and the *Health Reference* the courts considered the objective solely by reference to the requirements of Article 43.2. The exception to this trend was the *Daly* case in which Justice Costello merely stated the objective of the legislation without giving it further consideration.

In the cases involving the application of the *Heaney* test, Article 40.3 and the question of unjust attack was linked to the question of the means used to achieve the purported objective of the legislation. The proportionality step of the *Heaney* test was the used to consider whether or not Article 40.3 has been contravened. This approach could be seen in the *Iarnród Éireann* case, the *Daly* case, and the *Planning Reference*. Thus, a restriction was considered unjust if the means were arbitrary, not connected to the objective or disproportionate to the objective.[369]

As I have noted, the courts also considered the extent to which the courts had jurisdiction to consider whether the requirements of Article 43.2 regarding the principles of social justice and the exigencies of the common good had been met. The issue was given consideration in the *Donnelly case,* the *Buckley case,* by the Supreme Court in *SIT*, and in the *CDDA* decision. Again, two general approaches were evident, with some judges stating the courts did have jurisdiction, whilst some stating the matter was reserved for the Oireachtas. However, some decisions seemed to take a middle ground, stating that the court had a limited jurisdiction to consider the matter. In *Buckley,* Justice O'Byrne justified his assertion that the court had the power to consider whether the requirements of Article 43.2 had been met, by pointing to the fact that the court's jurisdiction in this regard had not been expressly removed, as it had been in relation to the provisions of Article 45. In *CDDA*, Justice Kenny stated that if the courts did not have jurisdiction in this area, the Oireachtas could justify any restriction on private property rights by claiming that it was doing so in order to promote the common good. This situation, he argued, would be unacceptable. A different view could be seen in the *Donnelly* case where Justice Hanna argued that the subjective nature of the phrase social justice meant that it was ill-suited to judicial consideration. Instead, he argued, it was for the Oireachtas to decide whether the legislation which limited property rights was enacted in light of principles of social justice. In *SIT*, Justice Lavery took a slightly more nuanced approach stating that the *primary* jurisdiction to consider whether the requirement of Article 43.2 had been met lay with the Oireachtas. Justice Lavery justified his claim by reference to the separation of powers doctrine, and the related assertion that policy issues were not a matter for the courts. As with the question of the relationship between Article 43 and Article 40.3, the problem of jurisdiction regarding Article 43.2 did not disappear with the emergence of the *Heaney* test. And, again we see that, in the that more recent caselaw, a trend has emerged as

[369] As I noted, Justice Keane also referred to the preliminary step of the *Heaney* test when considering the means in the *Planning Reference*.

regards the jurisdictional issue with the courts generally holding that they did have jurisdiction to consider the matter. However, this sometimes came with the qualification that the primary responsibility rested with the legislature. In the *Employment Equality Reference*, Chief Justice Hamilton explicitly endorsed the arguments set out in *Buckley* that the courts did have jurisdiction to consider whether the requirements of Article 43.2 had been met since it had not been explicitly removed from judicial cognisance. However, he stated that the Oireachtas had the primary responsibility to decide the matter. In the *Iarnród Éireann* case, the *Planning Reference* and the *Health Reference,* the courts implicitly suggested that they had competence to consider the legislation in light of the requirements of Article 43.2. However, in the *Planning Reference* Justice Keane seemed to give the Oireachtas a wide margin of discretion in deciding what was required by the common good.

Thus, despite the confusing array of approaches taken by the Irish courts towards the constitutional property rights question we can make some general observations about how the matter will now be approached. First, the courts will consider the objective of the impugned legislation, using either the requirements of Article 43.2 and/or those of the preliminary step of the *Heaney* test as a guide. Then the means used to achieve the objective will be examined. Here the question of whether the legislation constitutes an unjust attack pursuant to Article 40.3 will be considered in light of the proportionality step of the *Heaney* test.

A final point to note is the question of compensation. In a number of the cases, the courts linked the issue of payment of compensation to the question of the constitutional validity of the legislation. In the *CDDA* case, the *Blake* case and in the *Planning Reference*, the court linked the issue directly to Article 40.3 and notion of unjust attack, suggesting that if there was no payment of compensation or if it was inadequate, the legislation would constitute and unjust attack on property rights. In the *Planning Reference* Justice Keane noted that it was particularly relevant to the question of compulsory purchase order. However, relying on the decision in *Dreher* he stated that such compensation did not necessarily have to equate to market value.

But what does all this tell us regarding the key question noted above, namely whether legislation which restricts private property rights but does so in pursuit of a common social goal is constitutionally sound. One would expect that the different approaches outlined above would lead to different results as regards whether the impugned legislation is ultimately found to be valid or not. However, it is difficult to link a particular approach

to a particular outcome. For instance, one may assume that the approach which viewed Article 40.3 and Article 43 as providing the same protections may favour a deferential approach by the courts towards the question of the validity of legislation as it generally led to a focus on whether the requirements of Article 43.2 had been met to the exclusion of any consideration of Article 40.3 and the issue of unjust attack. Thus, the scope of protection for property rights was narrowed. However, whilst this approach led the Supreme Court to find the impugned legislation to be valid in the *SIT* case, in the *Buckley* case a similar approach led to the legislation being found unconstitutional. On the other hand, one might assume that the view which suggests that the property rights articles provide distinct protections would favour a more interventionist approach, given that the tendency with this position has been to consider the protection of property rights in light of the requirements of Article 43.2 and Article 40.3. However, this approach led to Justice Kenny finding the legislation to be constitutionally sound in *CDDA*. As I noted above, since the adoption of the *Heaney* test, the generally accepted view is that Article 43.2 and Article 40.3 are both relevant to the question of interference with the rights of individuals as regards their property. Again, no firm link between that approach and the invalidation of legislation can be seen, with the court in the *Iarnród Éireann* case, and the *Planning Reference* finding the impugned legislation to be constitutionally valid.

When considering the question of court's jurisdiction regarding Article 43.2 again it would seem that one of the approaches taken, the view that the courts had no jurisdiction to examine the legislation in light of that provision, would lead to a more deferential approach being taken by the courts as to the validity of legislation, whilst the opposite view would favour a more interventionist approach. When one looks at the cases in which the courts held that they did not have jurisdiction to consider Article 43.2, the *Donnelly* case and the Supreme Court decision in *SIT,* the proposition seems to hold, as the courts held the legislation to be valid in both cases. However, when one looks to the cases where the courts held that they did have jurisdiction regarding Article 43.2 no discernible trend is evident.

One final factor which could be considered is the use of the proportionality test. Of the five cases I considered which explicitly or implicitly utilised the test, two, the *Iarnród Éireann* case, and the *Planning Reference* found the legislation to be valid, whilst the other three, the *Daly* case, the *Employment Equality Reference* and the *Health Reference* struck down the impugned provisions. My discussion above considered some of the most important cases regarding the property rights protections. However, it is interesting to note that

Rachael Walsh, who has considered a broader selection of these cases which have utilised the *Heaney* test, asserts that the courts have generally shown a 'high degree of deference' to the legislature in respect to examining the constitutionality of legislation in light of the Constitution's property rights provisions.[370] This position, she asserts, is the result of the way in which the courts have interpreted the *Heaney* test. Walsh argues that the courts have focused on the preliminary step of that test, considering whether the objective of the legislation meets a social purpose, and have emphasised the first step of the proportionality test, whether the means used are rationally connected to that objective.[371] She states that courts have neglected the other parts of the proportionality test, particularly the step which requires a consideration of whether the property rights are being impaired as little as possible. Indeed, this deferential attitude towards the Oireachtas can be discerned in a number of the cases examined here. Although the courts have been willing to invalidate legislation which constitutes an excessive restriction on the property rights of individuals, a significant margin of discretion has often been afforded to the legislature by the courts. This can be seen in the occasional reluctance to consider whether the requirements of Article 43.2 have been met and the more widespread view that despite the courts' ability to consider the matter, the primary jurisdiction rested with the Oireachtas. Thus, despite the importance of the right to private property in the Irish constitutional order, it seems that the courts, at least on some occasions have allowed the property rights of individuals to be restricted. This hesitance to invalidate legislation, although usually not explicitly justified by reference to the separation of powers doctrine,[372] seems to be grounded in a reluctance to excessively interfere in matters of policy. It appears therefore, that a tension exists between the liberal protection of private property and the separation of powers doctrine. Of course, in none of these decisions was the validity of private property as an institution ever in question. Further, there were a significant number of cases in which legislation was invalidated due to its excessive infringement of private property rights. However, it is interesting to note that judicial

[370] Rachael Walsh, The Constitution, Property Rights and Proportionality: A Reappraisal (2009) 31 Dublin U. L.J. 1, 3.

[371] Rachael Walsh, The Constitution, Property Rights and Proportionality: A Reappraisal (2009) 31 Dublin U. L.J. 1, 5-6.

[372] Of the cases covered here, only Justice Lavery's decision in the *SIT* case explicitly referenced the doctrine.

concern for limiting the role of the courts will sometimes mean that the property rights of individuals may be restricted.

Conclusion

In this chapter I have discussed the caselaw relating to Ireland's constitutional property rights provision. I will reserve an extended discussion on the implications this caselaw for progressive housing legislation and the right to housing, for Chapter seven. For now, it will suffice to say that the uncertainty regarding the relationship between private property rights and progressive housing legislation is understandable given the multitude of approaches and divergent results that have emerged from the Irish courts. Further it puts the lie to any assertion that private property rights are an insurmountable obstacle to the passing of progressive housing legislation, and indeed to declarations that they pose no barrier to such. Indeed, what might be the most astute observation in this regard is that those who have made such claims are clearly engaging in political propaganda and mobilisation of a particular set of conservative assumptions about the law, but one that is not grounded in a reasoned consideration of the caselaw. There is, therefore, potential for such conservative deceit to be tactically exposed and repudiated.

Chapter Four - Irish Liberal Legalism Examined: Constitutional Development & Socioeconomic Rights Jurisprudence

Introduction

This chapter will consist of an account of the efforts to achieve constitutional protection for socio-economic rights in Ireland since the enactment of *Bunreacht na hÉireann* in 1937. It will provide a discussion of relevant caselaw in that timeframe to unpack and contextualise judicial engagement with socioeconomic rights. In the previous chapter I considered the caselaw regarding Irish constitutional property rights. The reason for that discussion was that it related to the question of whether such rights pose a barrier to the enactment of progressive housing legislation and whether they might act as a countervailing force to any constitutional right to housing. The following discussion regarding the caselaw surrounding socioeconomic rights is also relevant to Chapter seven's analysis of the utility of a right to housing. This time the question is whether its insertion into the Constitution might lead to the courts imposing positive obligations on the State to ensure its vindication. One factor which might indicate the likelihood of this scenario is the attitude the Irish courts have previously taken towards imposing such obligations on the State in order to ensure the protection of other socioeconomic rights. As I noted in Chapter two, the removal of the 'principles of social policy' from judicial cognisance has meant that the Constitution provides minimal protection for socioeconomic rights. However, there have been various attempts to persuade the courts to protect them. This has included attempts by litigants to encourage the judiciary to have regard for the principles set out in Article 45 through the doctrine of unenumerated rights, and litigation brought pursuant to the two rights in the Constitution that can be understood as socioeconomic rights: the right to education set out in Article 42; and the right of vulnerable children to care from the State, provided for in Article 42.5.

I will therefore consider this caselaw in the following pages in order to get some indication of the approach the courts may take as regards imposing positive obligations on the State to vindicate a constitutionally protected right to housing. The first section will examine the caselaw which emerged pursuant to the doctrine of unenumerated rights. I will then turn to examine the jurisprudence that has developed in relation to Articles 42 and 42.5 respectively.

I – Unenumerated Rights and Socioeconomic Rights

The doctrine of unenumerated rights, the development of which constitutes one of the most notable instances of judicial activism in the Irish courts since the enactment of *Bunreacht na hÉireann,* emerged in the 1960s. Basil Chubb locates the reason for this move towards a more activist interpretation of the Constitution in the emergence of a new generation of judges who did not feel constrained by the principles adopted from the British legal system and who were more willing to explore the possibilities provided by the system of judicial review.[373] The doctrine was initially developed in the case of *Ryan v. Attorney General.*[374] The case was concerned with the compulsory fluoridation of Dublin's drinking water pursuant to the *Health Act* 1950. The plaintiff, Ms. Ryan, was opposed to fluoridation of her water supply. She grounded her action on a claim that the *Health Act* violated Article 41 of the Constitution as it interfered with family life and, using a broad definition of education, with Article 42, claiming the act intruded upon her ability to raise her children. Of more interest to our present discussion is the third ground upon which Ms. Ryan based her case, that the fluoridation scheme interfered with her right to bodily integrity. Such a right was not explicitly recognised in Constitution, but Ms. Ryan argued that it could be derived from the rights guaranteed in Article 40.3.

As we have seen, Article 40.3.1 sets out a general guarantee that the state will defend the personal rights of its citizens. Article 40.3.2 enumerates a list of such rights. Crucially however, Article 40.3.2 states that it will defend the listed rights 'in particular'. Ms Ryan argued that the phrase 'in particular' implied that the list was not exhaustive and that the court had the power to recognise rights not explicitly set out in the Constitution. In the High Court Justice Kenny rejected Ms. Ryan's arguments based on Article 41 and Article 42. However, on the third ground he accepted that the general guarantee set out in Article 40 could give protection to rights not explicitly set out in Article 40.3.2. and determined that the right to bodily integrity was one such unenumerated right protected by the Constitution. On balance however, he found that the fluoridation scheme did not violate Ms. Ryan's right.

The establishment of the doctrine in *Ryan* opened up the possibility that the courts may find that certain socioeconomic rights were protected by the Constitution despite not being explicitly contained in the written document. An attempt was made to argue such

[373] Basil Chubb, *The Politics of the Irish Constitution* (Institute of Public Administration 1991) 65-66.

[374] [1965] IR 294.

in *The State v Frawley*.[375] Here the plaintiff claimed that his detention in Mountjoy prison was not in accordance with the law due to the treatment he had been subjected to whilst incarcerated. Mr. Frawley suffered from a sociopathic personality disorder and the prison did not have the capacity to provide for his needs whilst under detention. Due to his sometimes-aggressive behaviour, Mr. Frawley was often kept in confinement and was denied the equipment and facilities provided to other inmates. The plaintiff claimed, inter alia, that the conditions under which he was being kept violated his right to bodily integrity. He further argued that the aforementioned right imposed a positive obligation upon the State to protect his health as far as reasonably possible and that this obligation extended to the provision of specialist care facilities. In the High Court, Justice Finlay recognised that, after the *Ryan* case, the right to bodily integrity was protected by the Constitution.[376] He stated that the existence of the right implied that the Executive, through its acts or omission, could not expose the health of a person to risk or danger. He noted that this same proposition could be articulated positively, placing a duty on the Executive to protect the health of those in its custody as far as reasonably possible. However, the judge rejected the contention that, in these circumstances, such a duty could only be met if the State were to provide specialist facilities and treatment for a prisoner.[377] Further, in response to the contention that the nature of the prisoner's life under incarceration would make the provision of appropriate facilities desirable, he stated – in a refrain that would become familiar in cases when the courts were dealing with the issue of protection of socioeconomic rights – that 'it is not the function of the Court to recommend to the Executive what is desirable or to fix the priorities of its health and welfare policy'.[378] Justice Finlay held that the treatment provided to Mr. Frawley was reasonable in the circumstances. The *Frawley* case therefore provides an early example of the reluctance of the Irish courts to impose a positive obligation on the State to expend resources in order to ensure the protection of a citizen's constitutional rights.

Another case in which the right to bodily integrity was used to attempt to place a positive obligation on the State was that of *O'Reilly v Limerick Corporation*.[379] Here the plaintiffs

[375] [1976] IR 365.

[376] *Frawley* at Page 372.

[377] *Frawley* at Pages 372-373.

[378] *Frawley* at Page 373.

[379] [1989] ILRM 181.

were members of the traveller community who were residing in caravans on unofficial sites in Limerick city, in conditions of serious deprivation. A number of the plaintiffs lived at a particular site on Childers Road. At this site, Limerick Corporation (the name for the city council at the time) had decided to build a roundabout and the position of the plaintiffs' caravans impeded the carrying out of this work. The plaintiffs, worried about what the proposed development might mean for their living situation, employed a solicitor who threatened injunction proceedings against the Corporation unless an alternative site was offered. The Corporation had offered to house some of the plaintiffs. However, the accommodation offered was at odds with the way in which the travelling community traditionally lived. After negotiations over the provision of alternative sites broke down, the plaintiffs sought a mandatory injunction directing Limerick Corporation to provide them with serviced halting sites containing the modest facilities they needed to live, i.e., toilet facilities, running water and refuse collection. Their contention was that the *Housing Act 1966* imposed such an obligation on the Corporation. The plaintiffs also sought damages for the distress they had undergone related to the conditions which they had been forced to live in. This claim was based on two propositions. The first was grounded in Article 40.3. The judge summarised the plaintiffs' claim as follows.

> 'Each individual in society requires a certain minimum standard of basic material conditions to foster and protect his or her dignity and freedom as human persons; the right to be provided with these conditions is one of the unenumerated personal rights embraced by Article 40.3.2 of the Constitution; the State's duty to respect and as far as is practicable to defend and vindicate these unenumerated rights has been broken by permitting the plaintiffs to live in conditions without water and sanitary services, and the plaintiffs are entitled to damages for this breach.'[380]

The second proposition argued that the State's duty to ensure minimum standards of living flowed from its duty to protect the family set out in Article 41.2. Justice Costello dealt with the two claims together as they both related to the question of whether the courts could impose obligations on the State regarding the distribution of resources. The judge noted that typically claims related to Article 40.3 and the doctrine of unenumerated rights, were concerned with preventing 'wrongful interference'[381] by the State in the lives

[380] *O'Reilly* at Page 192.

[381] *O'Reilly* at Page 192.

of its citizens. He noted that in this case, 'an entirely different kind of claim'[382] was being advanced, as the plaintiffs were asserting that they had a right to be provided with material resources by the State, and that the State's failure to fulfil this duty should result in damages being paid to the plaintiffs. The judge noted the floodgates argument, the contention that to award damages in this case would necessarily lead to similar claims being advanced by other parties. Although he noted that the argument might not be particularly relevant, given the facts of the case before him, he stated that it did highlight the nature of the claim that the plaintiffs were making. He stated,

> 'The question raised by their claims is this; can the courts with constitutional propriety adjudicate on an allegation that the organs of Government responsible for the distribution of the nation's wealth have improperly exercised their powers? Or would such an adjudication be an infringement by the courts of the role which the Constitution has conferred on them?[383]

Justice Costello then sought to provide an answer to this question by providing an account of the distinction between distributive justice and commutative justice. The former, he argued was concerned with distribution of community resources, the latter with the relationships between individuals.[384] He stated that the question of the distribution of the common stock of community resources can only be decided by those charged with furthering the common good, that is, the Government.[385] Further, he argued, a court cannot adjudicate on whether an individual has been deprived of what was due to them from that common stock. He stated that the role of the courts was limited to deciding issues of commutative justice. Justice Costello then argued that this distinction was accounted for in the separation of powers between the different institutions of the State and asserted that the role of deciding upon the distribution of common funds lay with the Oireachtas. Finally, he highlighted the unsuitability of the courts for dealing with questions of distributive justice due to the lack of expertise amongst the judiciary regarding the determination of questions pertaining to resource distribution, and due to the case-by-case manner in which the courts make decisions.[386]

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[382] *O'Reilly* at Page 192.

[383] *O'Reilly* at Page 193.

[384] *O'Reilly* at Page 193.

[385] *O'Reilly* at Page 194.

[386] *O'Reilly* at Page 195.

Justice Costello granted a declaration obliging the Corporation to review its building programme but refused to grant an order directing the body to provide serviced halting sites.

The *O'Reilly* judgment is important as it sets out some of the main arguments that have been referred to in the Irish courts in order to reject requests for the judiciary to protect socioeconomic rights by imposing positive obligations on the Oireachtas to ensure their fulfilment. He made the distinction between negative and positive rights and highlighted the floodgates argument which is often used to deny the protection of the latter. He also gave extended consideration to the separation of powers principle, explaining the concept via a commutative-distributive justice distinction. He used the concept to explain why the courts could not engage in decisions around resource distribution and argued that this restriction on judicial powers was justified given the unsuitability of the courts to this task. As we shall see, these arguments have been repeatedly referred to in Irish judicial decisions concerning socioeconomic rights.

Thus, despite initial optimism that the doctrine of unenumerated rights might provide a route through which socioeconomic rights might gain a form of constitutional protection from the courts, ultimately this approach proved fruitless. The key difference, as far as the courts were concerned, between the claim made in *Ryan* and those made in *Frawley* and *O'Reilly*, was that the former was perceived as being a negative liberty claim. The plaintiff was requesting that the court vindicate the purported constitutional right in order to prevent the State from interfering in her life, in this case, with her bodily integrity. However, in the *Frawley* and *O'Reilly* cases the plaintiffs were requesting that the court impose positive obligations on the State to expend resources in order to protect the right in question. Thus, the liberal legal tendency to characterise rights in a negative manner and to oppose attempts to encourage state intervention in social and economic life, is evident in the judgments concerning unenumerated rights. This tendency was mediated through the separation of powers doctrine which was interpreted as disallowing judicial interference in policy matters. In *Frawley*, Justice Finlay characterised the matter in these terms. As did Justice Costello in *O'Reilly*. Costello also explained the distinction between institutional rules in terms of the commutative, distributive justice distinction.

Before moving on to Article 42 and Article 42A, the explicit constitutional provisions which protect socio-economic rights, it is worth bringing attention to the case of *Murtagh Properties Ltd v Cleary*[387] in which operation of the doctrine of unenumerated rights seemed

[387] [1972] IR 330.

to provide the possibility of judicial recognition of the principles contained in Article 45. The case involved a dispute between three vintners and the secretary of the Irish National Union of Vintners, Grocers and Allied Trades Assistants over whether the former could employ female bar staff. The plaintiff vintners were seeking the extension of an injunction preventing the union from picketing their premises in response to the dispute. The plaintiffs argued, inter alia, that the actions of the union in attempting to compel the plaintiffs to terminate the employment of the bar staff would lead to the breach of the latter's constitutional right to earn a livelihood without discrimination on the ground of sex, therefore obliging the plaintiffs to act unconstitutionally. The plaintiffs argued that this right, although recognised only in the non-justiciable Article 45, could be inferred from Article 40.3.2. In the High Court Justice Kenny held that although Article 45 was not directly cognisable by the courts, this did not preclude the bench from using the principles set out in the article to guide the enumeration of rights flowing from Article 40.3.1. He stated that the opening passage of Article 45 setting forth the non-cognoscibility of its principles by the court,

> 'does not mean that the Courts may not have regard to the terms of the Article, but they have no jurisdiction to consider the application of the principles in it in the making of laws. This does not involve the conclusion that the Courts may not take it into consideration when decided whether a claimed constitutional right exists'.[388]

Justice Kenny agreed with the plaintiffs that the proposed right was protected by the Constitution and ultimately granted the extension of the injunction on the basis that the union's actions risked obliging the plaintiffs to dismiss the female bar staff in breach of their constitutional right to earn a livelihood without discrimination on the ground of sex. Justice Kenny therefore set forth the principle that Article 45 could be used as an interpretive tool to discover the rights protected by Article 40.3.1 but reaffirmed that it could not be used to interrogate the validity of legislation. Hogan has argued that Justice Kenny seems to be 'doing, through the backdoor of Article 40.3.1, what is expressly forbidden in Article 45,'[389] implying the invalidity of such an approach. Indeed, it does not seem that the Irish courts have felt obliged to develop this approach to any great

[388] *Murtagh* at Pages 335/336.

[389] Gerard Hogan, 'Directive Principles, Socioeconomic Rights and the Constitution', (2001), 36 Irish Jurist 175, 177.

degree, and this narrow approach to Article 45 seems to be the limit to which the courts will consider its application.[390]

It is worth considering for a moment, by way of comparison, the approach taken in another common law jurisdiction towards non-justiciable principles of social policy and the enumeration of socioeconomic rights. The Indian experience shows that the approach taken by the Irish courts towards Article 45 was by no means inevitable. Part IV of the Indian Constitution sets out a number of non-justiciable Directive Principles, similar to those contained in *Bunreacht na hÉireann.*[391] Article 38 commits the State to promoting the welfare of the people by securing a social order in which justice is central and pledges that the State will endeavour to minimise inequalities in income, status, facilities and opportunities. Article 39 further commits the State to certain policy principles such as aiming to realise the right to an adequate means of livelihood. Article 41 commits the State to take measures, having regard to resource constraints, to secure the rights to work, education and social assistance.

Unlike their Irish counterparts, the judges of the Indian Supreme Court have shown a willingness to use these principles in order to oblige the State to protect certain socioeconomic rights. They have done this through what is known as 'Public Interest Litigation', a jurisdiction through which the Supreme Court has encouraged litigants, through various procedural innovations, to bring actions in order to enforce their rights.[392] Primarily by using the Directive Principles as an interpretive tool in order to flesh out the Constitution's justiciable civil and political rights, particularly the right to life, the Indian Supreme Court has enumerated rights relating to healthcare[393], food[394], education[395] and shelter.[396] According to O'Connell, this period of judicial activism took

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[390] Paul O'Connell, *Vindicating Socio-Economic Rights: International Standards and Comparative Experiences*, (Routledge 2012) 142.

[391] The Indian Constitution.
https://legislative.gov.in/constitution-of-india

[392] Francis Xavier Rathinam and A.V Raja, 'Courts as Regulators: Public Interest Litigation in India' (April 2011) 16 (2) Environment and Development Economics 199-219, 203.

[393] *Consumer Education and Research Centre v. Union of India* [1995] INSC 91.

[394] *People's Union for Civil Liberties v. Union of India Writ Petition* (Civil) No.196/2001 (23 July 2001) Unreported ('PUCL case').

[395] *Miss Mohini Jain v. State of Karnataka* [1992] INSC 184 (30 July 1992).

[396] *Shantistar Builders v. Narayan Khimalal Totame* (1990) 1 SCC 520.

place despite the fact that it was widely acknowledged that the courts were 'reordering of the relationship between the courts and the elected branches of government…'[397]

In Ireland, despite a recent exception, the practice of enumerating rights not explicitly included in *Bunreacht na hÉireann* has fallen out of fashion in judicial circles.[398] However, for a time it showed the possibility of judicial creativity in interpreting the Constitution, the possibility of moving away from an approach of strict fidelity to the constitutional text and of adapting it to developments in the polity. This creative burst by the Irish courts shows that strict adherence to conservative interpretive principles was not viewed as sacrosanct. However, as we have seen the willingness to depart from traditional interpretive norms did not extend as far as imposing obligations on the State expend resources in order to improve the welfare of its citizens. One could try and explain this reluctance by reference to the specific facts of the cases discussed above. Alternatively, one could argue that the courts' reluctance to impose obligations on the State regarding resource distribution may result from the fact that the claims were being made via the doctrine of unenumerated rights. If such claims were instead made pursuant to an explicitly protected socioeconomic right, there might be a different result. And, as we shall see in the following cases, a number of High Court decisions seemed to suggest there was some merit to these claims. However, the ideological aversion to involvement in questions of resource distribution, has been a consistent feature of Supreme Court decisions pertaining to socioeconomic rights.

II – Article 42 – The Right to Education

Article 42.4 of *Bunreacht na hÉireann* provides that:

> 'The state shall provide for free primary education and shall endeavour to supplement and give reasonable aid to private and corporate educational initiative, and, when the public good requires it, provide other educational facilities or institutions with due regard, however, for the right of parents, especially in the matter of religious and moral formation.'

Of interest in some of the jurisprudence around this provision is the extent of the obligation placed by Article 42 on the State to provide education for its citizens and the

[397] Paul O'Connell, *Vindicating Socio-Economic Rights: International Standards and Comparative Experiences* (Routledge, 2012) 89.

[398] Conor O'Mahony, 'Unenumerated Rights after NHV' (2017) 40 Dublin U LJ 171.

ability of the courts to impose mandatory orders to ensure this obligation is met. The first case of interest in this line of judgements is that of *Crowley v Minister for Education*[399]. The case resulted after efforts to appoint a principal for a national school in Drimoleague, Co. Cork. The appointee, Mr. McCarthy did not have the requisite five years' experience for role and was appointed therefore on a temporary basis amid assurances from Fr. Crowley, the manager of the school that the position would then be re-advertised. Several teachers from the school had previously applied for the position but had not been considered suitable. After the temporary appointment it seems that Fr. Crowley, acting under orders of the local Bishop, intentionally delayed the advertisement of the permanent position so that Mr. McCarthy could accrue the requisite teaching experience and subsequently be awarded the position on a permanent basis. Frustrated by these tactics, the Irish National Teachers Organisation (INTO) balloted its members and in April 1976 the teachers at the school and two other local national schools withdrew their services in order to compel Fr. Crowley to re-advertise the position. However, once Mr. McCarthy had accumulated the five years teaching experience, Fr. Crowley appointed him as permanent principal of the school. In August of that year, following an instruction from the INTO, teachers in neighbouring schools refused to enrol pupils who were enrolled at Drimoleague. Various attempts were made to provide teaching for the schoolchildren during the period of the strike action, including through parents and unqualified students who had only recently obtained their leaving certificates fulfilling this function. This was paid for by the parents of the schoolchildren. This situation continued until January 1978 when the High Court made an order obliging the Department of Education to provide buses to take the affected children to other schools in the area. The parents involved, who were unsatisfied with this arrangement, took a further action in the High Court seeking, inter alia, an order directing the provision of free primary education for the pupils of Drimoleague.

In the High Court, Justice Mahon found that during the period in which no buses had been provided to take the children of Drimoleague to other schools in the area, the State had been in breach of its obligation to provide free primary education to the children. The State appealed the decision. In the Supreme Court, Justice Kenny, provided the majority opinion. He stated that Article 42.4 declares that the state shall provide *for* free primary education, rather than to provide free primary education.[400] He noted that the

[399] [1980] IR 102.

[400] *Crowley* at Page 126.

proper translation of the Irish version of the constitutional text was that the State had to make arrangements to ensure basic free education was available. The State, he asserted, discharged this obligation by providing the school buildings, paying the teachers, providing transport for the schoolchildren if necessary and by prescribing minimum standards. Justice Kenny held that, in the circumstances there had been no breach by the State of its obligation to provide for free primary education. Justice O'Higgins suggested that the State may have a case to answer as regards the parents of the schoolchildren having to pay for substitute teachers.[401] However, this was a minority opinion.

The aforementioned case of *Ryan v. Attorney General* is also significant in terms of Article 42. One of the grounds pursuant to which Ms. Ryan had argued her case was that the fluoridation scheme interfered with her right to educate her children. Education, she argued included the acts of rearing and nurturing. Although this ground of her claim was dismissed by the Supreme Court, Chief Justice O'Dálaigh agreed that education could be given a broad definition. He stated that 'Education essentially is the teaching and training of a child to make the best possible use of his inherent and potential capacities, physical, mental and moral.[402]

The influence of this broad definition of education could be seen in the High Court case of *O'Donoghue v Minster for Health* [403] in which Justice O'Hanlon extended the state's duty to provide for education to mentally disabled children. In the case, the mother of a severely mentally and physically disabled child took action against the State, again for failure to meet its obligation under Article 42.4. The mother had made attempts to enrol her son with a voluntary organisation which provided residential and day care services for mentally and physically disabled children. However, her applications were refused due to a lack of vacancies. Several years later the mother made a new application to the voluntary organisation, and this was accepted, although her child was only able to attend on a concessionary and a limited basis. The mother then took action in the High Court against the State for breach of its Article 42.4 obligations. In the High Court the State argued that the provision of education to severely mentally disabled children was futile as it was of no real benefit to them.[404] Further, they argued that the obligation to provide for free

[401] *Crowley* at Page 125.

[402] *Ryan v. Attorney General* [1965] IR 294, at Page 350.

[403] [1996] 2 IR 20.

[404] *O'Donoghue* at Page 25.

education under Article 42.4 extended only to the type of scholarly education which was provided in the national schools' system. The State asserted that the type of training that could be provided to the applicant which would be of real benefit to him could not be considered 'education'. Justice O'Hanlon, after considering the scientific research in this area, dismissed the claim that the child was incapable of being educated.[405] He also rejected the State's assertion that Article 42.4 was only concerned with the scholarly education provided for in the Irish national school system. He stated that,

> '…there is a constitutional obligation imposed on the State by the provisions of Article 42, s.4 of the Constitution to provide for free basic elementary education of all children and that this involves giving each child such advice, instruction and teaching as will enable him or her to make the best possible use of his or her inherent and potential capacities, physical, mental and moral, however limited these capacities may be.'[406]

He asserted that the type of education would be dependent on the particular abilities of the child in question. Justice O'Hanlon endorsed the broad definition of education espoused in *Ryan* adding that the definition extended even to those with limited capacity. He stated that, since it had been established that children suffering from severe mental disabilities could benefit from formal education, it was clear that there was a constitutional obligation upon the state to provide for free primary education for such children.[407] Interestingly, when faced with the State's contention that the issue being considered was moot, since a pilot scheme for the education of severely mentally disabled children had already been launched, the judge stated that the resources currently being directed towards the pilot scheme were insufficient.[408] Justice O'Hanlon ultimately held that the State had failed in its duties under Article 42.4 as regards the child. The judge limited his ruling to a declaration that the State had failed in its constitutional obligations. However, he noted that the applicant reserved the right to apply to the court for a mandatory order should the State fail to remedy the situation. As O'Connell notes, the significance of the case was that it extended the right to education to a section of society which had been

[405] *O'Donoghue* at Page 62.

[406] *O'Donoghue* at Page 65.

[407] *O'Donoghue* at Page 66.

[408] *O'Donoghue* at Page 69.

neglected by the State.[409] What is most interesting from our point of view is that the judge ruled that there was a positive obligation on the State to ensure that its duties under Article 42.4 were fulfilled. Further, he was willing to criticise the authorities for their failure to expend sufficient resources in a particular area

The judgement in *O'Donoghue* gave rise to further litigation in this area as the State continued to fail in its obligations to provide the requisite educational facilities for the severely mentally disabled. The most important of these cases is that of *Sinnott v Minister for Education.*[410] The case was brought by a 23-year-old autistic man named Jamie Sinnott and Kathryn Sinnott his mother and primary caregiver. Jamie who was born in 1977, was diagnosed with autism from an early age and his mother had attempted to obtain appropriate treatment for his condition. However, the health services were operating using outdated methods and Ms. Sinnott was frustrated in her attempts to convince them to adopt more appropriate treatments. In 1988 when Jamie was aged 11, he participated in a course of education for the first time, receiving training in feeding and toileting. However, this education was discontinued after less than a year. In 1991, after being educated by his mother for two years Jamie became enrolled in a school for the mentally disabled in Cork. However, due to large class sizes and lack of staff Jamie's education was interrupted and the school ceased to provide educational facilities after 1995. Subsequent to this Jamie became enrolled in another school with a specialised teacher who had knowledge of autism. However, after Jamie had reached the age of 18, the school refused to provide him with further education. He was forced to move to another school that did not have staff trained in teaching people with autism.

Actions were taken in the High Court by both Jamie and Kathryn Sinnott. Counsel for Mr Sinnott claimed that the State had failed to fulfil its obligations under Article 42.4. to provide for free primary education up until he had reached the age of 18. Counsel further argued that the right to free primary education extended beyond the age of 18 and the State had failed in its obligations in this regard. Counsel for Ms Sinnott claimed that a number of her rights had been breached due to the State's failure to vindicate her son's right to free primary education. The State claimed, inter alia, that its obligation under Article 42.4 did not extend to persons over eighteen. In the High Court, Justice Barr held

[409] Paul O'Connell, *Vindicating Socio-Economic Rights: International Standards and Comparative Experiences*, (Routledge 2012) 149.

[410] [2001] 2 IR 545.

that despite the applicant having reached the age of 18 he was entitled to receive free primary education for as long as he could benefit from such. He stated that,

> 'I am satisfied that the constitutional obligation of the State under Article 42.4 to provide and continue to provide for primary education and related ancillary services for the first plaintiff is open-ended and will continue as long as such education and services are reasonably required by him.'[411]

Noting the inadequacy of the current educational arrangements provided by the State for Mr Sinnott, the judge noted that 'the constitutional obligation of the State to provide for his continuing primary education should be met by the provision of sufficient funds for an alternative system of primary education and training which is suitable to his needs…'[412] Ultimately Justice Barr granted the damages to both applicants. Again, it is interesting to note that Justice Barr, like Justice O'Hanlon in the *O'Donoghue* case, was willing to comment on the level of resources the State was expending. However, unlike Justice O'Hanlon, Justice Barr was prepared to make a mandatory order, rather than merely a declaration, obliging the State to provide ongoing primary education for Mr Sinnott pursuant to Article 42.4. This order not only placed a mandatory positive obligation on the State, but also set out the specific requirements which had to be met.

The State authorities accepted that they had failed in their duties towards Mr Sinnott pursuant to Article 42.4 up until he had reached the age of 18 and agreed to pay the damages awarded in the High Court. However, they appealed to the Supreme Court in order to clarify the extent of obligation its obligations under Article 42.2, specifically whether they extended to providing free education to citizens beyond the age of 18. The State also challenged the mandatory nature of Justice Barr's order. A majority in the Supreme Court ultimately held that the State's obligations under Article 42.4 ceased once a person had reached the age of 18. The ruling meant that the question of the mandatory injunction imposed by Justice Barr was moot. Nevertheless, a number of judges decided to comment on the ability of the courts to grant mandatory orders against State institutions.

Justice Hardiman provided the most extended consideration of both the nature of the obligation imposed on the State by Article 42.4 and the ability of the courts to impose orders of the type made by Justice Barr in the High Court. He rejected the contention,

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[411] *Sinnott* at Page 584.

[412] *Sinnott* at Page 585.

put forward by counsel for Mr Sinnott, that Article 42.4 imposed an unqualified duty on the State which could not be limited by decisions regarding policy, means or alternative priorities. The judge noted the claim that the Constitution placed some unqualified duties on the State, for example, the duty to hold elections. However, he stated that these duties were narrow, gave rise to no questions of policy and required the expenditure of minimum resources.[413] The obligation stemming from Article 42.4 by contrast was complex, involved the expenditure of significant sums of money and raised numerous policy questions.[414] He referred to Article 17.2 of the *Bunreacht na hÉireann*, which requires legislative and executive approval for the expenditure of public monies. The judge stated that this provision supported the view that the duty imposed by Article 42 must be fulfilled in a manner approved by those bodies.[415] He stated that, in deciding how that obligation was best fulfilled the legislature and executive 'must necessarily have a wide measure of discretion having regard to available resources and having regard to policy considerations of which they must be the judges.'[416]

Speaking on the power of the courts to make mandatory orders towards the other branches of government Justice Hardiman stated that the trial judge, without legislative authority had 'derived a power to make highly specific, and binding, prescriptions for how the first plaintiff is to be treated by the State authorities.'[417] He noted that these were normally matters for the legislature and that this was due to the separation of powers set out in Article 6 of *Bunreacht na hÉireann*. The judge then quoted at length from the judgment of Justice Costello in the *O'Reilly* case discussed above, noting the distinction made between commutative and distributive justice, the judge's comments on the separation of powers and his view that the courts were not a suitable arena for making decisions regarding resource distribution. Justice Hardiman then stated that the separation of powers doctrine 'exists to prevent the accumulation of excessive power in any one of the organs of government, and to allow the check and balance of the others.'[418] Further, he noted that the courts must be 'concerned not to infringe upon the proper

[413] *Sinnott* at Page 694.

[414] *Sinnott* at Pages 694-695.

[415] *Sinnott* at Page 695.

[416] *Sinnott* at Page 695.

[417] *Sinnott* at Page 698.

[418] *Sinnott* at Page 702.

prerogatives and area of operations of the other branches of government.'[419] Justice Hardiman accepted a situation could arise where the courts might have to compel the State to protect the constitutional right set out under Article 42.4. However, he referred to such a situation as 'extreme' and stated that 'the fact powers to deal with extreme circumstances must be retained cannot be a basis for the exercise of such powers in other circumstances.'[420] He gave four reasons as to why the courts should interfere in decisions around policymaking, echoing the reasoning of Justice Costello in *O'Reilly*. First, to do so would contravene the separation of powers. Secondly, it would result in the courts making decisions on issues for which they were unqualified. Thirdly, the courts would not be democratically responsible for such decisions and finally, the adversarial procedures of the court were ill-suited to making policy related decisions.

The other judges also noted that mandatory orders would only be made in exceptional circumstances. Justice Denham stated that she 'would not exclude the rare and exceptional case, where, to protect constitutional rights, the court may have a jurisdiction and even a duty to make a mandatory order.'[421] However, she asserted that, pursuant to the separation of powers, the courts would normally assume that such orders weren't necessary, and that declaratory orders would be sufficient.[422] Similarly, Justice Geoghegan stated that whilst there were 'very exceptional' circumstances in which a court may order a particular allocation of funds where a constitutional right had been breached without justification, generally the courts should refrain from imposing detailed orders. Justice Keane stated that the courts would not grant mandatory orders requiring the legislature to provide funds for a particular purpose in order to uphold the constitutional rights of members of the public. He did suggest that, if it was established that a constitutional right had been breached by the State and would continue to be breached in the future, and if it was clear that the Minister in question had sufficient resources to remedy that breach, there was nothing in principle to preclude a mandatory order. However, he stated that in such a situation it would be appropriate for the courts to presume that any breach would be remedied by the Minister, and therefore a mandatory order would not be necessary.

[419] *Sinnott* at Page 707.

[420] *Sinnott* at Page 710.

[421] *Sinnott* at Page 656.

[422] *Sinnott* at Pages 655-656.

Thus, despite some willingness on the part of High Court judges to take a more activist role in ensuring the protection of Article 42.4, the Irish Supreme Court was unwilling to rule that the provision placed extensive positive obligations on the State to ensure its protection. Further the court made it clear that mandatory orders should be considered exceptional. This view was grounded in a strict interpretation of the separation of powers doctrine which placed questions of policymaking and resource distribution exclusively within the domain of the legislature and Oireachtas. As we shall see, a similar pattern has emerged in the caselaw regarding Article 42.5.

III – Article 42.5 and the State's Duty to Care for Vulnerable Children

Up until 2015 the Constitution contained a provision numbered Article 42.5. It stated that,

> 'In exceptional cases, where the parents for physical or moral reasons fail in their duty towards their children, the State as guardian of the common good, by appropriate means shall endeavour to supply the place of the parents, but always with due regard for the natural and imprescriptible rights of the child.'

In 2012 a referendum was held which led to the Thirty-first Amendment of the Constitution. This amendment repealed Article 42.5 and replaced it with Article 42A, an expanded provision. This came into force in 2015. The new article states, inter alia, that,

Article 42A (1)

> 'The State recognises and affirms the natural and imprescriptible rights of all children and shall, as far as practicable, by its laws protect and vindicate those rights.'

Article 42A (2)

> 'In exceptional cases, where the parents, regardless of their marital status, fail in their duty towards their children to such extent that the safety or welfare of any of their children is likely to be prejudicially affected, the State as guardian of the common good shall, by proportionate means as provided by law, endeavour to supply the place of the parents, but always with due regard for the natural and imprescriptible rights of the child.'

The old Article 42.5 has been read as placing an obligation on the state to provide for the welfare of children whose parents are incapable of or unwilling to support them. The new Article 42A(1)gives explicit recognition to the rights of children under the Constitution. Article 42A(2) takes into account children born outside of traditional marriage structures

and places greater focus on the impact on children of the failure of their parents in their duty towards them. The following discussion is based on the body of caselaw which emerged whilst Article 42.5 was still operative. As with Article 42, the question dealt with in the following line of caselaw was the extent of the obligation pursuant to Article 42.5 and whether or not the courts were willing to interpret the article as placing a positive obligation on the state to allocate resources to ensure its protection. The question of the courts' ability to make mandatory orders in relation to such obligations was also considered.

The case *G v. An Bord Uchtala,*[423] is the first case of note, if only because Justice O'Higgins gave a useful outline of the import of Article 42.5. Speaking in the context of disputed adoption, the judge stated that,

> 'Having been born, the child has the right to bed and to live, to be reared and educated, to have the opportunity of working and of realising his or her full personality and dignity as a human being. These rights of the child (and others which I have not enumerated) must equally be protected and vindicated by the State. In exceptional cases the State, under the provisions of Article 42, s. 5 of the Constitution, is given the duty, as guardian of the common good, to provide for a child born into a family where the parents fail in their duty towards that child for physical or moral reasons.'[424]

The next notable judgment came from Justice Geoghegan in the High Court decision of *FN v Minister for Education.*[425] The applicant child, whose father was unknown, had been placed in the care of the Eastern Health Board after his mother died. After displaying behavioural problems in several care settings, he was diagnosed with a hyperkinetic conduct disorder by a psychiatrist who recommended he be placed in a secure unit until he was given appropriate treatment. He sought a declaration that the respondents, which included the Minister for Education, the Minister for Health, and the Eastern Health Board had failed to vindicate the applicant's rights under, Article 42.5. He also sought a mandatory order obliging the respondents to provide secure accommodation and to provide for his education. Justice Geoghegan stated that the child was in obvious need of care and that in order for such care to be effective it needed to be carried out in a secure

[423] [1980] IR 32.

[424] *An Bord Uchtala* at Page 56.

[425] [1995] IR 409.

setting.[426] He noted that there were other children in the state in a similar situation to the applicant and that there was a lack of suitable facilities in the state. He rejected the State's argument that there was no constitutional obligation on the State to provide services beyond what was presently being provided for children such as the applicant, asserting that, 'where there is a child with very special needs which cannot be provided by the parent or guardian there is a constitutional obligation on the State under Article 42, s. 5 of the Constitution to cater for those needs in order to vindicate the constitutional rights of the child.'[427] Whilst refusing to delineate the extent of this obligation and noting that there may be exceptional circumstances in which the State may be exempted from it due to issues of impracticability or prohibitive cost, he stated that in this particular instance the State did have a constitutional duty to provide appropriate care for the applicant. He issued a declaratory order asserting that the State was constitutionally obliged to provide this care.

Subsequent to this case, the State furnished proposals to build the relevant care facilities. However, progress was delayed due to bureaucratic failures and concerns around cost. This state of affairs resulted in an increase in caselaw in this area,[428] including the High Court case of *DB v. Minister for Justice.*[429] In the case the applicant child again was in the care of the Eastern Health Board and was in need of specialised care in a high support unit due to behavioural problems. Relying on the declaration made by Justice Geoghegan in *DB*, the applicant sought an order directing the State to provide funding to enable the Health Board to open and maintain a high support unit. He also sought an order compelling the State to do everything necessary to facilitate, the building, opening and maintenance of that unit. Justice Kelly considered whether or not the courts had the power to make such an order. Referring to Article 40.3.1 and the dicta of Chief Justice Hamilton in *D.G. v. Eastern Health Board* [430] and Chief Justice Ó'Dálaighin *State (Quinn) v. Ryan* [431]*,* he stated that, 'in carrying out its constitutional function of defending and

[426] *FN* at Page 413.

[427] *FN* at Page 416.

[428] Gerard Hogan, 'Directive Principles, Socioeconomic Rights and the Constitution', (2001), 36 Irish Jurist 175.

[429] [1999] 1 IR 29.

[430] [1997] 3 IR 511.

[431] [1965] IR 70.

vindicating personal rights, the Court must have available to it any power necessary to do so in an effective way. If that were not the case, this Court could not carry out the obligation imposed upon it to vindicate and defend such rights.'[432] He then made reference to the dicta of Chief Justice Finlay in *Crotty v Taoiseach*[433] where the Chief Justice submitted that the courts have a right to intrude upon the activities of the executive in order to secure constitutional rights. Justice Kelly noted the importance of the separation of powers doctrine and the question of the court's involvement in issues of policy. However, he stated that since proposals had previously been put forward by the State, policy on the matter had already been decided.[434] The court therefore was not getting involved in deciding matters of policy. Instead, the court was ensuring that the policy position already adopted would be implemented.[435] He noted the special circumstances which were leading him to make the mandatory order. First, a declaratory order had already been made and had not been complied with. Secondly, if the support units weren't provided promptly, the respondent and others currently before the courts would become too old to benefit from them. Thirdly, he noted the impact that the failure to provide the units would have on the children. Finally, he stated that he did not believe the Minister for Education had made all reasonable efforts to ensure the units were provided.[436] In conclusion, Justice Kelly granted the mandatory order sought by the applicant compelling the State to open and maintain the unit.

This sequence of cases regarding the provision of high support units for certain minors within the State continued in the case of *T.D. v. Minister for Education.*[437] The case involved the applicant, TD and eight other teenagers and young adults with behavioural problems who were in need of high support units. The applicant claimed that pursuant to Article 42.5, the State was obliged to provide him with appropriate accommodation, education, and maintenance. In the High Court, Justice Kelly reaffirmed the position he had taken in the *DB* case. He issued a mandatory order requiring the Ministers for Education,

[432] *DB* at Page 41.

[433] [1987] IR 713.

[434] *DB* at Page 42.

[435] *DB* at Page 45.

[436] *DB* at Page 43.

[437] [2001] 4 IR 259.

Health, and Children to build the high support units within a specified timeframe as per the proposals which the State had set out prior to the *FN* ruling. Central to Justice Kelly's decision to issue the mandatory orders, were the repeated and unjustifiable delays in the building of the unit, and his view, previously set out in the *DB* case that he was not determining policy but implementing policy that the executive had previously set out. The State appealed arguing that the order violated the separation of powers as Justice Kelly had concerned himself with policy matters and interfered with budget allocation. Counsel for the applicant argued that the courts had an obligation to supervise the governments exercise of powers and to intervene where it was acting constitutionally. The Supreme Court reversed the decision of Justice Kelly and made a number of points relevant to the constitutional protection of socioeconomic rights. Each of the judges viewed the doctrine of the separation of powers as being crucial to the case. What was key was the way in which this doctrine was to be construed and the implications that this construction would have for the current case.

In the leading judgment, Chief Justice Keane stated that the executive power reserved for the Government did not preclude the courts from intervening to secure compliance with constitutional rights if the Government had breached such rights.[438] However, he asserted that the mandatory orders made in by Justice Kelly in *DB v. Minister for Justice* and in the current case were without precedent in that they not only found the Government to be in breach of constitutional rights but compelled the executive to act in a certain manner by expending resources, and to do so within a certain time limit.[439] This he argued ran contrary to the separation of powers doctrine and involved the courts determining matters of policy.[440] The fact that there had been delays and repeated failures on the part of the government as regards providing the support units did not provide any justification for this breach of the separation of powers. He also rejected the contention of Justice Kelly in the *DB* case that since the policy had already been decided, the effect of his order was not to determine that policy but to enforce it. Chief Justice Keane stated that in this area the appropriate policy solution may change overtime and therefore a flexible approach may need to be taken by Government.[441] He concluded that the High Court's

[438] *TD* at Page 284.

[439] *TD* at Pages 284-285.

[440] *TD* at Pages 286-287.

[441] *TD* at Page 287.

decision to make a mandatory order had crossed a 'Rubicon' by assigning itself a role reserved to other organs of the State.[442] It is worth noting that Chief Justice Keane also remarked obiter, whilst discussing the doctrine of unenumerated rights that, he 'would have the gravest doubts as to whether the courts at any stage should assume the function of declaring what are today frequently described as socioeconomic rights.'[443]

In his judgment Justice Murphy also commented on the position of socioeconomic rights within *Bunreacht na hÉireann*. He stated that, other than right to education under Article 42, there were no express provisions in the Constitution which impose an express obligation on the State to provide accommodation, medical treatment, welfare or any other form of socio-economic benefit for any of its citizens, however needy or deserving.[444] Further he highlighted the fact that none of the referenda which had taken place since the enactment of the Constitution had resulted in any such rights being inserted into the Constitution, arguing that this 'would suggest a conscious decision' to withhold the status of constitutionality from such rights.[445] He suggested several reasons why this might be the case, including the possibility that it was anticipated that to give such rights constitutional protection would constitute a 'radical departure' from the separation of powers principle. He then suggested that the method of securing socioeconomic rights through the non-justiciable Article 45 could be regarded as 'ingenious' as it ensured social justice was achieved without the need of the judiciary.

Justice Murray stated that the separation of powers principle was 'an essential and inherent part of the modern liberal democracy founded on the rule of law.[446] He noted courts had jurisdiction to intervene in the affairs of the legislature or executive in order 'prevent an invasion of rights or determine constitutional obligations.'[447] However, he stated that there was an important difference between the courts determining whether policies of the executive or legislature were compatible with the Constitution and the courts 'taking a command of such matters' so as to effectively exercise the constitutional

[442] *TD* at Page 288.

[443] *TD* at Page 282.

[444] *TD* at Page 316.

[445] *TD* at Pages 316-317.

[446] *TD* at Page 329.

[447] *TD* at Page 332.

powers of one of those organs of government.[448] The courts did not have a general supervisory role but were restricted to deciding what constitutional rights and obligations exist.[449] The legislature and executive decide the policies best suited to protect those rights and fulfil those obligations. Justice Murray asserted that the judiciary's lack of judicial accountability was the primary reason why the courts were not allowed to engage in the exercise of legislative or executive power.[450] He noted the possibility of exceptions but argued that the fundamental principle should not be lost sight of.[451] Like Chief Justice Keane, Justice Murray rejected Justice Kelly's contention that his mandatory order was not deciding policy but ensuring an agreed upon policy was implemented.[452] The carrying out of the proposals furnished by the State would involve decisions of a discretionary nature, which would be impacted by changing circumstances. He stated that, by prescribing a policy programme through a mandatory order, the court was essentially removing the power of the executive to make such discretionary decisions.[453] As a result, the court would effectively be administering policy, in breach of the separation of powers doctrine.[454] He asserted that, whilst it was possible for the courts to issue a mandatory order as a result of the State's failure to fulfil its obligations, such a failure would have to be the result of a 'conscious and deliberate decision' by the State to disregard such obligations, accompanied by an element of 'bad faith or recklessness'.[455] This has not been the case in the current situation.

Justice Hardiman also discussed the separation of powers, noting the importance of judicial independence and the important role the courts play in protecting minorities against majority rule, through their safeguarding of the Constitution.[456] Conversely however, the power of the judiciary had to be limited due their lack of democratic

[448] *TD* at Page 331.

[449] *TD* at Page 332.

[450] *TD* at Page 333.

[451] *TD* at Page 333.

[452] *TD* at Page334.

[453] *TD* at Page 335.

[454] *TD* at Page 335.

[455] *TD* at Page 337.

[456] *TD* at Page 338.

accountability. He argued that judicial independence had to be matched by the independence of the other organs of State.[457] After expressing similar views as Chief Justice Kelly and Justice Murray regarding Justice Kelly's contention that his order was aimed at implementing rather than determining policy, he referred to his own remarks in the *Sinnott* case in relation to the unsuitability of the courts to decide on certain social, economic and political questions.[458] To this he added that any expansion of judicial power would be progressive, with citizens increasingly looking to the courts for remedies regarding political matters, at the expense of the other organs of government. The judge also echoed Justice Murray's view that separation of powers doctrine didn't accord to the courts a general supervisory or 'residual' power over the other organs of government so that the judiciary could determine that those organs had failed in their constitutional duties and then proceed to take it upon themselves to fulfil those duties by carrying out executive or legislative functions.[459] Such action would essentially attribute paramountcy to the judicial arm of government over the others organs, something not envisioned by the Constitution.[460] The Constitution set out boundaries between the powers of the different institutions of government, each of whom had its assigned role. These boundaries had to be respected.

The minority viewpoint in this case was put forward by Justice Denham who argued that the mandatory order should be allowed. She stated that the separation of powers doctrine does not envisage a strict division of powers which must be rigidly applied.[461] It is not absolute but is to be applied in a functional manner. It involves a system of checks and balances which undermine any notion of a rigid conception of the doctrine.[462] She noted that the doctrine is based on the idea of respect between the different organs of government.[463] However, she argued that the doctrine did not disallow interference by the courts in the functions of the other governmental institutions if the latter showed a

[457] *TD* at Page 359.

[458] *TD* at Page 361.

[459] *TD* at Page 367.

[460] *TD* at Page 368.

[461] *TD* at Page 298.

[462] *TD* at Page 306.

[463] *TD* at Page 299.

'clear disregard of its constitutional powers and duties'.[464] Indeed, the courts were obliged to intervene in such a scenario. She stated that the separation of powers doctrine exists alongside another principle, the supremacy of the Constitution, and the court's role as guardians of that Constitution must be considered in light of this.[465] She posed the issue as a question of the balance between the separation of powers and the protection of fundamental constitutional rights,[466] and argued that the protection of the latter is part of protecting the interests of the minority in a democratic system.[467] She stated that 'in rare and exceptional circumstances, to protect constitutional rights, a court may have the jurisdiction and even a duty to make a mandatory order against another branch of government.[468] She noted the impact of the delay in building the high support units would have on the applicants and the particular knowledge Justice Kelly had in relation to the issue.[469] And, unlike Chief Justice Keane, Justice Murray and Justice Hardiman, she accepted that the mandatory order was to enforce rather than determine the policy of the executive.[470] She concluded by stating that in her opinion the High Court had the jurisdiction to make the mandatory orders in question, given the exceptional circumstances of the case.[471]

The Article 42.5 caselaw therefore saw a similar pattern emerge as with Article 42.4. In the High Court, a number of judges were willing to provide an expansive interpretation of the obligation stemming from the right. Further, Justice Kelly was prepared to make a mandatory order to ensure that obligation was fulfilled. However, the Supreme Court again looked to place limits on the extent of the duty imposed by the provision and made it clear that mandatory orders should only be considered in exceptional cases.

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[464] *TD* at Page 300.

[465] *TD* at Page 307.

[466] *TD* at Page 312.

[467] *TD* at Page 314.

[468] *TD* at Page 306.

[469] *TD* at Page 309.

[470] *TD* at Page 310.

[471] *TD* Page 315.

IV – Analysis: Negative Liberty & the Separation of Powers

In this overview of Irish caselaw in respect of socioeconomic rights, a number of discernible trends have emerged. The first point to note is that the decisions have highlighted the liberal demarcation between positive and negative rights, with the courts apprehensive about interpreting the Constitution as imposing the former to any great extent. This demarcation can be seen as part of the wider liberal aversion to encouraging state intervention into the social and economic spheres. The judicial aversion to positive conceptions of rights was demonstrated in the decisions regarding unenumerated rights, where Justice Finlay in *Frawley* and Justice Costello in *O'Reilly* made it clear that the doctrine would only be relevant to the enumeration of rights which prevent state interference, not those that might impose obligations on the authorities. These cases are particularly revealing as the emergence of the unenumerated rights caselaw marked a particularly creative period in Irish judicial decision-making. The fact that the courts were clear that this creativity did not extend to the enumeration of positive rights shows the institutional and ideological barriers to their recognition in the Irish system. This demarcation was also evident in the Article 42.4 cases, particularly in the *Crowley* decision in which Justice Mahon made clear that the obligation emanating from the provision was merely to provide *for* free primary education. The decision highlights the enduring influence of the liberal ideology which marked the drafting of *Bunreacht na hÉireann.* I noted in Chapter two the 1934 Constitutional Review Committee's recommendation that the provision guaranteeing the right to free elementary education should be altered to instead provide *for* free primary education, in order to avoid excessive financial burden being placed on the State. This recommendation made its way into the final text of the new Constitution and ensured that the court in *Crowley* did not place positive obligations on the State. Although the scope of the article was expanded in *O'Donoghue* and in the High Court judgement in *Sinnott,* the Supreme Court in the latter case made it clear that the duty imposed by the article on the State was a limited one. The Article 42.5 caselaw saw a similar attempt to expand the scope of the provision in the *FN* case and in Justice Kelly's judgments in *DB* and *TD*. And, as with the Article 42.4 cases, the Supreme Court once again stepped in to narrow the extent of the obligations imposed by the provision.

It is interesting to note that, for the most part, the outcomes of the cases impacted only a relatively small number of people: those in custody as in *State v Frawley*; members of the travelling community in *O'Reilly*; the severely mentally disabled in *O'Donoghue* and the *Sinnott* case; and vulnerable young people who required high support units in the caselaw

regarding Article 42.5. Several points can be inferred from this. First, in the instances in which the High Court judges were willing to impose positive obligations on the State to ensure constitutional rights were protected, it is likely the judges were willing to take a more activist approach because they were aware that the decision would only affect a small number of people. Secondly, the fact that Judge Costello in *O'Reilly* and the Supreme Court judges in *Sinnott* and in the *TD* case were keen to limit the State's obligations, even to this relatively limited number of people, shows the opposition that has existed in the Irish judiciary to imposing positive obligations on the State. Finally, we can infer that in situations where larger numbers of people could potentially benefit from the imposition of positive duties in relation to socioeconomic rights, it is extremely unlikely that the Irish Supreme Court would be willing to take an expansive approach.

The issue of the power of the judiciary to compel the State to protect constitutional rights, particularly those involving positive obligations was evident in *Sinnott* and in the *DB* case and the *FN* case, with High Court judges willing to make mandatory orders requiring the State to undertake certain actions to ensure their constitutional obligations were met. However, as we have seen the Supreme Court made it clear that such orders would be exceptional. The judicial hostility to expansive interpretations of constitutional provisions so that they imposed significant obligations on the State and the view that mandatory orders should only be handed out in exceptional circumstances, were justified by reference to the separation of powers doctrine. In *Sinnott,* Justice Hardiman stated that the principle ensured a system of checks and balances and prevented excessive power being concentrated in any single branch of government. In *TD*, Chief Justice Keane, Justice Murray and Justice Hardiman linked it to the idea of assigning particular roles to the different branches of government, as did Justice Costello in the *O'Reilly* decision. Two issues were key in this regard. First was the contention that the courts do not have jurisdiction to determine matters of policy. Linked to this was the view that the judiciary should not be deciding how the State's resources are allocated. Of particular influence was Justice Costello's distinction between commutative and distributive justice and his reasoning as to why the courts were ill-suited to questions relating to the latter. He cited the lack of judicial expertise in the area and the adversarial nature of the courts as the primary reasons why the courts should not be determining policy or matters of resource distribution. Justice Hardiman, in his decision in *Sinnott*, added the issue of democratic accountability to this list, an issue also cited by Justice Murray in *TD*. In the latter case both Justice Hardiman and Justice Murray, in their discussions about the roles assigned

to the different branches of government, asserted the judiciary did not have a general supervisory role over the other branches of government. They could not therefore step in and fulfil the role of the other institutions if those institutions had failed to carry out their functions. The courts competence was limited to ruling that there had been such a failure.

Justice Denham put forward a different view of the separation of powers doctrine in her judgment in the *TD* case. She argued against a rigid interpretation of the principle which required a strict demarcation of institutional competences. Interestingly, like Justice Hardiman in *Sinnott,* she described the doctrine as providing a system of checks and balances. However, she argued that this aspect of the doctrine was inconsistent with the idea of a rigid role demarcation, a demarcation that Justice Hardiman seemed to endorse. Also of interest was Justice Denham's reference to the principle of the supremacy of the Constitution which see saw a countervailing factor against efforts to overly limit the role of the judiciary. Ultimately the issue which seems to be at the core of the differing interpretations of the separation of powers doctrine, particularly in relation to the making of mandatory orders, is where line is drawn between the court highlighting the failures of the other branches of government to fulfil their constitutional obligations, and the court determining how those other institutions carry out those functions in order to ensure their obligations are met. Key in this regard is the question of what the courts can do if another branch of government is refusing to carry out its duties. The judges who were willing to impose mandatory orders treated this as a real problem and argued that the courts needed to provide a solution. Those who rejected the use of mandatory orders characterised the problem as marginal and seemed to view the relationship between the different branches of government as more collaborative than conflictual. Finally, it is worth noting that, even with those judges who were willing to make mandatory orders, they did so in a context of viewing such a situation as exceptional. Therefore, even if the view of those judges who were willing to impose such orders became dominant in Irish jurisprudence, their use would likely only be seen in an extremely limited number of cases. What this caselaw ultimately reveals is that the general liberal aversion to State intervention also finds particular expression in a similar antipathy towards positive rights on the part of the judicial establishment. However, unlike with the property rights caselaw, this attitude is in fact complemented by the separation of powers doctrine and therefore, at the Supreme Court level at least, the view of the judiciary towards socioeconomic rights has been clear and unsupportive.

Conclusion

In this chapter I have considered the caselaw which has emerged around the constitutional protection of socioeconomic rights. I have discussed the cases in which an attempt was made to convince the courts to enumerate socioeconomic rights so as to place a positive obligation on the State to ensure their protection. I also considered the caselaw relating to the two recognised socioeconomic rights in *Bunreacht na hÉ*ireann, Article 42.4 and the right to education, and article 42.5 (now Article 42 A) and the right of vulnerable children to protection from the State. As I noted above, this chapter, along with the previous chapter which discussed the caselaw relating to the Constitution's property rights decisions, will form the basis of the analysis of the utility of a right to housing in Chapter seven. Again, I will reserve my observations regarding the implication of the socioeconomic rights caselaw for a constitutional right to housing, for that chapter.

Chapter Five - Resisting the Legal Form: Home Sweet Home & the Occupation of Apollo House

Introduction

On the 15th of December 2016 a group of almost 100 people gathered in order to take possession of a disused office block in Dublin city centre named Apollo House.[472] Their aim was to use it in order to provide shelter for Dublin's rough sleepers during the Christmas period. Over the coming weeks they were to attract both national and international attention[473] bringing scrutiny to Ireland's growing housing and homelessness crisis. The occupation of the building lasted one month, ending on January 11th 2017 with up to 40 homeless people residing in the building on any given night.[474] It provoked a massive wave of public support with thousands offering to volunteer in Apollo House and almost €200,000 in donations being raised over the course of the occupation.[475] It sparked a series of debates including the standard and availability of shelters for homeless people in Dublin, the role of a state agency, the National Assets Management Agency (NAMA) in providing properties that could be used for social housing, and the way in which the Irish state was dealing with an escalating housing crisis.

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[472] Kitty Holland, 'Occupy Nama: City Property Taken Over to House Homeless' *The Irish Times* (Dublin, 16 December 2016) https://www.irishtimes.com/news/social-affairs/occupy-nama-city-property-taken-over-to-house-homeless-1.2907854 accessed 14 December 2020.

[473] Donie O'Sullivan, 'Activists Take Over City Block to House Irish Homeless' (*CNN*, 19 December 2016) https://edition.cnn.com/2016/12/19/world/ireland-dublin-building-homeless/index.html accessed 8 January 2021.

Barbara McCarthy, 'Speaking Out for The Homeless at Dublin's Apollo House' (*Aljazeera.com*, 3 Jan 2017) https://www.aljazeera.com/features/2017/1/3/speaking-out-for-the-homeless-at-dublins-apollo-house accessed 8 January 2021.

[474] The Irish Times, 'Campaigners Warn of Worsening Homelessness Crisis' (Dublin, 17 December 2017) https://www.irishtimes.com/news/social-affairs/campaigners-warn-of-worsening-homelessness-crisis-1.3330355 accessed 15 January 2021.

[475] Gavin White, 'Apollo House Installs 'Well-Being Area' *Irish Independent* (Dublin, 29 December 2016) https://www.independent.ie/irish-news/apollo-house-installs-well-being-area-35327880.html accessed 6 January 2021.

Kitty Holland, 'Apollo House Campaigners Got Almost €200,000 in Donations' *Irish Times* (Dublin, 6 February 2017) 7.

This chapter will examine the way in which the legal form influenced the episode. Law shaped the fate of the occupation explicitly, with the instigation of legal proceedings meaning that the actions of the protestors were at least partially mediated through the legal form. The legal form also affected the occupation in more subtle ways as it helped shape the political debate which surrounded the intervention, particularly through its symbolic effects. The chapter will be divided into four major sections and a conclusion. Section one will provide some background to and a timeline of events. Section two will offer a recap of some of the theoretical considerations set out in Chapter one. Section three will examine the legal proceedings which were brought in order to evict the protestors, proceedings which also involved an attempt by the protestors to apply to the court to allow the occupation to continue. Section four will consider the political debate which surrounded the occupation and the way in which it was influenced by legal considerations. Finally, the conclusion will consist of a general reflection on the ways in which the law influenced the Apollo House occupation and whether any lessons can be learned from this.

I – Background

This section will begin by providing some background to the National Assets Management Agency (NAMA), whose role in Ireland's housing system was central to the activists' protest. Subsection two will also discuss Apollo House itself, including details of its ownership history. Subsection three will consider the aims and objectives of the activists. The final subsection will set out a timeline of events and will discuss some of the main issues involved.

I.A – NAMA

In order to understand why the activists chose Apollo House as the location for their protest, and also the wider context of the occupation it is important to understand the role of Ireland's National Assets Management Agency. NAMA was established by the Irish government in 2009 following the financial crisis. The agency was set up in order to acquire the non-performing property development loans which were on the books of Ireland's major banks. In exchange for these loans and the properties associated with them, NAMA would issue government backed bonds to the banks. The purported aim of such transactions was to help re-capitalise Irish banks and to encourage them to increase lending into the Irish economy in order to stimulate economic activity. Once

NAMA took control of the sites and properties securing the debts it had acquired, it sought to recoup this debt by selling them to property developers and capital funds. NAMA therefore became a vehicle for property development in Ireland in the decade following the collapse of the housing market.

In subsequent years the agency became a focal point for frustrations around the direction of Ireland's economic recovery and a symbol of the mismanagement of Irish housing development. Some argued that, through NAMA, the state had control of vast swathes of residential and commercial properties which, instead of being sold to private entities, could be utilised by the state in order to provide community and cultural centres, homeless accommodation and social housing. Frustration over the role of NAMA was compounded by the fact that a significant number of the buildings controlled by the agency were lying vacant at a time when the housing and homelessness crisis was escalating. As the crisis worsened, activists argued that it was justifiable for citizens to occupy these vacant buildings which were under NAMA's control in order to put them to cultural and social uses. They asserted that since the buildings were state owned, they essentially belonged to the people of Ireland, and if the government was refusing to utilise them, then the people had a right to intervene. The occupation of Apollo House was a manifestation of this argument. The building itself which was located on Poolbeg Street in Dublin's south inner-city was a nine-story office block constructed in 1969. It had been owned by Cuprum Properties, part of the Shelbourne Development group which was controlled by property developer Garret Kelleher.[476] Shelbourne Developments had borrowed extensively from Anglo Irish Bank during the property boom. After the collapse of the property market, the global credit crunch and the consequent winding up of Anglo, NAMA took control of the bank's loan book which included a portfolio of loans related to Shelbourne developments and Cuprum Properties.[477] Therefore Apollo House came under the control of NAMA. In 2014 NAMA appointed Simon Coyle and Tom O'Brien of Mazars, a financial services firm, as receivers to the assets of Cuprum Properties and therefore to Apollo House. The building had been leased to the

[476] Gavin Daly, 'Nama Puts Kelleher's Irish Assets on Sale' *Sunday Times* (London 6 April 2014) 3.

[477] Conor Lally and Pat Leahy, 'Apollo House Occupation 'Not the Solution' to Homelessness Crisis' *The Irish Times* (Dublin, 17 December 2016) 3.

Department of Social Protection but had been vacated sometime in 2015 and had been lying empty for a period of time.[478]

I.B – Home Sweet Home & the Irish Housing Network – Origins, Aims & Objectives

The occupation was carried out by two groups. The first, known as Home Sweet Home was a coalition of trade unionists, activists, charities and cultural figures who came together to carry out the occupation.[479] The second organisation, the Irish Housing Network (IHN) was a coalition of grassroots housing groups which had been attempting to organise those who were suffering under the housing crisis. According to Home Sweet Home co-founder, Dean Scurry, the idea for the occupation came about after he saw a post on social media from a homeless man who had suggested occupying a NAMA owned building in order to house homeless people.[480] After meeting with the man, Mr. Scurry began conversations with Brendan Ogle, a prominent trade unionist, with the IHN, and with cultural figures he knew were interested in making an intervention into Ireland's housing crisis by helping to provide accommodation for Dublin's homeless population. It took five weeks to plan and execute the taking over of the property. Mr. Ogle stated that it took about a week of searching to find a suitable building.[481] During the occupation, the two groups involved, Home Sweet Home and the Irish Housing Network, essentially worked as one, and therefore for convenience I will refer to both under the appellation Home Sweet Home.

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[478] Irish Examiner, 'Sinn Féin Urges People to Sign Online Petition after Group Takes Over Nama Building in Dublin' (Dublin, 16 December 2016) https://www.irishexaminer.com/news/arid-30768906.html accessed 30 December 2020.

[479] Kitty Holland, 'Occupy Nama: City Property Taken Over to House Homeless' *The Irish Times* (Dublin, 16 December 2016) https://www.irishtimes.com/news/social-affairs/occupy-nama-city-property-taken-over-to-house-homeless-1.2907854 accessed 14 December 2020.

[480] Tim O'Brien, 'Protestors Take Over Vacant Nama Building for Use by Homeless' *The Irish Times* (Dublin, 16 December 2016) https://www.irishtimes.com/news/social-affairs/protesters-take-over-vacant-nama-building-for-use-by-homeless-1.2908396 accessed 29 December 2020.

[481] Brendan Ogle, 'Why we are Taking Over the Apollo Building' *The Irish Times* (Dublin, 17 December 2016) 15.

The objectives of the group were initially twofold. At the outset of the campaign, Mr. Ogle characterised the occupation as a 'citizens intervention' in the homelessness crisis.[482] He stated that the action involved a practical aspect, to provide accommodation for homeless people. It also had a broader aim, to draw attention to the country's homelessness crisis. As to the first element, the group hoped to use the occupied building to house homeless people who were unable to access any form of suitable emergency accommodation. Dean Scurry described the intervention as a 'short-term initiative' which intended to provide accommodation for Dublin's rough sleepers.[483] The activists stated that it was necessary to provide such accommodation in order to prevent people from dying on the streets of the city.[484] Regarding the broader aim of bringing attention on Ireland's homelessness crisis, the activists spoke of wanting to start a 'national conversation' around the issue of homelessness.[485] Central to this conversation was the activists' assertion that the government had failed in its efforts to prevent homelessness and that a key aspect of this failure was the fact that NAMA was not being utilised in ways which could help alleviate the country's housing crisis. Reflecting upon the occupation a year after it ended, Brendan Ogle noted that 'it [Apollo House] was a State asset and it [the occupation] was about trying to force the Government to use the assets at its disposal in the interests of the most vulnerable citizens.'[486] The activists justified the

[482] Kitty Holland, 'Occupy Nama: City Property Taken Over to House Homeless' *The Irish Times* (Dublin, 16 December 2016) https://www.irishtimes.com/news/social-affairs/occupy-nama-city-property-taken-over-to-house-homeless-1.2907854 accessed 14 December 2020.

[483] Tim O'Brien, 'Protestors Take Over Vacant Nama Building for Use by Homeless' *The Irish Times* (Dublin, 16 December 2016) https://www.irishtimes.com/news/social-affairs/protesters-take-over-vacant-nama-building-for-use-by-homeless-1.2908396 accessed 29 December 2020.

[484] Gavin White, 'Citizens Take Over NAMA-Controlled Property and Set Up Rooms for Homeless People' *Irish Independent* (Dublin, 16 December 2016) https://www.independent.ie/irish-news/citizens-take-over-nama-controlled-property-and-set-up-rooms-for-homeless-people-35299848.html accessed 30 December 2020.

[485] Amy Mulvaney, 'We are Involved in an Act of Civil Disobedience... It is an Illegal Act,' Glen Hansard Tells The Late Late Show' *Irish Independent* (Dublin, 16 December 2016) https://www.independent.ie/entertainment/television/tv-news/we-are-involved-in-an-act-of-civil-disobedience-it-is-an-illegal-act-glen-hansard-tells-the-late-late-show-35299949.html accessed 30 December 2020.

[486] Elaine Edwards and Ronan McGreevy, 'Turning Apollo House into 'Cash Cow' is Upsetting - Trade Union Official' *Irish Times* (Dublin, 3 December 2018) https://www.irishtimes.com/news/social-affairs/turning-apollo-house-into-cash-cow-is-upsetting-trade-union-official-1.3718895 accessed 15 January 2021.

occupation by arguing that the vacant NAMA buildings were essentially owned by 'the people', and therefore they had the right to occupy Apollo House and to put it to use if the government was failing to do so.[487] As Mr Ogle stated during the occupation, 'If the government won't use them [vacant NAMA buildings] then the citizens have decided they will.'[488] The occupation of Apollo House was therefore a potentially powerful symbolic tool as it highlighted the homelessness crisis and directly linked it to the problem of vacancy and to the argument that the state, through NAMA should put the properties at its disposal to social and cultural use.

Over time the organisers began to speak of the occupation as the start of a larger movement to intervene in the homelessness emergency and in the country's housing crisis more generally. As early as December 20th the activists began planning for the future of the Home Sweet Home group.[489] They spoke of opening a permanent support and advice centre for those with housing issues,[490] and of bringing their campaign to other cities and towns around the country.[491] They characterised their activities as a 'permanent intervention' in the housing crisis[492] and stated they were committed to ending

[487] Brendan Ogle, 'Why we are Taking Over the Apollo Building' *The Irish Times* (Dublin, 17 December 2016) 15.

Amy Mulvaney, 'We are Involved in an Act of Civil Disobedience... It is an Illegal Act,' Glen Hansard Tells The Late Late Show' *Irish Independent* (Dublin, 16 December 2016) https://www.independent.ie/entertainment/television/tv-news/we-are-involved-in-an-act-of-civil-disobedience-it-is-an-illegal-act-glen-hansard-tells-the-late-late-show-35299949.html accessed 30 December 2020.

[488] Irish Independent, 'Redeveloped Apollo House Office Block Could Soon House 60 Homeless People' (Dublin, 19 December 2016) https://www.independent.ie/breaking-news/irish-news/redeveloped-apollo-house-office-block-could-soon-house-60-homeless-people-35306092.html accessed 1 January 2021.

[489] Wayne O'Connor, 'Hansard: Apollo House Money Will be Given to Other Charities' *Sunday Independent* (Dublin, 25 December 2016) 9.

[490] Irish Independent, 'Home Sweet Home and Minister in Deal to End Apollo House' (Dublin, 9 January 2017) https://www.independent.ie/breaking-news/irish-news/home-sweet-home-and-minister-in-deal-to-end-apollo-house-occupation-35354593.html accessed 9 January 2021.

[491] Alan O'Keeffe, 'Apollo House Homeless Campaign Set to Go National' *Irish Independent* (Dublin 28 December 2016) 13.

[492] Elaine Edwards, 'Apollo House Not an Ending but a Beginning, Activists Pledge' *The Irish Times* (Dublin, 13 January 2017) 5.

homelessness in Ireland.[493] By the end of January Mr Ogle was speaking of building Home Sweet Home into a mass social movement, which would partake in both legal and political campaigning, with the aim of changing Irish housing policy.[494] However, despite these plans, shortly after the end of the physical occupation, the group decided to disband.

I.C – The Occupation – Timeline & Main Issues

As noted, the physical occupation of the building began on December 15th and immediately attracted the attention of the country's major media outlets. Inside Apollo there were both activists, who did not reside in the building, and residents, the homeless people who stayed in Apollo House. As soon as the occupation began the Home Sweet Home activists, aided by a multitude of volunteers and donations from the public, began efforts to convert the building into a homeless facility. This included the reconnection of water, electricity and heating and the installation of two fully fitted kitchens, and showers for the residents.[495] The group set about organising the various volunteers who had offered to help out in the facility. More than 2,500 people offered to volunteer over the course of the occupation[496] with people providing assistance with media relations, administrative tasks and IT issues.[497] The activists also made efforts to provide care for

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[493] Irish Independent, 'Home Sweet Home and Minister in Deal to End Apollo House' (Dublin, 9 January 2017) https://www.independent.ie/breaking-news/irish-news/home-sweet-home-and-minister-in-deal-to-end-apollo-house-occupation-35354593.html accessed 9 January 2021.

[494] Kitty Holland, 'Home Sweet Home Group Plans Mass Movement to Challenge Housing Policy' *Irish Times* (Dublin, 23 January 2017) 8.

[495] Gavin White, 'Citizens Take Over NAMA-Controlled Property and Set Up Rooms for Homeless People' *Irish Independent* (Dublin, 16 December 2016) https://www.independent.ie/irish-news/citizens-take-over-nama-controlled-property-and-set-up-rooms-for-homeless-people-35299848.html accessed 30 December 2020.

Kitty Holland and others, 'Homeless Should be Allowed Stay in Apollo House, Says Zappone' *The Irish Times* (Dublin, 19 December 2016) https://www.irishtimes.com/news/social-affairs/homeless-should-be-allowed-stay-in-apollo-house-says-zappone-1.2911420 accessed 1 January 2021.

Kitty Holland, 'Former Owner Backs Aim of Occupation' *The Irish Times* (Dublin, 21 December 2016) 6.

[496] Gavin White, 'Apollo House Installs 'Well-Being Area' *Irish Independent* (Dublin, 29 December 2016) https://www.independent.ie/irish-news/apollo-house-installs-well-being-area-35327880.html accessed 6 January 2021.

[497] Allison Bray and Laura Larkin, 'Papers Served on Apollo House' *Irish Independent* (Dublin, 20 December 2016) https://www.independent.ie/irish-news/courts/papers-served-on-apollo-house-35309775.html accessed 2 January 2021.

those staying in Apollo House. This involved attracting volunteers who had the skills needed to provide appropriate supports for the residents. A number of doctors, psychiatrists, and social workers were enlisted, and they looked after the residents' medical and other needs.[498] The group also set up a 'well-being' area staffed by volunteers including physiotherapists and massage therapists, in order to provide some comforts to the residents.[499] A legal team was also formed in anticipation of any legal action that might be brought against the group. This included several legal professionals.

Attempts to end the occupation began soon after the activists took possession of the building. As noted, a financial services firm named Mazars had been appointed as receivers to Apollo House in 2014. I will discuss the role played by the receivers below. For now, it is sufficient to note that, as receivers it was Mazars who were legally entitled to possession of the property and therefore who had standing to bring a legal action to remove the protestors. Their attempts to achieve this began almost immediately. On December 16th they released a statement outlining their concerns regarding the occupation.[500] Shortly after they sent a letter to the activists requesting their exit from the premises.[501] Despite efforts by the activists to reassure the receivers regarding any concerns they had in relation to the occupation, the firm continued to voice its

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[498] Ryan Nugent and Gavin White, 'We're Full Up' - Apollo House Takes in 30 People' *Irish Independent* (Dublin, 20 December 2016) https://www.independent.ie/irish-news/news/were-full-up-apollo-house-takes-in-30-people-35307836.html accessed 2 January 2021.

Joyce Fegan, 'Act of Highly Organised 'Civil Disobedience' and Humanity' *Irish Examiner* (Dublin, 19 December 2016) https://www.irishexaminer.com/news/arid-20435818.html accessed 1 January 2021.

Nicola Anderson, 'Activists Claim Win as Apollo House to Host Homeless Over Christmas' *Irish Independent* (Dublin, 22 December 2016) 16.

[499] Irish Independent, 'Massage and Physiotherapy Among Services Being Offered to Apollo House Residents' (Dublin, 30 December 2016) https://www.independent.ie/irish-news/massage-and-physiotherapy-among-services-being-offered-to-apollo-house-residents-35330247.html accessed 7 January 2021.

[500] Gavin White, 'Citizens Take Over NAMA-Controlled Property and Set Up Rooms for Homeless People' *Irish Independent* (Dublin, 16 December 2016) https://www.independent.ie/irish-news/citizens-take-over-nama-controlled-property-and-set-up-rooms-for-homeless-people-35299848.html accessed 30 December 2020.

[501] Kitty Holland, 'Legal Notice Served on Activists Occupying Dublin Office Block' *The Irish Times* (Dublin, 17 December 2016) https://www.irishtimes.com/news/social-affairs/legal-notice-served-on-activists-occupying-dublin-office-block-1.2910168 accessed 31 December 2020.

opposition, releasing another statement on December 20th in which they highlighted the dangers posed by the occupation.[502] Mazars also noted that the building had lost its fire insurance as a result of the occupation.[503] Then, on the same day, Tom O'Brien and his partner Simon Coyle of Mazars launched a High Court action seeking an order from the court requiring the occupiers to leave and restoring possession of the premises to the receivers.[504] At the initial ex parte hearing Mazars sought permission to serve short notice of the injunction proceedings on the occupiers. Mr Rossa Fanning SC, for the receivers stated that his clients wished to resolve the matter outside of court.[505] However, he informed the court that the activists had failed to meet with representatives of the firm. Mr Justice Gilligan granted Mazars permission to serve short notice on the activists and made the matter returnable to the following morning. Following the hearing, papers were served on the protestors, attached to the gates of Apollo House.[506]

On December 21st the application for injunctive relief was heard in the High Court. I will discuss the court hearing in detail below. Justice Gilligan granted the injunctive relief sought by Mazars, ruling that the occupiers were trespassing and ordering that they vacate the property and refrain from re-entering.[507] However, he placed a stay of three weeks on

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[502] Irish Independent, 'Office Block Receivers Take Court Action to Move Homeless Campaigners' (Dublin, 20 December 2016) https://www.independent.ie/breaking-news/irish-news/office-block-receivers-take-court-action-to-move-homeless-campaigners-35308935.html accessed 2 January 2021.

[503] Dan Griffin, 'Apollo House Homeless Action Triggers Loss of Fire Insurance Cover' *The Irish Times* (Dublin, 20 December 2016) https://www.irishtimes.com/news/ireland/irish-news/apollo-house-homeless-action-triggers-loss-of-fire-insurance-cover-1.2912989 accessed 2 January 2021.

[504] The Irish Times, 'Receivers Seek Court Order to Regain Possession of Apollo House' (Dublin, 20 December 2016) https://www.irishtimes.com/news/crime-and-law/courts/high-court/receivers-seek-court-order-to-regain-possession-of-apollo-house-1.2912964 accessed 2 January 2021.

[505] Ann O'Loughlin, 'Receivers Seek to Take Back Apollo' *Irish Examiner* (Dublin, 21 December 2016) https://www.irishexaminer.com/news/arid-20436113.html accessed 4 January 2021.

[506] Allison Bray and Laura Larkin, 'Papers Served on Apollo House' *Irish Independent* (Dublin, 20 December 2016) https://www.independent.ie/irish-news/courts/papers-served-on-apollo-house-35309775.html accessed 2 January 2021

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[507] Kitty Holland, 'Home Sweet Home Ordered to Vacate Apollo House Next Month' *The Irish Times* (Dublin, 21 December 2016) https://www.irishtimes.com/news/social-affairs/home-sweet-home-ordered-to-vacate-apollo-house-next-month-1.2914947?mode=sample&auth-failed=1&pw-origin=https%3A%2F%2Fwww.irishtimes.com%2Fnews%2Fsocial-affairs%2Fhome-sweet-home-ordered-to-vacate-apollo-house-next-month-1.2914947 accessed 3 January 2021.

the order to vacate the property meaning that the occupiers did not have to leave until January 11th, 2017. The stay was made on condition that the activists limited the amount of people staying in the building to forty per night, that Mazars be granted access to inspect the property and that those who reconnected the electricity co-operated with the receivers.

Simultaneous to these legal proceedings a political debate gathered pace between the activists and state authorities. Dublin City Council, whose job it was to provide homeless accommodation in Dublin through various charities, joined with the government in attempting to undermine the occupation. They did this in two ways. The first was to raise questions regarding the health and safety of those residing in Apollo house. I will discuss this aspect of the political debate in the analysis section below. The second tactic of the state authorities was to argue that there was already sufficient suitable homeless accommodation available to Dublin's rough sleepers and therefore the occupation was an unnecessary intervention. This claim was supported by the fact that three new homeless hostel facilities were opened in Dublin in and around the time of the occupation. Two, at Ellis Quay and at Little Britain Street on were opened on December 9th, before the occupation began.[508] On the 16th December, the Minister for Housing, Simon Coveney highlighted the fact that another homeless shelter was due to be opened on Francis Street in Dublin the following day with 80 new beds being provided.[509] He stated that with the new facilities there would be 1,800 emergency beds available, enough for any rough sleepers who needed one. On December 20th a government spokesperson stated that capacity had never been a problem in terms of providing emergency accommodation.[510] The government also claimed that the new facilities had been due to

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Aodhan O'Faolain and Kitty Holland, 'Apollo House: Judge Says Occupants Must Vacate in January' *The Irish Times* (Dublin, 21 December 2016) https://www.irishtimes.com/news/ireland/irish-news/apollo-house-judge-says-occupants-must-vacate-in-january-1.2913959> accessed 3 January 2021.

[508] Irish Examiner, 'Apollo House Resident can Stay Put Until January 11, High Court Says' (Dublin, 21 December 2016) https://www.irishexaminer.com/news/arid-30769582.html accessed 4 January 2021.

[509] Irish Examiner, 'High Court Hears Campaigners Don't Believe There are Enough Beds for Homeless in Dublin' (Dublin, 21 December 2016) https://www.irishexaminer.com/news/arid-30769533.html accessed 4 January 2021.

[510] Harry McGee and Barry O'Halloran, 'Government Avoids Condemning Apollo House Occupation' *The Irish Times* (Dublin, 20 December 2016) https://www.irishtimes.com/news/politics/government-avoids-condemning-apollo-house-occupation-1.2913524 accessed 1 January 2021.

open irrespective of the actions of the Home Sweet Home campaign. Following the High Court hearing on December 21st Dublin City Council noted that a fourth hostel would be operating at Wolfe Tone Quay.[511] The council asserted that there was sufficient accommodation to provide shelter for the residents of Apollo House.[512] On the same day Minister Coveney suggested that the problem was not the availability of beds but the fact that a number of rough sleepers were unwilling to take up the accommodation provided.[513] On December 23rd, in a provocative move, the Minister tweeted, 'So people know the facts: There were 54 unoccupied beds last night in homeless shelters in Dublin and no more than 17 in Merchants Quay.'[514] On January 3rd, Dublin City Council made a similar point, stating that 'There were a significant number of available/unused bed spaces throughout the hostel system during the Christmas/New Year period.'[515]

The activists responded by drawing attention to the standard of the accommodation being provided by the state through the various homeless charities, arguing that it was unsuitable for many rough sleepers. This led to a contentious public debate on the standards of homeless accommodation being provided in by Dublin City Council as opposed to that being provided by Home Sweet Home in Apollo House. For example, after activists criticised the accommodation provided by the council in the High Court hearing on December 21st, the latter responded, rejecting the criticisms made in court and insisting that their emergency accommodation was 'subject to strict standards of operation and configuration'.[516] After Minister Coveney's tweet on December 23rd,

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[511] Irish Examiner, 'Apollo House Resident can Stay Put Until January 11, High Court Says' (Dublin, 21 December 2016) https://www.irishexaminer.com/news/arid-30769582.html accessed 4 January 2021.

[512] Tim Healy, 'Apollo House Occupiers can Stay Until After Christmas Court Rules' *Irish Independent* (Dublin, 21 December 2016) https://www.independent.ie/irish-news/courts/apollo-house-occupiers-can-stay-until-after-christmas-court-rules-35312495.html accessed 3 January 2021.

[513] Marie O'Halloran, 'Coveney Asks Apollo House Occupants to Work with State' *The Irish Times* (Dublin, 21 December 2016) https://www.irishtimes.com/news/politics/oireachtas/coveney-asks-apollo-house-occupants-to-work-with-state-1.2914259 accessed 3 January 2021.

[514] Simon Coveney (*Twitter.com* 2016) https://twitter.com/simoncoveney/status/812242152482803712?lang=en accessed 3 January 2021.

[515] Laura Lynott, 'Twenty People were Turned Away from Apollo House Every Night' *Irish Independent* (Dublin, 3 January 2017) 14.

[516] Tim Healy, 'Apollo House Occupiers can Stay Until After Christmas Court Rules' *Irish Independent* (Dublin, 21 December 2016)

Tommy Gavin, a spokesperson for Home Sweet Home suggested that one of the reasons that those staying in Apollo House were refusing to take up beds in homeless accommodation was the prevalence of alcohol and drug use in such facilities.[517] On December 28th a statement from Home Sweet Home alleged that some of the available beds which Minister Coveney had been alluding too, were nothing more than mats on the ground, stating that 'a few hours on the floor of a packed dormitory does not constitute a bed'.[518] During an appearance on *The Pat Kenny Show* on *Newstalk Radio* on December 28th Owen Keegan, the Chief Executive of Dublin City Council, suggested that Home Sweet Home were able to avoid some of the difficulties posed by providing homeless accommodation by refusing to allow people with drink or drug addictions into the facility. He claimed that this played into notions of 'deserving homeless' and that the council could not engage in such actions.[519] He argued that there had been 'a major improvement' in the standard of homeless accommodation being provided in Dublin and suggested that the reason the Home Sweet Home campaign had garnered such attention was simply due to the fact that celebrities were involved.[520] As well as criticising the

https://www.independent.ie/irish-news/courts/apollo-house-occupiers-can-stay-until-after-christmas-court-rules-35312495.html accessed 3 January 2021.

[517] Elaine Edwards, 'Apollo House Campaigners May Take Court Action to Force End to Homelessness' *Irish Times* (Dublin, 23 December 2016) https://www.irishtimes.com/news/social-affairs/apollo-house-campaigners-may-take-court-action-to-force-end-to-homelessness-1.2916508 accessed 5 January 2021.

[518] Vivienne Clarke, 'Apollo House Accommodation 'Substandard', Council Chief Says' *The Irish Times* (Dublin, 28 December 2016) https://www.irishtimes.com/news/ireland/irish-news/apollo-house-accommodation-substandard-council-chief-says-1.2919209 accessed 6 January 2021.

[519] Joe Leogue, 'Simon Coveney Asked to Clarify 'Beds' for Homeless' *Irish Examiner* (Dublin, 29 December 2016) https://www.irishexaminer.com/news/arid-20436920.html accessed 6 January 2021.

Vivienne Clarke, 'Apollo House Accommodation 'Substandard', Council Chief Says' *The Irish Times* (Dublin, 28 December 2016) https://www.irishtimes.com/news/ireland/irish-news/apollo-house-accommodation-substandard-council-chief-says-1.2919209 accessed 6 January 2021.

[520] Vivienne Clarke, 'Apollo House Accommodation 'Substandard', Council Chief Says' *The Irish Times* (Dublin, 28 December 2016) https://www.irishtimes.com/news/ireland/irish-news/apollo-house-accommodation-substandard-council-chief-says-1.2919209 accessed 6 January 2021.

Irish Examiner, 'Dublin City Council CEO Questions Celebrity Endorsement of Apollo House Sit-in' *Irish Examiner* (Dublin, 28 December 2016) https://www.irishexaminer.com/news/arid-30770210.html accessed 6 January 2021.

standards of accommodation being provided by Dublin City Council, the activists were keen to highlight the superior nature of accommodation which was on offer in Apollo House. The activists claimed that they were providing the type of facility that homeless people needed, arguing that the availability of private rooms to which the residents had 24-hour access, coupled with the community-oriented nature of the facility, meant that residents were much happier there than they would be in council provided accommodation.[521]

Despite this contentious debate the activists in Apollo House had agreed to allow staff from one of the city's housing charities, the *Peter McVerry Trust,* to enter into the building to assess residents and to facilitate their move to other accommodation.[522] An agreement was reached between the charity and Home Sweet Home as regards this transfer with the latter keen to ensure that the decision rested with the residents themselves as to whether they would leave Apollo House and take up the new accommodation.[523] As early as December 22nd, the day after the High Court granted the injunction, a number of those residing in Apollo House left for accommodation provided by the *Peter McVerry Trust.* These transfers continued in the following weeks.

On January 6th, five days before the court-imposed deadline to vacate the premises, members of Home Sweet Home met with Minister Coveney in order to try and reach agreement on an outcome that would satisfy the activists and avoid the potential for a forced eviction on January 11th.[524] Prior to the meeting Home Sweet Home published an

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[521] Ryan Nugent, 'Director Sheridan Making Apollo House Documentary' *Irish Independent* (Dublin, 24 December 2016) 22.

Joe Leogue, 'Apollo House Residents Hesitant in Moving Out' *Irish Examiner* (Dublin, 24 December 2016) https://www.irishexaminer.com/news/arid-20436602.html accessed 5 January 2021.

[522] Elaine Edwards, 'Apollo House Campaigners May Take Court Action to Force End to Homelessness' *Irish Times* (Dublin, 23 December 2016) https://www.irishtimes.com/news/social-affairs/apollo-house-campaigners-may-take-court-action-to-force-end-to-homelessness-1.2916508 accessed 5 January 2021.

[523] Irish Independent, 'Peter McVerry Trust Offers Accommodation to 40 Residents of Apollo House' (Dublin, 22 December 2016) https://www.independent.ie/irish-news/news/peter-mcverry-trust-offers-accommodation-to-40-residents-of-apollo-house-35315839.html accessed 4 January 2021.

[524] Irish Independent, 'Nama Defends Social Housing Efforts as Campaigners Demand Action' (Dublin, 5 January 2017) https://www.independent.ie/breaking-news/irish-news/nama-defends-social-housing-efforts-as-campaigners-demand-action-35344734.html accessed 8 January 2021.

Emergency Housing Plan[525] in which they set out the demands of the campaign. These included that the government declare a national housing emergency; that the needs of homeless people be addressed through the raising of standards in homelessness accommodation - including the provision of private rooms which would have 24 hour access for 6 month periods; that particular policies and legislative measures, such as limiting rent increases in the private rental sector be adopted to help alleviate the homelessness crisis; the decommodification of the housing sector through the large-scale provision of social housing; and the adoption of particular measures to ensure that such a crisis could not arise in the future - notably the holding of a referendum on the inclusion of the right to housing in the Irish constitution and the provision of housing through NAMA.

On January 9th agreement was reached between the two parties. In a statement, Minister Coveney confirmed that the occupiers had agreed to leave the premises by the January 11th deadline and that the residents of Apollo House would be moving to alternative accommodation.[526] He stated that the parties had discussed a number of issues relating to the needs of the residents in Apollo House and regarding homelessness and housing more broadly. In terms of specific, novel commitments, Mr Coveney, announced that additional emergency homeless accommodation would be provided through the opening of two new facilities in Dublin 'to meet potential future demand.' The statement also gave assurances as regards the standard of homeless accommodation, a key aspect of Home Sweet Home's *Emergency Housing Plan*, with Mr Coveney stating that efforts would be made to ensure that any new facilities were appropriate for homeless people and based on their particular needs. He also stated that it had been agreed that Dublin City Council would improve 'community-based homeless services and facilities through their local authority office network'. Minister Coveney also re-stated the government's commitment to a number of assurances it had previously made in relation to housing, namely ending the use of commercial hotels for emergency homeless accommodation, moving 'beyond emergency accommodation' completely by providing homeless people with a home and

[525] 'Home Sweet Home: Emergency Housing Plan' (*Tuleftforum.com*, 2017) http://www.tuleftforum.com/wp-content/uploads/2012/04/HSH_report_print.pdf accessed 6 January 2021.

[526] Simon Coveney, 'Minister Coveney' Statement on Agreed Arrangements for People Currently Accommodated in Apollo House - Rebuilding Ireland' (*Rebuilding Ireland*, 2021) https://rebuildingireland.ie/news/statement-on-apollo-house-arrangements/ accessed 4 January 2021.

access to appropriate services, and the ramping up of social housing provision and housing supply more generally. However, no commitments were made in terms of other key aspects of Home Sweet Home's *Emergency Housing Plan,* including the desired constitutional referendum on the right to housing or the provision of housing through NAMA. Brendan Ogle of Home Sweet Home announced that the occupiers had agreed not to accept new residents into Apollo House and would facilitate the transfer of the remaining residents to suitable alternative accommodation once it was provided by Dublin City Council.[527] In a statement Home Sweet Home noted that the standards of accommodation being provided in Apollo House, including the provision of private rooms with 24hr access, would provide the benchmark for the new facilities that were to be opened.[528]

However, almost immediately the agreement between the parties was under threat. First, on the day the deal was announced, Minister Coveney tweeted that the decision to open two new homeless facilities had not been the result of the negotiations between the government and Home Sweet Home but had been agreed with Dublin City Council in advance of those meetings.[529] Mr Coveney reiterated this point on *Sean O'Rourke's show* on *RTÉ radio* the following day.[530] In response, the activists accused the Minister of downplaying 'the significant achievement reached by a citizen's intervention in the worst

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[527] Irish Examiner, 'Home Sweet Home to Vacate Apollo House as Deal Struck with Simon Coveney' (Dublin, 9 January 2017) https://www.irishexaminer.com/news/arid-30771704.html accessed 11 January 2021.

[528] Barry Roche, 'Deal Struck to End Homeless Occupation of Apollo House' *Irish Times* (Dublin, 9 January 2017) https://www.irishtimes.com/news/ireland/irish-news/deal-struck-to-end-homeless-occupation-of-apollo-house-1.2930476 accessed 9 January 2021.

Conall Ó Fátharta, 'Apollo House Evacuees Return Amid Claims of 'Unsuitable' Alternative Facilities' *Irish Examiner* (Dublin, 11 January 2017) https://www.irishexaminer.com/news/arid-20438573.html accessed 11 January 2021.

[529] Luke Byrne, 'Apollo House Campaigners Claim Victory as Government Confirm Two New Homeless Accommodation Facilities' *Irish Independent* (Dublin, 9 January 2017) https://www.independent.ie/irish-news/news/apollo-house-campaigners-claim-victory-as-government-confirm-two-new-homeless-accommodation-facilities-35354021.html accessed 11 January 2021.

[530] Kitty Holland, 'Apollo House Activists Claim Breakdown in Trust with Minister' *The Irish Times* (Dublin, 10 January 2017) https://www.irishtimes.com/news/social-affairs/apollo-house-activists-claim-breakdown-in-trust-with-minister-1.2932118 accessed 11 January 2021.

housing crisis the state has ever seen.'[531] A spokesperson for Home Sweet Home said that there had been a breakdown in trust between the two parties and that the group was concerned that the Minister was reneging on the deal. The second threat to this agreement was related to the standard of accommodation that was being offered to those transitioning from Apollo House to other facilities. From early January the activists had noted on a number of occasions that they would only vacate the property on the January 11th deadline if all the residents received suitable alternative accommodation.[532] When Brendan Ogle announced that the activists had agreed to end the occupation, he stated that this was contingent upon the alternative accommodation offered being up to standard.[533] On the day after the agreement had been reached between the government and Home Sweet Home, the activists announced that a number of the residents who had moved to alternative facilities had returned to Apollo House as the accommodation being offered was inadequate.[534] In a statement the group claimed that the accommodation that had been provided to some of the residents was 'completely unsuitable to their needs' as drugs and alcohol were being used in those facilities.[535] This, the group argued constituted a 'failure to meet the terms of the agreement' reached between the activists and the

[531] Kitty Holland, 'Apollo House Activists Claim Breakdown in Trust with Minister' *The Irish Times* (Dublin, 10 January 2017) https://www.irishtimes.com/news/social-affairs/apollo-house-activists-claim-breakdown-in-trust-with-minister-1.2932118 accessed 11 January 2021.

[532] Gavin White, 'We Won't Leave Apollo House Until Everyone is Sorted Out' *Irish Independent* (Dublin, 4 January 2017) 12.

Conor Pope, 'Apollo House Group: Homeless 'Will Not Be Thrown to The Wolves' *Irish Times* (Dublin, 8 January 2017) https://www.irishtimes.com/news/social-affairs/apollo-house-group-homeless-will-not-be-thrown-to-the-wolves-1.2929570 accessed 9 January 2021.

[533] Barry Roche, 'Deal Struck to End Homeless Occupation of Apollo House' *Irish Times* (Dublin, 9 January 2017) https://www.irishtimes.com/news/ireland/irish-news/deal-struck-to-end-homeless-occupation-of-apollo-house-1.2930476 accessed 9 January 2021.

Marie O'Halloran, 'Apollo House Residents to Get New Rooms' *The Irish Times* (Dublin, 10 January 2017) 5.

[534] Kitty Holland, 'Apollo House Activists Claim Breakdown in Trust with Minister' *The Irish Times* (Dublin, 10 January 2017) https://www.irishtimes.com/news/social-affairs/apollo-house-activists-claim-breakdown-in-trust-with-minister-1.2932118 accessed 11 January 2021.

[535] Conall Ó Fátharta, 'Apollo House Evacuees Return Amid Claims of 'Unsuitable' Alternative Facilities' *Irish Examiner* (Dublin, 11 January 2017) https://www.irishexaminer.com/news/arid-20438573.html accessed 11 January 2021.

government. They reiterated that the occupation would only be ended when the needs of the residents had been met.[536]

On the morning of January 11th, 2017, the day on which the stay placed on the High Court's order to vacate was to expire, the activists brought an application before the court to have that stay extended. Again, the details will be discussed below. The application was rejected by Justice Gilligan meaning that the activists were legally obliged to vacate the premises that afternoon. The immediate reaction from the activists to the court's refusal to extend the stay on the order to vacate was one of defiance. On the day of the ruling and amidst repeated claims that the government had failed to live up to its side of the agreement reached between the parties, the group stated that they would defy the court order and would not vacate until the remaining residents were provided with acceptable accommodation.[537] At a rally held outside Apollo House after the court ruling, Rosi Leonard of the Irish Housing Network called on people who were willing to be on an 'anti-eviction list' to come to the property in order to 'protect Apollo House and everything it stands for.[538] However the next morning, an hour before the matter was due back before the High Court, the activists began to vacate the property.[539] By 10:15 that morning the majority of activists and remaining residents had left.[540] A spokesperson for

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[536] Laura Larkin, 'Ex-Apollo House Resident Claims People are 'Smoking and Injecting Heroin' in His New Accommodation' *Irish Independent* (Dublin, 10 January 2017) https://www.independent.ie/irish-news/ex-apollo-house-resident-claims-people-are-smoking-and-injecting-heroin-in-his-new-accommodation-35357341.html accessed 11 January 2021.

[537] Kitty Holland and Elaine Edwards, 'Activists Refuse to Leave Apollo House After Court Ruling' *Irish Times* (Dublin, 11 January 2017) https://www.irishtimes.com/news/social-affairs/activists-refuse-to-leave-apollo-house-after-court-ruling-1.2932832 accessed 11 January 2021.

Irish Independent, 'Apollo House Occupiers Refuse to Vacate Building Despite Court Order' (Dublin, 11 January 2017) *Irish Independent* https://www.independent.ie/breaking-news/irish-news/apollo-house-occupiers-refuse-to-vacate-building-despite-court-order-35360054.html accessed 11 January 2021.

[538] Joyce Fegan, 'Arm in Arm, Activists Stand Together at High Noon' *Irish Examiner* (Dublin, 12 January 2017) https://www.irishexaminer.com/opinion/commentanalysis/arid-20438718.html accessed 12 January 2021.

[539] Irish Independent, 'Campaigners for Homeless Agree to End Occupation of Empty Dublin Office Block' (Dublin, 12 January 2017) https://www.independent.ie/breaking-news/irish-news/campaigners-for-homeless-agree-to-end-occupation-of-empty-dublin-office-block-35362444.html accessed 12 January 2021.

[540] Cian Murray and Aodhan O' Faolain, 'One Person Remains in Apollo House as Home Sweet Home Occupation Ends' *Irish Independent* (Dublin, 12 January 2017)

the group said that those residents who had still been living in the building at the end of the occupation had been offered temporary accommodation, paid for out of the donations that had been given to Home Sweet Home over the course of the occupation. One of the residents refused to leave the property but agreed to do so after talks with the gardaí.[541] There were also some issues with the removal of the occupiers' property from the building, with the receivers seeking an indemnity in relation to any claims from people who had donated items to the occupation and who wished to see them returned.[542] These issues led to a number of adjournments by the court so that they could be resolved. However, on the 3rd of February 2017 the High Court action over the occupation of Apollo House formally came to an end with counsel for the receivers informing the court that all property had been removed from the building, and with Mr. Justice Gilligan striking out the proceedings with no order.[543]

II – Theoretical Considerations

Before analysing the legal proceedings and the political impact of those proceedings I would like to offer a reminder of some of the theoretical considerations, set out in Chapter one, which will be relied upon in the analysis. In Chapter one I spoke of the role the legal form plays in capitalist society, particularly the way in which it operates through the Rule of Law. To briefly recap, the Rule of Law commits to the idea of 'formal equality', the notion that social relations should be regulated through the application of ostensibly objective, value-free and politically neutral rules to moments of dispute between individuals. The application of these objective rules denudes the social

https://www.independent.ie/irish-news/one-person-remains-in-apollo-house-as-home-sweet-home-occupation-ends-35362254.html accessed 12 January 2021.

[541] Irish Examiner, 'Last Remaining Homeless Person Leaves Apollo House' (Dublin, 12 January 2017) https://www.irishexaminer.com/news/arid-30772199.html accessed 12 January 2021.

Irish Examiner, 'One homeless person remains in Apollo House' (Dublin, 12 January 2017) https://www.irishexaminer.com/news/arid-30772155.html accessed 12 January 2021.

[542] Aodhan O'Faolain, 'Efforts to Remove Donated Items from Apollo House Continue' *Irish Times* (Dublin, 17 January 2017) https://www.irishtimes.com/news/crime-and-law/courts/high-court/efforts-to-remove-donated-items-from-apollo-house-continue-1.2940650 accessed 13 January 2021.

[543] Aodhan O'Faolain, 'Legal Action Over Apollo House Occupation Concludes' *Irish Times* (Dublin, 3 February 2017) https://www.irishtimes.com/news/crime-and-law/courts/high-court/legal-action-over-apollo-house-occupation-concludes-1.2962390 accessed 13 January 2021.

relationship in question of the political and social disparities which inevitably are imprinted upon it. Formal equality is therefore concerned only with a superficial procedural equality. The substantive material inequalities which exist between individuals and between social classes are disregarded and therefore reproduced. However, the gesture towards a commitment to some notion of equality has the effect of mystifying the role of law and concealing this depoliticization of the relations which it mediates. The legal form therefore helps to reproduce the material inequalities of capitalism whilst simultaneously claiming the achievement of just outcomes through its processes.

In Chapter one, I noted how the legal form could have implications for activists who came into contact with legal structures. I highlighted how the legal from helped to shape how dissent was viewed. I noted Brabazon's contention that, in the neoliberal period law is constitutive, it not only supports the neoliberal view of a circumscribed, 'depoliticised' political sphere, it actively helps to model it.[544] Private law, which best embodies the characteristics of the legal form, is increasingly employed to mediate social relations.[545] These relations are consequently depoliticised in a manner conducive to the neoliberal view of social interaction. The law therefore moulds and shapes the way we view and understand the world. Brabazon asserts that this has implications for dissent. First there is increased repression. Secondly, there is a 'hyper-regulation' of protest.[546] This means that dissent is increasingly channelled through legal structures. As a result, activists are often compelled to carry out their struggle within the courtroom. This struggle is forced to conform a 'judicial rationality' which circumscribes the way in which it can be expressed.[547] In Chapter one, I noted Gabel and Harris' comments on the effect of judicial rationality. They asserted that the legal system provides concepts and categories which condition the way in which we understand social conflict and encourage us to accept certain outcomes which maintain the status quo.[548] The courtroom therefore impacts the

[544] Honor Brabazon, 'Dissent in a Juridified Political Sphere' in Honor Brabazon (ed), *Neoliberal Legality: Understanding the Role of Law in the Neoliberal Project* (Routledge 2017) 169.

[545] Honor Brabazon, 'Dissent in a Juridified Political Sphere' in Honor Brabazon (ed), *Neoliberal Legality: Understanding the Role of Law in the Neoliberal Project* (Routledge 2017) 173.

[546] Honor Brabazon, 'Dissent in a Juridified Political Sphere' in Honor Brabazon (ed), *Neoliberal Legality: Understanding the Role of Law in the Neoliberal Project* (Routledge 2017) 175.

[547] Honor Brabazon, 'Dissent in a Juridified Political Sphere' in Honor Brabazon (ed), *Neoliberal Legality: Understanding the Role of Law in the Neoliberal Project* (Routledge 2017) 175.

[548] Peter Gabel and Paul Harris, 'Building Power and Breaking Images: Critical Legal Theory and the Practice of Law' (1982-1983) 11 N.Y.U Review of Law & Social Change 369, 373.

way in which dissent is understood and therefore the different arguments that can be put forward by activists. I also discussed Robert Knox's insight that the abstract nature of the legal form means that the law is concerned with the actions of individuals, rather than the motivations behind those actions. Thus, the context in which dissent takes places is disregarded and the protestors are judged solely by whether their actions have contravened certain technical rules. Similarly, the law is only concerned with specific moments of dispute, rather than the structural issues which may have led to them.[549] Therefore the courts are only concerned with the immediate disturbance, and legal action is unlikely to result in the courts intervening in order to resolve broader structural issues. The mystifying role of the law, which operates through the notion of formal equality, creating a sense of justice having been achieved through legal processes, also has implications for activists. A courtroom judgement which condemns the actions of protestors can shape how the public views the protest and the level of support it can maintain.

In the case of the Apollo House occupation, the activists were operating within the context of a housing crisis where large numbers of people were becoming homeless. Further, given the lack of suitable homeless accommodation, people were being forced to sleep rough on the streets of Ireland's towns and cities. The protestors were also trying to highlight the fact that the government possessed buildings which were laying empty, which could be used to help ease the homelessness crisis. Mazars, on the other hand were seeking to enforce their private property rights and to regain possession of the building. As I have noted in Chapter one and elsewhere, the protection of private property is a core concern of legal liberalism. We will see in the following section how this dispute played out in the legal arena, specifically whether the socioeconomic context was disregarded by the courts and the approach the judge took towards the protection of private property. I will then consider the consequences this had for the political debate around Apollo House in section four.

III – The Legal Proceedings

III.A – Introduction

In this section I will examine the legal proceedings between Mazars and the activists. I will begin by discussing the legal position of the receivers. Then I will consider the

[549] Robert Knox, 'Marxism, International Law, and Political Strategy' (2009) 22(3) Leiden Journal of International Law 413, 430-431.

statements made pre-trial by both of the parties. This will help to explain the reasons why Mazars brought legal proceedings and the approach that the activists took in the days before legal action was instigated. It will also help us to understand the choice of argument put forward by the parties at the proceedings. The subsequent subsection will consider the arguments made by both parties at the hearings of December 21st and January 11th and the judgments of Justice Gilligan in both hearings.

III.B – Position of Mazars

To begin with I will consider why Mazar's decided to bring a legal action. The legal proceedings were initiated by the receivers, leading to the first hearing on December 21st regarding their request for injunctive relief, and to the second hearing on January 11th at which the activists applied for an extension of the stay placed on the order to vacate. Therefore, an understanding of the motivations that lay behind their decision to bring an action will help to elucidate to some extent, the approaches taken by the parties and the legal arguments made before the court.

NAMA had appointed Mazars as receivers of Apollo House in 2014. A receiver is usually appointed by a creditor when seeking to realise a secured debt owed by a debtor. The creditor will appoint the receiver whose legal duty is then to take control of the asset securing the debt and to use it, usually by leasing or selling it, in order to realise the debt owed to the creditor. In this case Anglo Irish Bank had been the creditor, Cuprum Properties the debtor and Apollo House the asset securing the debt. When NAMA took on the loan portfolio connected to Apollo House from Anglo Irish Bank, it essentially became the creditor. They then appointed Mazars as receivers. Mazars took control of Apollo House in order to try and recoup the debt owed by Cuprum. As receivers Mazars were under a legal obligation to achieve the best return reasonably possible from the property in order to satisfy the debt. It seems that by 2016 Mazars had decided that this could be best achieved through the sale of the property and site and it was reported that both were on the market with agent BNP Paribas at the time of the occupation.[550] The occupation potentially placed Mazars at risk of being sued for failing to fulfil their legal obligation to obtain the best reasonable return for the property. The presence of the

[550] Kitty Holland, 'Apollo House Occupation Started with Facebook Post' *The Irish Times* (Dublin, 19 December 2016) https://www.irishtimes.com/news/social-affairs/apollo-house-occupation-started-with-facebook-post-1.2912167 accessed 1 January 2021.

occupiers risked damage being done to the building which could have caused its devaluation. The occupation also made it more difficult to sell the property as any potential buyers may have been deterred by the presence of the activists. There was also a third consideration. Under Irish law a property owner owes a certain duty of care to a trespasser to protect them from any dangers on the property they have entered. Although it is unclear the extent to which the receivers would have been exposed to a claim of liability in this case, there was a possibility that such a claim could arise, given that property being trespassed upon was a derelict office block which had not been maintained. Therefore, it was important for Mazars to regain possession of the property so that they could fulfil their legal duty to obtain a return from the property and to avoid any potential claims arising out of the occupation.

III.C – Pre-trial Statements

These considerations explain Mazars' eagerness to bring the matter before the courts in order to have the occupiers evicted. It also explains the statements made by the receivers in the press prior to initiating the legal proceeding, and the approach taken by the activists. As noted in the outline above Tom O'Brien of Mazars released a statement on December 16th.[551] In this statement he discussed some of the concerns just outlined. First, he asserted that the occupation was illegal and that the occupiers were trespassing. He also pointed out that the building was unsuitable for providing homeless accommodation and highlighted potential issues regarding insurance and health and safety. Mr. O'Brien also noted that, as receivers, his firm was under certain legal obligations and emphasised that the firm had no option but to bring legal action. Mazars then communicated directly with the activists by sending them a legal notice informing them they were trespassing.[552] The letter again noted the illegality of the occupation and stated that the receivers could not allow it to continue, 'particularly in light of the condition of the property and the obvious health and safety concerns.' The notice stated that Mazars would be willing to meet with

[551] Gavin White, 'Citizens Take Over NAMA-Controlled Property and Set Up Rooms for Homeless People' *Irish Independent* (Dublin, 16 December 2016) https://www.independent.ie/irish-news/citizens-take-over-nama-controlled-property-and-set-up-rooms-for-homeless-people-35299848.html accessed 30 December 2020.

[552] Kitty Holland, 'Legal Notice Served on Activists Occupying Dublin Office Block' *The Irish Times* (Dublin, 17 December 2016) https://www.irishtimes.com/news/social-affairs/legal-notice-served-on-activists-occupying-dublin-office-block-1.2910168 accessed 31 December 2020.

the occupiers in order arrange for their voluntary exit from the premises but made it clear that if the protestors did not leave, the firm would have no option but to pursue the matter through the courts. Finally, the statement released by Tom O'Brien on December 20th brought attention to the fact that the building had lost its fire insurance due to the occupation.[553] Mr. O'Brien also noted the risk that a fire potentially posed to the occupiers of Apollo House.[554] The statement asserted that the main concern of the receivers was 'for the health and safety of those who are homeless and currently staying in Apollo House' and reiterated that the proper provision of homeless accommodation could not be carried out in the repurposed office block. Further Mr O'Brien stated that, contrary to the claims of Home Sweet Home, the activists had failed to co-operate with the receivers and therefore the latter had 'no option but to take the only responsible course available and look for assistance from the courts in seeking to resolve this issue.'[555] We can see therefore that the concerns which Mazars had regarding their legal obligations as receivers influenced their media statements and their decision to bring legal action. If we examine the activists' response to the legal notice sent by Mazars, we can also begin to understand the approach they were taking towards the receivers. What is notable about the activists' reply to Mazars legal threat is the conciliatory tone and the eagerness to cooperate. After receiving the letter from Mazar's solicitors, the occupiers, through lawyers operating on their behalf, sent a letter of reply which stated that the activists were willing to meet with receivers.[556] A spokesperson for the group reiterated this on December 19th, stating the group was open to 'sitting down with the owners of the

[553] Dan Griffin, 'Apollo House Homeless Action Triggers Loss of Fire Insurance Cover' *The Irish Times* (Dublin, 20 December 2016) https://www.irishtimes.com/news/ireland/irish-news/apollo-house-homeless-action-triggers-loss-of-fire-insurance-cover-1.2912989 accessed 2 January 2021.

[554] Irish Independent, 'Office Block Receivers Take Court Action to Move Homeless Campaigners' (Dublin, 20 December 2016) https://www.independent.ie/breaking-news/irish-news/office-block-receivers-take-court-action-to-move-homeless-campaigners-35308935.html accessed 2 January 2021.

[555] Dan Griffin, 'Apollo House Homeless Action Triggers Loss of Fire Insurance Cover' *The Irish Times* (Dublin, 20 December 2016) https://www.irishtimes.com/news/ireland/irish-news/apollo-house-homeless-action-triggers-loss-of-fire-insurance-cover-1.2912989 accessed 2 January 2021.

[556] Paul Cullen, 'Apollo House Protestors to Meet Owners over Occupation' *The Irish Times* (Dublin, 18 December 2016) https://www.irishtimes.com/news/ireland/irish-news/apollo-house-protesters-to-meet-owners-over-occupation-1.2910660 accessed 31 December 2020.

building'.[557] The group claimed that 'everyone wants to co-operate' and stated that they would be sending a list of the founders of the group to the solicitors of the receivers, as requested.[558] This eagerness to mediate was accompanied by efforts to reassure the receivers as regards their concerns regarding damage being done to the property and the risks posed by the occupation to the safety of the activists. On the 17th December, following the delivery of the legal notice to the protestors, Brendan Ogle highlighted the fact that Dublin Fire Brigade had inspected the premises and were satisfied with the 'rules and systems' which had been put in place by occupiers.[559] He commented on the work that had been carried out by various volunteer tradespeople who had been endeavouring to make the building suitable for accommodating homeless people, stating that such work had been carried out to a high standard.

Therefore, rather than taking a hostile approach towards the receivers, the activists attempted to reassure them that the occupation was not a threat to their interests in order to dissuade them from brining legal action. However, despite the conciliatory tone the occupiers also insisted that they had no intention to vacate the premises [560] and stated they had prepared strong arguments to justify their position if the matter were to come before the courts.[561]

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[557] Gavin White, 'It's Heaven' - Homeless in Illegally Occupied Building' *Irish Independent* (Dublin, 19 December 2016) 16.

[558] Kitty Holland and others, 'Homeless Should be Allowed Stay in Apollo House, Says Zappone' *The Irish Times* (Dublin, 19 December 2016) https://www.irishtimes.com/news/social-affairs/homeless-should-be-allowed-stay-in-apollo-house-says-zappone-1.2911420 accessed 1 January 2021.

[559] Kitty Holland, 'Legal Notice Served on Activists Occupying Dublin Office Block' *The Irish Times* (Dublin, 17 December 2016) https://www.irishtimes.com/news/social-affairs/legal-notice-served-on-activists-occupying-dublin-office-block-1.2910168 accessed 31 December 2020.

[560] Caroline O'Doherty, 'We are Involved in an Act of Civil Disobedience' - Musicians Lends Support to Homelessness Sit-In' *Irish Examiner* (Dublin, 17 December 2016) https://www.irishexaminer.com/news/arid-20435679.html accessed 31 December 2020.

[561] Kitty Holland, 'Legal Notice Served on Activists Occupying Dublin Office Block' *The Irish Times* (Dublin, 17 December 2016) https://www.irishtimes.com/news/social-affairs/legal-notice-served-on-activists-occupying-dublin-office-block-1.2910168 accessed 31 December 2020.

III.D – Legal Arguments & Judicial Decisions

I will now consider both sets of proceedings related to the Apollo House occupation in light of the theoretical considerations outlined above.

III.D.1 – December 21st, 2016, Hearing & the Granting of Injunctive Relief

III.D.1.(i) – Mazars

On December 21st the application for injunctive relief was heard in the High Court.[562] Mr. Rossa Fanning set out the case for Mazars. As expected, the core argument put forward by the receivers was that the protestors were infringing upon their private property rights by illegally trespassing in Apollo House. The receivers also tried to undermine the basis of the occupation by noting that they had been in contact with Dublin City Council who had assured them that the homeless people staying in Apollo House could be accommodated at other emergency accommodation facilities in the city. This argument was supplemented with a sworn statement from the Director of the Dublin Region Homeless Executive, Dr. Dáithí Downey who confirmed that the council had sufficient capacity to provide accommodation for the residents.[563] Mazars also emphasised their concerns relating to their legal obligations outlined above. Mr. Fanning noted his clients' reluctance to bring legal action but stated that they had 'no choice' but to bring proceedings.[564] Then, he stated that the receivers wished to recover possession of the property so that they could sell it and receive the best return possible for the taxpayer. Counsel for the receivers also informed the court of the issues regarding the lapse of the building's fire insurance and noted that its public liability insurance would also lapse in mid-January unless Mazars were able to regain possession.

Mr. Fanning also drew attention to the health and safety issues connected to the occupation, stating that his clients had particular concerns as regards the electricity and

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[562] Aodhan O'Faolain and Kitty Holland, 'Apollo House: Judge Says Occupants Must Vacate in January' *The Irish Times* (Dublin, 21 December 2016) https://www.irishtimes.com/news/ireland/irish-news/apollo-house-judge-says-occupants-must-vacate-in-january-1.2913959 accessed 3 January 2021.

[563] Irish Examiner, 'Apollo House Residents can Stay Put Until January 11, High Court Says' (Dublin, 21 December 2016) https://www.irishexaminer.com/news/arid-30769582.html accessed 4 January 2021.

[564] Irish Examiner, 'Apollo House Residents can Stay Put Until January 11, High Court Says' (Dublin, 21 December 2016) https://www.irishexaminer.com/news/arid-30769582.html accessed 4 January 2021.

water supply, refuse disposal and the potential for the occupants to trip on stairwells.[565] He noted that these safety issues meant that the building, which he stated was never intended for residential use, was unsuitable for the purpose which the occupiers were putting it to. It is worth reflecting on the utilisation of these health and safety arguments and the particular role they played in the proceedings. Brabazon has noted that in the neoliberal period, health and safety claims, which come under the rubric of administrative law, have become a useful tool in attempting to defuse political dissent.[566] She argues that administrative law involves a 'confluence' of two legitimising discourses, public law and private law.[567] Public law is associated with notions of collective public interest. Private law best symbolises the autonomous, depoliticising image of the legal form. The utilisation of administrative law through health and safety claims thus invokes the characteristics of private law, depoliticising dissent by reducing moments of dispute to technical, procedural questions.[568] At the same time the public character of administrative law means that this depoliticising manoeuvre is viewed as one which is actually concerned with safeguarding the public interest as it involves attempts to secure the safety of the public and even the protestors themselves. The utilisation of administrative law to mediate dissent enables authorities to avoid having to employ more coercive approaches which tend to exacerbate the tension in question, focusing political attention upon it. Instead, health and safety claims create the 'image of a neutral containment of dissent on technical grounds in the public interest.'[569] The dispute is therefore discursively reframed, transformed from a public, political question to an apolitical, technical one. This reframing is difficult for protestors to combat as the health and safety questions cannot

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[565] Aodhan O'Faolain, 'Some Occupiers of Apollo House - Including Musician Glen Hansard - Oppose Legal Action by Receivers to Gain Control' *Irish Independent* (Dublin, 21 December 2016) https://www.independent.ie/irish-news/courts/some-occupiers-of-apollo-house-including-musician-glen-hansard-oppose-legal-action-by-receivers-to-regain-control-35311806.html accessed 3 January 2021.

[566] Honor Brabazon 'Yelling 'Fire' in a Crowded Occupation: Cynical Fire Hazard Claims and the Technocratic Containment of Dissent [2020] 29(4) Social & Legal Studies 549.

[567] Honor Brabazon 'Yelling 'Fire' in a Crowded Occupation: Cynical Fire Hazard Claims and the Technocratic Containment of Dissent [2020] 29(4) Social & Legal Studies 550.

[568] Honor Brabazon 'Yelling 'Fire' in a Crowded Occupation: Cynical Fire Hazard Claims and the Technocratic Containment of Dissent [2020] 29(4) Social & Legal Studies 555.

[569] Honor Brabazon 'Yelling 'Fire' in a Crowded Occupation: Cynical Fire Hazard Claims and the Technocratic Containment of Dissent [2020] 29(4) Social & Legal Studies 550.

simply be dismissed, but at the same time they are not easily contested given the technical knowledge required in order to do so.[570] In the case of the Apollo House proceedings we find that there are some differences to the situation described in Brabazon's analysis. First, it was a private company rather than state authorities that were bringing the legal action. Secondly, Mazars, did not seem to be relying on any specific health and safety legislation, their claims were more general in nature. However, Mazars had the same goal as the state authorities, to end the occupation, albeit for different reasons. And even though no specific legislation was relied upon, Justice Gilligan did make reference to the health and safety claims in his judgment. It is also important to note that despite the fact that the health and safety claims can be directly linked to the legal obligations Mazars were under as receivers, this does not negate the fact that utilising such claims also had particular benefits as regards protecting Mazars from the public backlash they potentially faced if their legal claim consisted solely of claims around property rights. And it does seem as though Mazars were concerned about their public image during the dispute. In their statement released on December 20th, prior to the initial court application, they claimed that their 'overriding concern is for the health and safety of those who are homeless currently staying in Apollo House.'[571] At the ex parte hearing on the 20th, counsel for Mazars noted that his clients were sensitive to the issue of homelessness and had attempted to avoid legal action.[572] At the hearing on the 21st counsel stated that the application was not about evicting the residents and that the receivers had 'no choice' but to bring proceedings.[573] In their post hearing statement on the same day, Mazars stated that the 'proceedings were never about the evicting of the people currently living in Apollo House but were brought in order to address the serious legal and safety issues

[570] Honor Brabazon 'Yelling 'Fire' in a Crowded Occupation: Cynical Fire Hazard Claims and the Technocratic Containment of Dissent [2020] 29(4) Social & Legal Studies 563-564.

[571] Irish Independent, 'Office Block Receivers Take Court Action to Move Homeless Campaigners' (Dublin, 20 December 2016) https://www.independent.ie/breaking-news/irish-news/office-block-receivers-take-court-action-to-move-homeless-campaigners-35308935.html accessed 2 January 2021.

[572] The Irish Times, 'Receivers Seek Court Order to Regain Possession of Apollo House' (Dublin, 20 December 2016) https://www.irishtimes.com/news/crime-and-law/courts/high-court/receivers-seek-court-order-to-regain-possession-of-apollo-house-1.2912964 accessed 2 January 2021.

[573] Irish Examiner, 'Apollo House Residents can Stay Put Until January 11, High Court Says' (Dublin, 21 December 2016) https://www.irishexaminer.com/news/arid-30769582.html accessed 4 January 2021.

arising from the present situation'.[574] The health and safety claims therefore enabled Mazars to claim that they were compelled to bring legal action and that their primary motivation was a concern for the safety of the residents. They helped the firm to avoid public criticism whilst simultaneously providing grounds to evict the protestors. The receivers clearly did not think that the health and safety claims were enough to win the orders sought. As noted, their core legal claim was still related to the fact that the occupiers were trespassing and therefore infringing upon the receivers' property rights. However, the health and safety claims proved a useful ancillary tactic, providing a supplementary legal argument whilst deflecting public criticism.

The receivers therefore put forward several arguments which had the effect of stripping the occupation of Apollo House of its political aspects. Their key argument was the assertion of private property rights. This highlights their knowledge of the structural disposition of law towards the protection of private property. They also invoked insurance issues and health and safety arguments. Together, these claims helped to characterise the dispute in a way which ignored the reasons for the occupation and the political considerations involved.

III.D.1.(ii) – Home Sweet Home

The activists, four of whom had been named as defendants in the case[575] were represented in court by Ross Maguire (SC) and Michael Lynn (SC). As it was clear that Mazars had legal right to possession and that the activists were trespassing, it was virtually impossible for the activists to construct an argument directly disputing the assertion by Mazars that it had property rights at stake. The activists therefore had two tasks. First, they had to reassure the court that health and safety concerns were unwarranted. Second, they had to construct an argument showing that a particular right or interest of those occupying Apollo House deserved prioritising over the property rights of the receivers or called for the restriction of the receiver's property rights. As regards the first aspect, Mr. Maguire tried to alleviate concerns as regards issues of health and safety connected with the

[574] Tim Healy, 'Apollo House Occupiers can Stay Until After Christmas Court Rules' *Irish Independent* (Dublin, 21 December 2016) https://www.independent.ie/irish-news/courts/apollo-house-occupiers-can-stay-until-after-christmas-court-rules-35312495.html accessed 3 January 2021.

[575] Brendan Ogle and Glen Hansard of Home Sweet Home and Aisling Hedderman and Carrie Hennessy of the Irish Housing Network.

building, stating that any issues had been addressed by his clients.[576] Additionally, one of the defendants, Ms. Aisling Hedderman provided a sworn statement in which she noted that security for the building was being provided by a professional firm, and highlighted the fact that the group did not allow drugs or alcohol in the building.[577] As regards identifying an interest which would trump the property interests of the receivers, counsel for the activists put forward an interesting claim. Mr. Maguire argued that the residents of Apollo House would be unreasonably rendered homeless if they were required to vacate the premises.[578] This, he claimed, provided the 'exceptional circumstances' needed in order to warrant a refusal to grant the orders sought. The activists were therefore arguing that the rights of the residents of Apollo House not to be rendered homeless should be given priority over the property rights of the receivers. Mr. Maguire based this argument on the claim that the homeless accommodation provided by Dublin City Council was insufficient and inadequate and therefore did not constitute alternative accommodation the residents could use if they were forced to vacate Apollo House.[579] This view was endorsed by noted housing activist, Fr. Peter McVerry who, in a sworn statement, questioned the claim that the council had the sufficient beds available to accommodate those living in Apollo House.

The activists therefore were restricted in their arguments due to the particular rationality of the courtroom and the characteristics of the legal form. First, they were forced to engage with the technical health and safety claims of the receivers, which were difficult to rebut. Secondly, their claim regarding the potential fate of the Apollo House residents if the order was granted, had to take a particular form. They had to argue that the public interest should take precedence over the property rights of the receivers. The protestors'

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[576] Irish Examiner, 'High Court Hears Campaigners Don't Believe There are Enough Beds for Homeless in Dublin' (Dublin, 21 December 2016) https://www.irishexaminer.com/news/arid-30769533.html accessed 4 January 2021.

[577] Irish Examiner, 'Apollo House Residents can Stay Put Until January 11, High Court Says' (Dublin, 21 December 2016) https://www.irishexaminer.com/news/arid-30769582.html accessed 4 January 2021.

[578] Irish Examiner, 'Apollo House Residents can Stay Put Until January 11, High Court Says' (Dublin, 21 December 2016) https://www.irishexaminer.com/news/arid-30769582.html accessed 4 January 2021.

[579] Aodhan O'Faolain and Kitty Holland, 'Apollo House: Judge Says Occupants Must Vacate in January' *The Irish Times* (Dublin, 21 December 2016) https://www.irishtimes.com/news/ireland/irish-news/apollo-house-judge-says-occupants-must-vacate-in-january-1.2913959> accessed 3 January 2021.

claim was interesting, in that it attempted to fit an argument which highlighted socioeconomic concerns, into the form allowed by the court, i.e., a question of balancing rights. The protestors therefore tried to work within the legal form, but also to disrupt it, by bringing material context into their arguments.

If this argument had found favour it could be viewed as an important moment of rupture. However, given the structural disposition of the law towards the protection of private property the chances of success were minimal. We have seen in Chapter three that the courts have sometimes found social legislation, which contravenes individual property rights, to be constitutionally valid. However, as I noted the process was mediated by the separation of powers doctrine. The courts were reluctant to invalidate legislation passed by the government. However, in the Apollo House case, the public interest was being expressed through an illegal occupation of a building by private individuals. It was therefore highly unlikely that the judge would allow property rights to be restricted in this instance.

III.D.1.(iii) – Judgment

Justice Gilligan granted the orders requested by Mazars ruling that the occupiers were trespassing.[580] As might be expected, given our theoretical discussion above, Justice Gilligan clearly viewed the dispute as one between the private property rights of the receivers and whatever countervailing claim the activists could produce. And, as predicted, the judgment favoured the protection of property rights. Justice Gilligan presented this characterisation and the judgement which flowed from it, as inevitable. He noted that the law was clear in relation to trespass and in relation to the rights of Mazars who controlled the property and, stated that the courts were obliged to 'apply the law'.[581] He also asserted that the exceptional circumstances which would give the court discretion not to grant the orders requested did not exist in this instance, and that the occupiers' arguments fell short in this regard.

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[580] Aodhan O'Faolain and Kitty Holland, 'Apollo House: Judge Says Occupants Must Vacate in January' *The Irish Times* (Dublin, 21 December 2016) https://www.irishtimes.com/news/ireland/irish-news/apollo-house-judge-says-occupants-must-vacate-in-january-1.2913959 accessed 3 January 2021.

[581] Aodhan O'Faolain and Kitty Holland, 'Apollo House: Judge Says Occupants Must Vacate in January' *The Irish Times* (Dublin, 21 December 2016) https://www.irishtimes.com/news/ireland/irish-news/apollo-house-judge-says-occupants-must-vacate-in-january-1.2913959 accessed 3 January 2021.

The protection of property rights in the Irish legal system is given such emphasis that there are few circumstances in which a court would desist from enforcing them. Therefore, whilst the activists' argument in relation to the conditions of homeless accommodation in Dublin had merit, it was always unlikely to convince the judge to desist from granting injunctive relief. The structural disposition of the law towards the protection of private property rights, legitimised through notions of judicial objectivity, means that legal arguments which seek to justify efforts to challenge those rights must be utterly compelling if they are to stand any chance of success. Here, the activists' claim ultimately turned on whether one considered the alternative accommodation being provided by Dublin City Council to be adequate. This claim, however, was open to such subjective interpretation that it was always unlikely the court would choose to occupy itself with determining the suitability of Dublin's hostel accommodation.

The judge also noted the health and safety concerns raised by the receivers and stated that he accepted the assurances of Dublin City Council regarding the availability of alternative suitable accommodation.[582] However, in a somewhat surprising move, he placed a stay of three weeks on the order to vacate the property meaning that the occupiers did not have to leave until January 11th, 2017.[583] Why did he do so? Given his endorsement of each of Mazar's claims it is difficult to conclude that it was because of the legal arguments put forward by counsel for the Home Sweet Home activists. Instead, it may have been due to Mazars willingness to accept such an outcome. At the ex parte hearing on December 20th, Mr. Fanning had submitted that his clients would be amenable to accepting a timeline from the court for the occupiers to leave the building if the injunction was granted.[584] At the hearing on the 21st, Home Sweet Home had sought a six-month stay on the order whilst Mazars argued any stay should only last a number of days.[585] The judge therefore may have been influenced by the willingness of the receivers

[582] Irish Examiner, 'Apollo House Residents can Stay Put Until January 11, High Court Says' (Dublin, 21 December 2016) https://www.irishexaminer.com/news/arid-30769582.html accessed 4 January 2021.

[583] Aodhan O'Faolain and Kitty Holland, 'Apollo House: Judge Says Occupants Must Vacate in January' *The Irish Times* (Dublin, 21 December 2016) https://www.irishtimes.com/news/ireland/irish-news/apollo-house-judge-says-occupants-must-vacate-in-january-1.2913959 accessed 3 January 2021.

[584] Ann O'Loughlin, 'Receivers Seek to Take Back Apollo' *Irish Examiner* (Dublin, 21 December 2016) https://www.irishexaminer.com/news/arid-20436113.html accessed 4 January 2021.

[585] Aodhan O'Faolain and Kitty Holland, 'Apollo House: Judge Says Occupants Must Vacate in January' *The Irish Times* (Dublin, 21 December 2016)

to accept some form of stay on the order. The judge may also have been influenced by the political context of the case. It is possible that, in this instance socioeconomic factors were considered in the decision. The moral aspect of the case may also have impacted the judge's decision. Although Justice Gilligan accepted Dublin City Council's evidence that sufficient alternative accommodation was available, he may have been influenced by the fact that the activists were offering a more comfortable standard of accommodation over the Christmas period and that the residents of Apollo House seemed eager to stay there. The stay, which allowed the occupation to continue during Christmas, enabled the court to vindicate the property rights of the receivers, whilst also defusing the political impact of the strict application of the legal rules, which may have resulted in the residents being evicted during the festive period. The granting of the stay may therefore be seen as a partial victory for the activists, in their attempt to politicise the proceedings. However, as we shall see from the second hearing, this was to be a temporary departure from the status quo.

III.D.2 – January 11th, 2017, Hearing & the Application for an Extension on the Stay

III.D.2.(i) – Home Sweet Home

On the morning of January 11th, 2017, the day on which the stay placed on the High Court's order to vacate was to expire, the activists brought an application before the court to have that stay extended.[586] At the hearing the four named defendants in the case were again represented by Ross Maguire SC. Mr. Maguire told the court that his clients had made all efforts to comply with the order to vacate, but problems regarding the suitability of alternative accommodation had arisen. He contended that assurances made by the government as regards the provision of suitable alternative accommodation had not been met and informed the court that some residents had returned to Apollo House after finding the alternative accommodation provided unacceptable. [587] He stated the efforts

https://www.irishtimes.com/news/ireland/irish-news/apollo-house-judge-says-occupants-must-vacate-in-january-1.2913959 accessed 3 January 2021.

[586] Aodhan O'Faolain, 'Apollo House Occupiers Lose High Court Application' *The Irish Times* (Dublin, 11 January 2017) https://www.irishtimes.com/news/crime-and-law/courts/high-court/apollo-house-occupiers-lose-high-court-application-1.2933240 accessed 11 January 2021.

[587] Aodhan O'Faolain, 'Apollo House Occupiers Lose High Court Application' *The Irish Times* (Dublin, 11 January 2017) https://www.irishtimes.com/news/crime-and-law/courts/high-court/apollo-house-occupiers-lose-high-court-application-1.2933240 accessed 11 January 2021.

were ongoing to find suitable accommodation for those remaining in the building, but more time was needed.[588] Mr. Maguire asked the court for a seven-day extension to the stay on the order to vacate. The activists therefore seemed to be persisting with the argument which they utilised in the first hearing. They were claiming that the poor standard of accommodation being offered by Dublin City Council effectively meant that the residents of Apollo House would essentially be rendered homeless unless the stay was extended until suitable accommodation could be sourced. Perhaps the activists were encouraged by the belief that this argument had convinced Justice Gilligan to grant the stay in the first place. They could also now support their claim by pointing to the fact that some of those who had been residing in Apollo House, and who had attempted to transition to other state provided accommodation, had returned, as the accommodation was inadequate. Again, the activists were attempting to politicise the court proceedings by bringing socioeconomic considerations into the courtroom. They were attempting to bring their political argument with the state as regards the adequacy of homeless accommodation into the courtroom and were trying to use the government's failings in this regard, in order to prevail over the property rights assertions of the receivers.

III.D.2.(ii) – Mazars

At the second hearing Mazars opposed the activists' application for an extension on the stay. What is striking about the receivers' arguments at the second hearing, is their insistence that the court focus on the issue of property rights. Mr. Fanning was keen to direct the court towards what he considered the core issues in the case, the illegality of the occupiers' trespass and the property rights of the lawful owners, the receivers.[589] He

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Irish Examiner, 'Apollo House Residents Ignore Court Order to Leave; Coveney Encourages 'Continued Engagement' (Dublin, 11 January 2017) https://www.irishexaminer.com/news/arid-30771964.html accessed 11 January 2021.

[588] Aodhan O'Faolain, 'Apollo House Occupiers Lose High Court Application' *The Irish Times* (Dublin, 11 January 2017) https://www.irishtimes.com/news/crime-and-law/courts/high-court/apollo-house-occupiers-lose-high-court-application-1.2933240 accessed 11 January 2021.

[589] Aodhan O'Faolain, 'Apollo House Occupiers Lose High Court Application' *The Irish Times* (Dublin, 11 January 2017) https://www.irishtimes.com/news/crime-and-law/courts/high-court/apollo-house-occupiers-lose-high-court-application-1.2933240 accessed 11 January 2021.

described the matter as a 'very simple law case involving illegal trespass'[590] The receivers also introduced a separation of powers argument into proceedings, with Mr. Fanning arguing that the issue of whether the alternative accommodation being offered to the occupiers was sufficient was a political issue which lay beyond the jurisdiction of the court.[591] Accordingly he asked the court not to grant the extension requested. The receivers therefore were attempting to narrow the focus of the court to the issue of property rights. They were likely surprised at the length of the stay granted at the original hearing and decided to focus on their strongest argument at the second hearing, their property rights. Their aim was to remind the court that its first priority should be to protect Ireland's system of property ownership.

III.D.2.(iii) – Judgment

I noted that, at the first hearing, it was somewhat surprising that Justice Gilligan placed a stay of such length on the order to vacate. At the second hearing, the judge was quick to emphasise that his initial judgement was only a momentary departure from established legal norms. In delivering his judgment dismissing the application of the activists, Justice Gilligan, endorsed the arguments of the receivers, noting that the case was concerned with private property rights.[592] He reiterated that the court had found that the occupiers had no legal right to be on the premises and that the receivers were entitled to possession. He noted that the court had granted the occupiers 'a more than generous stay' [593] and

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[590] Irish Examiner, 'Apollo House Residents Ignore Court Order to Leave; Coveney Encourages 'Continued Engagement' (Dublin, 11 January 2017) https://www.irishexaminer.com/news/arid-30771964.html accessed 11 January 2021.

[591] Aodhan O'Faolain, 'Apollo House Occupiers Lose High Court Application' *The Irish Times* (Dublin, 11 January 2017) https://www.irishtimes.com/news/crime-and-law/courts/high-court/apollo-house-occupiers-lose-high-court-application-1.2933240 accessed 11 January 2021.

[592] Aodhan O'Faolain, 'Apollo House Occupiers Lose High Court Application' *The Irish Times* (Dublin, 11 January 2017) https://www.irishtimes.com/news/crime-and-law/courts/high-court/apollo-house-occupiers-lose-high-court-application-1.2933240 accessed 11 January 2021.

[593] Aodhan O'Faolain, 'Apollo House Occupiers Lose High Court Application' *The Irish Times* (Dublin, 11 January 2017) https://www.irishtimes.com/news/crime-and-law/courts/high-court/apollo-house-occupiers-lose-high-court-application-1.2933240 accessed 11 January 2021.

stated that the court could not 'stand idly by and allow the trespass to continue.' [594] He said that he did not want to give the impression that courts would take 'a benevolent' attitude in cases where public-owned buildings are being illegally occupied.[595] This, he said would be intolerable in a democratic society. This reassertion of the sanctity of property rights in the Irish legal system was rationalised by the judge's endorsement of the separation of powers argument put forward by Mazars. Justice Gilligan agreed with the contention of Mr Fanning that the suitability of the alternative accommodation being offered to the occupiers was not an issue which the court could concern itself with, stating that the issue was a 'matter for government'.[596]

Thus, if the socioeconomic factors which underpinned the activists' arguments, had any impact on the decision to put a stay on the injunction, these factors were decisively disregarded in the second judgment. Instead, the judge's decision focused narrowly on the issue of private property rights. Interestingly, the judge relied upon the separation of powers doctrine to justify his disregard for the political factors which surrounded the case. In this instance the doctrine was not in tension with private property rights, as it had been in the caselaw outlined in Chapter three. Instead, it allowed the court to ignore the socioeconomic context of the case and to ensure the protection of private property.

I will make some general observations on the legal proceedings in the conclusion of this chapter. First, I will consider the way in which the legal form influenced the political debate surrounding the occupation.

IV - The Political Debate

IV.A – Introduction

As noted at the beginning of this chapter, the influence of the legal form is not restricted to the outcomes of court judgments. It also helps to shape the way in which we view

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[594] Ian Begley, 'Activists Defy Court Order to Quit Apollo' *Irish Independent* (Dublin, 12 January 2017) 22.

[595] Aodhan O'Faolain, 'Apollo House Occupiers Lose High Court Application' *The Irish Times* (Dublin, 11 January 2017) https://www.irishtimes.com/news/crime-and-law/courts/high-court/apollo-house-occupiers-lose-high-court-application-1.2933240 accessed 11 January 2021.

[596] Aodhan O'Faolain, 'Apollo House Occupiers Lose High Court Application' *The Irish Times* (Dublin, 11 January 2017) https://www.irishtimes.com/news/crime-and-law/courts/high-court/apollo-house-occupiers-lose-high-court-application-1.2933240 accessed 11 January 2021.

social relations and the organisation of society, particularly through its symbolic power. This includes moments of protest and dissent. Therefore, this section will consider the ways in which the legal form influenced the occupation outside of the legal proceedings in the political realm. Politically the aim of the activists was to highlight the country's homelessness and housing crisis. This included drawing attention to the standards in homeless accommodation provided by Dublin City Council, criticising the failure to properly utilise NAMA in order to help alleviate the homelessness crisis, and exposing the failures in government housing policy. For both the government and Dublin City Council this became an extremely embarrassing incident. As noted, the occupation attracted a significant amount of public support and media attention, both national and international. The homelessness situation in Ireland had been deteriorating for a number of years and frustration was growing at the government's inability to tackle it. The situation was at its worst in the capital and Dublin City Council was struggling to cope with the increasing numbers of homeless people. The occupation therefore brought unwanted attention to the government and Dublin City Council and it is logical to presume that they wanted to bring it to a conclusion as quickly as possible.

IV.B – The Illegality of the Apollo House Occupation

I have described above the arguments which dominated the political debate: the state's arguments relating to health and safety, particularly around the unsuitability of the building and the level of supports that HSH could provide; the claim that Dublin City Council had sufficient accommodation to provide shelter for those residing in Apollo House; and the counterclaims from the activists as regards the adequacy of that accommodation and the standard of shelter that Home Sweet Home was offering. What was notably absent from this political debate was the fact that the occupation was illegal. The general public did not seem to have any issue with the legal status of the occupation as the protest had widespread support with large numbers donating financially and thousands offering to volunteer in Apollo House. The Irish media too, hardly known for its favourable coverage of political dissent, particularly when property rights are illegally being infringed upon, placed little focus on the illegality of the occupation. Even after the High Court decision around injunctive relief, in which Justice Gilligan explicitly noted that those occupying Apollo House were illegally trespassing, the media largely ignored the fact that the protestors were breaking the law. Indeed, it seems that the media's silence on this aspect of the occupation was a source of frustration for the government.

According to a cabinet source, Minister Coveney was particularly 'angry and agitated' at the coverage of RTÉ for its failure to focus on the legal implications of the activist's actions.[597] The source noted that it 'was very peculiar to have the national broadcaster engaging in idolatry around people advocating that it is legitimate to break the law and take over private property'. And it seems as though the lack of media attention on the illegality of the occupation deterred the state authorities from commenting upon it themselves. Members of the government rarely commented on this aspect of the protest and desisted more generally from criticising the activists. Instead, the state authorities seemed to have decided that their best course of action was to try to undermine the occupation by characterising it as a well-meaning but misguided attempt to solve a problem that, whilst a serious issue, was one which the government was getting under control.

It is worth pausing to consider why the issue of legality was largely absent from the political debate around Apollo House. If the theoretical understanding of law in the neoliberal period outlined above is correct, one would imagine the opposite would be true. Given the increasing mediation of social and political life by the legal form, it would seem to follow that the illegality of an occupation would draw attention. I have noted Brabazon's argument that, in the neoliberal era, dissent is subject to what she calls a 'procedural morality', whereby, the legitimacy of protest is 'judged less on the moral infraction it seeks to rectify and more on the morality of the means it assumes to do so'.[598] Dissent is deemed legitimate if it is compatible with a set of legal regulations which stipulate what is permissible. Modes of protest which break the law are deemed illegitimate. However, this does not seem to have been the case in this instance. This is likely due to a number of factors. First, the scale of the housing crisis meant that the moral infraction that the activists were trying to highlight was so great that people were willing to accept the illegality of the occupation. Secondly, the fact that the occupation took place over the Christmas potentially had an effect on people's' willingness to support it. Thirdly, the fact that the building had been vacant and was under the control of a

[597] Philip Ryan, 'Minister's Fury Over Tubridy's Coverage of Protest Group' *Sunday Independent* (Dublin, 15 January 2017) 4.

[598] Honor Brabazon, 'Dissent in a Juridified Political Sphere' in Honor Brabazon (ed), *Neoliberal Legality: Understanding the Role of Law in the Neoliberal Project* (Routledge 2017) 175.

receiver, meant that the idea of property rights being infringed did not seem important, as there was no obvious victim, or at least a victim who would arouse sympathy.

A fourth factor may have been the fact that the activists, to some extent, embraced the illegality of their actions. They referred to the occupation as an act of civil disobedience,[599] a form of protest that has a particular cache of legitimacy given its links to civil rights movements. This legitimacy means that civil disobedience may be a type of protest which passes the procedural morality test. Further, civil disobedience operates on the idea that a gap sometimes exists between justice and legality and in particular instances it is legitimate to disobey the law in order to highlight the injustice. This discourse, emphasising the morality and therefore the legitimacy of what Home Sweet Home was doing, despite its illegality, was evident in comments made by the activists. Brendan Ogle stated that not only were the protestors entitled to takeover Apollo House, but they were 'morally obliged' to do so.[600] He spoke of a 'threshold of indecency' being crossed in terms of the growing homeless population.[601] The activists often spoke of their 'duty of care' towards the residents of Apollo House.[602] The mood was summed up by one

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[599] Amy Mulvaney, 'We are Involved in an Act of Civil Disobedience... It is an Illegal Act,' Glen Hansard Tells The Late Late Show' *Irish Independent* (Dublin, 16 December 2016) https://www.independent.ie/entertainment/television/tv-news/we-are-involved-in-an-act-of-civil-disobedience-it-is-an-illegal-act-glen-hansard-tells-the-late-late-show-35299949.html accessed 30 December 2020.

Allison Bray and Laura Larkin, 'Papers Served on Apollo House' *Irish Independent* (Dublin, 20 December 2016) https://www.independent.ie/irish-news/courts/papers-served-on-apollo-house-35309775.html accessed 2 January 2021.

[600] Kitty Holland and others, 'Homeless Should be Allowed Stay in Apollo House, Says Zappone' *The Irish Times* (Dublin, 19 December 2016) https://www.irishtimes.com/news/social-affairs/homeless-should-be-allowed-stay-in-apollo-house-says-zappone-1.2911420 accessed 1 January 2021.

[601] Kitty Holland, 'Apollo House: Some Homeless Residents Leave the Property' *The Irish Times* (Dublin, 22 December 2016) https://www.irishtimes.com/news/social-affairs/apollo-house-some-homeless-residents-leave-the-property-1.2915986 accessed 4 January 2021.

[602] Irish Independent, 'Apollo House Occupiers Refuse to Vacate Building Despite Court Order' (Dublin, 11 January 2017) https://www.independent.ie/breaking-news/irish-news/apollo-house-occupiers-refuse-to-vacate-building-despite-court-order-35360054.html accessed 11 January 2021.

Cian Murray and Aodhan O' Faolain, 'One Person Remains in Apollo House as Home Sweet Home Occupation Ends' *Irish Independent* (Dublin, 12 January 2017) https://www.independent.ie/irish-news/one-person-remains-in-apollo-house-as-home-sweet-home-occupation-ends-35362254.html accessed 12 January 2021.

supporter of the group who stated that, 'What they're doing is illegal, but it's a matter of social justice and sometimes the law doesn't necessarily mean justice.'[603] It seems therefore, that despite the tendency of the legal form to depoliticise and to put emphasis on procedure over the substantive issue, notions of morality and justice are difficult to dislodge. This is particularly the case when there is considerable awareness of the moral infraction highlighted and when the victim of the act is not an entity that arouses much sympathy.

IV.C – Administrative Law in the Political Sphere

It is clear that the state authorities felt restricted in their ability to highlight the illegality of the occupation and consequently to criticise the activists. However, this does not mean that the legal form didn't have a role to play in the political debate. Above, I discussed the invocation of health and safety claims by Mazars and how this could be seen as an attempt to utilise the public and private characteristics of administrative law in order to avoid public criticism whilst still closing down dissent. Here, I would like to argue that something similar happened in the political sphere. Criticising the activists on grounds of health and safety was a key aspect of the state authorities' strategy. In one sense these arguments were quite similar to those made by Mazars in the High Court. For example, on December 21st, the Minister for Housing Simon Coveney, whilst admitting that he hadn't been inside Apollo House, stated that he did not think that it was 'a solution for people who are homeless to actually be accommodated in a building that's not suitable for that.'[604] The following day, Brendan Kenny, Deputy Chief Executive of Dublin City Council echoed this criticism when speaking on the *Morning Ireland* show on RTÉ radio. He stated that the council felt that 'Apollo House is totally unsuitable for residential accommodation.'[605] He contested the claims of the activists that residents in Apollo

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[603] Joyce Fegan, 'Act of Highly Organised 'Civil Disobedience' and Humanity' *Irish Examiner* (Dublin, 19 December 2016) https://www.irishexaminer.com/news/arid-20435818.html accessed 1 January 2021.

[604] Joyce Fegan, 'Coveney: 'I Will Work with Apollo House Activists' *Irish Examiner* (Dublin, 21 December 2016) https://www.irishexaminer.com/news/arid-30769496.html accessed 3 January 2021.

[605] Gavin White, 'Apollo House Campaigners 'Very Happy' with Visit from Receivers' *Irish Independent* (Dublin, 23 December 2016) https://www.independent.ie/irish-news/courts/apollo-house-campaigners-very-happy-with-visit-from-receivers-35316278.html accessed 5 January 2021.

House felt safe whilst residing there[606], and doubted their assertion that the building itself was safe.[607] He said that the council was 'concerned about what may happen in Apollo House between now and the 11th of January', the date on which the court had ordered the occupiers to vacate the building.[608] Owen Keegan, the Chief Executive of the council made similar remarks during his appearance on *The Pat Kenny Show* on Newstalk radio the following week, stating that the activists were providing homeless accommodation in a 'building that is substandard', and arguing that the council would be condemned if they accommodated people in a building that, like Apollo House, didn't meet fire and safety standards.[609] The health and safety criticism was also utilised in a slightly different form to that which the receivers had relied upon in the Hight Court, with state officials raising concerns not just about the building itself but over the nature of the supports and care being provided in Apollo House. These officials were keen to create the impression that the activists were amateurs working in an area which required professional expertise. For example, Minister Coveney, speaking in the Dáil on December 16th stated that the way to deal with the homelessness crisis was not 'to occupy a building and try and put supports together in an ad hoc way' and asserted that Apollo House was not a suitable location to care for people with complex needs.[610] On December 20th a spokesperson for the government again noted the complex needs of homeless people, stating that in order to provide homeless accommodation, issues such as addiction, safety, hygiene and medical

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[606] Gavin White, 'Apollo House Campaigners 'Very Happy' with Visit from Receivers' *Irish Independent* (Dublin, 23 December 2016) https://www.independent.ie/irish-news/courts/apollo-house-campaigners-very-happy-with-visit-from-receivers-35316278.html accessed 5 January 2021.

[607] Vivienne Clarke, 'Council 'Concerned' Over Safety Claims in Apollo House' *Irish Times* (Dublin, 22 December 2016) https://www.irishtimes.com/news/social-affairs/council-concerned-over-safety-claims-in-apollo-house-1.2915366 accessed 4 January 2021.

[608] Vivienne Clarke, 'Council 'Concerned' Over Safety Claims in Apollo House' *Irish Times* (Dublin, 22 December 2016) https://www.irishtimes.com/news/social-affairs/council-concerned-over-safety-claims-in-apollo-house-1.2915366 accessed 4 January 2021.

[609] Joe Leogue, 'Simon Coveney Asked to Clarify 'Beds' for Homeless' *Irish Examiner* (Dublin, 29 December 2016) https://www.irishexaminer.com/news/arid-20436920.html accessed 6 January 2021.

[610] Marie O'Halloran, 'Coveney: Emergency Beds Available for Anyone who Wants One' *The Irish Times* (Dublin, 16 December 2016) https://www.irishtimes.com/news/politics/oireachtas/coveney-emergency-beds-available-for-anyone-who-wants-one-1.2909252 accessed 30 December 2020.

needs had to be addressed.[611] The authorities also made this criticism indirectly, with Minister Coveney arguing that the homeless people residing in Apollo House needed to move to facilities where 'professionals' could look after their needs.[612] Similarly, in their statement following the granting of the injunction by the High Court on 21st December, Dublin City Council noted how the alternative accommodation available to the Apollo House residents was staffed by people with 'the required skills and competencies' to provide care for homeless people.[613]

I would argue that what was happening here was that the reach of the legal form, embodied in the dual aspects of administrative law, was extending beyond the courtroom into the political sphere. I have noted the claim that, in the neoliberal period, law increasingly structures both our social relationships and the political sphere. Here, I contend that the health and safety arguments put forward in court by the receivers were accompanied by their employment by the state authorities in the political debate surrounding the occupation, and that their utilisation served a similar purpose as in the courtroom even though the element of judicial coercion was absent in the political sphere. I have noted above that the state authorities were reticent to highlight the fact that the activists and residents of Home Sweet Home were illegally trespassing and infringing upon private property rights and that this was due to the high levels of public support which the occupation had secured. The authorities were therefore in a similar position to a litigant who has a compelling legal argument which they are unwilling to utilise for fear of the public relations damage it would cause if they did. Instead, like the litigant who employs administrative law through a health and safety claim in order to achieve the result they wish whilst appearing to be concerned with the public interest, here the state professed concern with the health and safety of the residents of Apollo House in order to undermine the occupation whilst avoiding the criticism that highlighting the illegality

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[611] Harry McGee and Barry O'Halloran, 'Government Avoids Condemning Apollo House Occupation' *The Irish Times* (Dublin, 20 December 2016) https://www.irishtimes.com/news/politics/government-avoids-condemning-apollo-house-occupation-1.2913524 accessed 1 January 2021.

[612] Marie O'Halloran, 'Coveney Asks Apollo House Occupants to Work with State' *The Irish Times* (Dublin, 21 December 2016) https://www.irishtimes.com/news/politics/oireachtas/coveney-asks-apollo-house-occupants-to-work-with-state-1.2914259 accessed 3 January 2021.

[613] Irish Examiner, 'Apollo House Residents can Stay Put Until January 11, High Court Says' (Dublin, 21 December 2016) https://www.irishexaminer.com/news/arid-30769582.html accessed 4 January 2021.

of the occupation might have attracted. And the fact that the health and safety claims being made by the state authorities, were similar to concerns that were deemed credible by the High Court judge in the legal proceedings undoubtedly helped to reinforce this argument.

The activists of course made efforts to counter these claims. In the courtroom and in their media responses to Mazar's statements, the activists highlighted the Dublin Fire Brigade inspection, the high standard of work that had gone into converting the building, the use of a private security team to ensure residents' safety and the efforts made to employ volunteers with the requisite skills to support the residents. This undoubtedly had an effect on the political debate outside the courtroom as well. And in a skilful rhetorical manoeuvre, the activists in fact managed to turn the debate regarding the suitability of Apollo House for providing homeless accommodation, into one about the standards of accommodation being provided by Dublin City Council to the city's rough sleepers. This perhaps shows the limits for the authorities of attempting to utilise the characteristics of administrative law in the political field. In the courtroom, as per the theoretical analysis above, the court will reproduce the status quo/prevailing class relations. Health and safety claims provide another avenue for the courts to legitimate their decision to shut down dissent. They can therefore be particularly effective in that arena. In the political sphere however, there is no such institution who can determine whether such arguments are successful. Instead, public opinion is influenced by numerous factors. And whilst health and safety claims are one of these factors, one which potentially could be effective, the Apollo House episode shows that they can be countered by clever political arguments.

IV.D – The Symbolic Impact of Judicial Decisions – Criticising the Court

Another aspect of the relation between the legal and the political in this episode is the public response of the activists to the decisions of the court. The legitimacy of judicial decisions is based on their supposed rationality, objectivity, and autonomy from political considerations. Of course, the accuracy of this image is something that Left legal theorists have criticised. However, in the public sphere this image has considerable influence. The reverence with which court decisions are held means that they are also a valuable political tool. If a judicial decision supports your political viewpoint, it can be used in order to suffuse your claim with a seeming objectivity which conceals the self-interest apparent in a raw political argument. Judicial backing can therefore provide an advantage in political debate. In the case of Apollo House, the legal decisions promulgated the property rights

claims that the state authorities felt unable to make. More generally it indicated that what the activists were doing was unacceptable. Despite this, the activists made little if any attempt to push back against the logic of the court's decision. In fact, the entire episode was marked by an acceptance of the inevitability of, and even in a sense, the propriety of the court's decision. The activists were at times scathing in their criticism of the government and Dublin City Council. However, it is difficult to find any instances in which the activists publicly criticised the judgments of Justice Gilligan during the episode. Speaking after the judgment on the 21st, the defendants spoke positively of the judge's decision. Brendan Ogle stated that the group was 'absolutely thrilled' that the residents would be able to stay in Apollo House 'until at least the 11th January'.[614] Glen Hansard, told the *Sunday Independent* newspaper that he felt the judgment was fair.[615] He said that the group had expected they would be ordered to leave before Christmas and stated that 'the judge ruled very well on this as far as we are concerned.' After the judge ruled against extending the stay on the order to vacate, the activists focused their attention on criticising the government. Some attention was drawn to the fact that the court order granted on the 21st had made the continued use of Apollo House unviable, but this was not framed as a criticism of the court.[616] It is clear that the activists did not agree with the court's decision, in that they clearly felt they should be permitted to continue to occupy Apollo House, at least for a period of time. And it is also apparent that the activists were not anxious to appear deferential to legal authority, evidenced by their regular assertions that they were willing to defy the orders of the court. However there seemed to be little effort to condemn the decisions of Justice Gilligan or to link them to the reproduction of a system of property rights which leads to the type of economic injustice which the activists were trying to highlight. Kitty Holland, an *Irish Times* journalist, wrote that one of the achievements of Home Sweet Home was that they had prompted a judge to explicitly state that 'the rights of private property trump the needs of the vulnerable people who

[614] Nicola Anderson, 'Activists Claim Win as Apollo House to Host Homeless Over Christmas' *Irish Independent* (Dublin, 22 December 2016) 16.

[615] Wayne O'Connor, 'Hansard: Apollo House Money Will be Given to Other Charities' *Sunday Independent* (Dublin, 25 December 2016) 9.

[616] Cian Murray and Aodhan O' Faolain, 'One Person Remains in Apollo House as Home Sweet Home Occupation Ends' *Irish Independent* (Dublin, 12 January 2017) https://www.independent.ie/irish-news/one-person-remains-in-apollo-house-as-home-sweet-home-occupation-ends-35362254.html accessed 12 January 2021.

had found a place they called home.'[617] The activists correctly criticised the government policies which are enabled by this state of affairs. But they failed to condemn the legal system which enforces it. One could argue that this was not the aim of the Home Sweet Home campaign, that their goal was to highlight the fact that government policies were contributing to the growing housing crisis, not to question the role of the legal system in reproducing systemic inequality. There is an obvious critique of this position, one which highlights the fact that social and economic injustice is structural, that it cannot be tackled my merely focusing on symptomatic policy decisions but must be dealt with at a systemic level. However, I wish to put forward a narrower, if related, critique. I have noted the way in which judicial decisions are legitimised through the appearance of objectivity. I have also highlighted, in Chapter one, the Left critique of this position, which posits that legal decisions are not determined by 'the law' as a neutral arbiter or objectively identifiable norm, but instead are simply subjective 'political' viewpoints. Legal decisions can therefore be viewed as simply a particular point of view, not as objective facts. However, given the fact that the myth of objectivity has resonance, legal decisions have a particular weight behind them. They are therefore potentially powerful tools in a political debate. In the case of Apollo House, the judgements of Justice Gilligan can also be viewed in this way. They were not a conclusive determination or established fact but a powerful political viewpoint. And this viewpoint was that the actions of the activists were improper, that the protection of the country's system of property rights was more important than highlighting and mitigating the homelessness crisis, and that the occupation should end. Given the political influence of a judicial decision, which could potentially carry more political weight than the claims of the state authorities, it seems bizarre that the activists would not make efforts to criticise and undermine it. Instead, their failure to do so ran the risk of appearing as an implicit endorsement of the objectivity of the decision, as if the legal decision was morally wrong but must be accepted because it was the result of a rational process.

IV.E – The Symbolic Impact of Legal Proceedings – Know Your Enemy

Before concluding this section, I would like to discuss another way in which the law can symbolically impact the political sphere. In a situation like Apollo House, in which the

[617] Kitty Holland, 'Campaign Intent on Continuing Conversation' *Irish Times* (Dublin, 13 January 2017) 5.

moral infraction highlighted is so great that the authorities are reticent to mention the illegality of the protest, the instigation of legal proceedings against the party attempting to highlight the moral infraction could constitute a public relations disaster. However, it is arguable that the symbolic impact of the legal proceedings and thus the political impact, was lessened here due to the identity of the claimants in the case. As noted above, a key aim of Home Sweet Home was to highlight the link between government policy, NAMA, and the country's housing and homelessness crisis. The occupation of a 'NAMA building' allowed them to make this link. The spectacle of NAMA and by extension the state in general, instigating legal proceedings against a group of activists who were seeking to provide homeless accommodation to rough sleepers over Christmas would have provided a potent image of the systemic injustice the activists were trying to highlight. It would have helped to reinforce a picture of a state betrothed to the interests of foreign capital, more interested in encouraging profiteering in Ireland's housing market than catering to the needs of its most vulnerable citizens. Further, the potential impact of this narrative may have given state officials reason to proceed with caution in their efforts to gain possession of the property. This is not to say that NAMA or state authorities would have resisted bringing a legal action to recover possession if necessary. But they may have been more willing to meet some of the demands of the activists in exchange for ending the occupation if this would have avoided the spectacle of legal proceedings. Instead, the legal action was brought by a professional services firm which was not directly connected to the issue the activists were trying to highlight and which was, due to the legal obligations imposed upon it by reason of its position in relation to the property, effectively compelled to bring an action against the activists. This disconnect between the issue the activists were trying to highlight and the entity bringing legal proceedings against them was visible in the relationship between Home Sweet Home and the receivers. The interactions between the parties were largely cordial, with Home Sweet Home desisting from criticising the actions of Mazars. This may have been part of a legal strategy to appease the receivers in the hopes that they would be less likely to bring legal proceedings if their fears regarding the safety of the building were allayed. Nonetheless, one would imagine that if NAMA had been the party to instigate legal proceedings the activists would have taken a much more hostile stance. And it is arguable that such a position would have better elucidated the conflict between a socially conscious group of activists and an uncaring state. Undoubtedly the fact that a receiver, an entity which in its own way is indelibly linked to Ireland's housing crisis, was bringing the legal action against the

activists, did have its own symbolic cache. And it could be argued that the average citizen may not have distinguished between the legal action being initiated by NAMA or by Mazars. However, the fact that it was the latter and not the former bringing the action potentially limited the political impact of the occupation.

Conclusion - Reflections on Apollo House

So, what can be learned from the Apollo House occupation? To answer this question, we must remind ourselves of what the activists aimed to achieve when they decided to take over a disused office building in central Dublin. Their two central aims were to provide accommodation to Dublin's rough sleepers in the short-term and to highlight the failures of government policy in relation to Ireland's housing crisis. For the first of these aims it is obvious that being able to physically occupy the building was essential. But this was also important for the second aim. In order to bring scrutiny to government policy failures, the activists needed to garner media attention. And the attention they did attract was linked to the physical occupation of the building. Without it, it is doubtful their political claims would have received so much focus. The activists therefore wanted to continue the physical occupation for as long as possible, and to politicise the issue of homelessness. In contrast, the state authorities wanted to end the occupation as and to depoliticise the issue, so that it would disappear from public view. Remaining in the building was therefore essential to the protestors' cause. Their ability to stay in building was of course threatened by the legal proceedings initiated by Mazars. The activists had four options available to them: Vacate as soon as legal action was instigated; ignore the legal proceedings and stay in the building until forcefully evicted; engage with legal proceedings but vacate if ordered by the court to do so; or engage with legal proceedings but defy any court order to leave. Clearly the activists decided that they were not going to simply vacate. It is also clear that the activists, at some point, decided it best not to expose themselves to a coercive eviction. The violence that lies behind the law therefore was a consideration and is one which should always be to the forefront of activists' thoughts.

The protestors therefore decided to engage with the legal proceedings. As we have seen these proceedings were structured around the issue of private property. This impacted the legal arguments made, and the ultimate decision of the courts. The structural disposition of the law towards the protection of private property meant that a win for the protestors would have been extremely significant, but also that it was unlikely to happen. The protestors tried to counteract the depoliticising nature of the legal form, by

introducing socioeconomic context into their legal argument about private property rights. This was ultimately rejected by the court. However, I suggested that it may have influenced the decision to grant the stay on the injunction. Given that this enabled the occupation to continue for another month, which further raised the profile of the protest, and put further pressure on the government, it can be argued that it was prudent of the protestors both to engage with court and to try and contextualise the protest.

This chapter has also highlighted the fact that the legal form can influence the political debate outside the courtroom. In terms of gaining media attention and foregrounding the issue of homelessness in this political debate, it is interesting to note that the illegality of the occupation helped in this regard. If the activists had hired a building and offered accommodation to homeless people, it is unlikely there would have been as much focus on their actions. Illegality can therefore by a useful tool in bringing public attention to a political intervention. The court proceedings themselves also brought attention to the issue as they provided an 'event' for the media to focus upon. I drew attention to the fact that the illegality of the occupation did not seem to negatively affect public perception of the activists' cause. However, it seems there are factors that need to be taken into account when contemplating whether an illegal action will gain support. The main considerations are the depth of the moral infraction being publicised and who, if anyone, will be the 'victim' of the illegal act. If the moral infraction is great, and there is no 'victim' or if the damage caused is negligible, the action is more likely to gain support. Framing the action as civil disobedience can also help to gain public support. Showing that the issue being politicised is so important, that there is no choice but to break the law can be a powerful political symbol.

I have also noted the way in which the dual nature of administrative law can be used both in the courtroom and in the political sphere, in order to try and shut down dissent, whilst appearing to do so in the name of the public good. Activists must therefore be conscious of such attempts to depoliticise political debate. They must also be aware that, in the political sphere at least, it is possible to counter these efforts to denude a moment of protest of its political context, by finding ways to repoliticise the issue in question. It is also important to recognise the potential political impact of judicial decisions, given the widespread acceptance of the view that they are objective and value neutral. Further, this symbolic power must be challenged by questioning the ways in which the courts characterise disputes, and the points of view which they prioritise. Activists must show how alternative characterisations and thus alternative outcomes are possible.

Another aspect to consider, when carrying out a protest which will invite a legal response, is the identity of the party who has standing to bring that action, and the impact that this might have on the political debate surrounding the issue. The gap which often exists between law and justice means that the instigation of legal proceedings can be politically detrimental to authorities who are trying to pacify dissent. Bringing activists to court and utilising the law to end a political protest which is highlighting injustice, can expose structural inequities, brining greater attention to the issue being highlighted. This can provide a shield for activists against the coercive use of the legal system. If the authorities are on thin ice politically, the instigation of legal proceedings could constitute a public relations disaster.

What should be clear from the preceding discussion is that there are numerous potential legal considerations which can impact upon a moment of political dissent. It is important for activists to be aware of these and to think about strategies which can help to overcome the depoliticising tendencies of the legal form.

Chapter Six – Utilising the Legal Form – The Dublin Tenants Association & Legal Practice

Introduction

In this chapter I will consider how a group of housing activists in Dublin, who set up the Dublin Tenants Association, engaged in an interaction with legal structures in order to advance their objectives. The first subsection will involve a discussion on the background to the group, the reasons behind its formation and its objectives. The second subsection will consider the general tactics and activities of the group. Subsection three will consider the group's interaction with the legal system through its engagement in 'casework', that is, assisting tenants who were facing or potentially facing legal difficulties in relation to their dwelling. That subsection will consider the rationale for engaging in casework, the benefits that came with the work as well as the difficulties that arose. The final subsection will provide an analysis of the group's interaction with legal structures. The study of the association is informed by my own participation in the group, primarily as a political organiser, and secondarily as a researcher. I became a member of the association shortly after its foundation in 2015 and was active within the group until 2018 at which time I withdrew due to time constraints. The study is also informed by an interview with one of the founding members of the group ('the interviewee') conducted in 2018.[618]

I – Background

I.A – Origins & Objectives

The Dublin Tenants Association was formed in 2015 by a small group of activists the majority of whom were renting in Dublin city. The primary reason behind the group's formation was to try and find ways to politicise the rental crisis that the city was facing. According to the interviewee it was clear around the time of the group's formation that there was a 'growing tension between the financialization of housing……and social reproduction in the form of housing'.[619] The founding members wanted to 'organise in

[618] Interview was conducted with a founding member of the Dublin Tenants Association on March 3, 2018.

[619] Interview was conducted with a founding member of the Dublin Tenants Association on March 3, 2018.

relation to that contradiction or tension.' In order to understand the group's ethos it is useful to note the group's own description of their activities:

> 'The Dublin Tenants Association is a private rented sector, tenant-led, peer support group. We believe that decent, affordable and secure housing is a right for everyone. As tenants we are primary stakeholders in the private rented sector and (given that more of us than ever are renting) primary stakeholders in housing policy. We know that proper reforms of the rental sector are needed and by coming together, in a collaborative process, we can break the isolation that tenants often feel and make our voices heard. Through informing and educating ourselves we can also advance our rights as tenants.'[620]

Initially the objectives of the group went beyond simply improving the situation of renters. As the interviewee stated, the aim was to 'organise tenants politically for the right to housing both because housing is important in its own right but also, I suppose as a broader anti-capitalist project.' However, 'as things developed the anti-capitalist element faded into the background somewhat.'[621] The reason for this de-emphasis of the anti-capitalist nature of the group was to some extent intentional. There was a conscious decision to avoid affiliation with any political party or ideological perspective and to develop an organic analysis of the problems in the rental sector, informed by the knowledge and experiences of tenants themselves. So, although there was some sense of an understanding amongst members that the problems they faced were caused by neoliberal capitalism, this was rarely made explicit, and the work of the group was focused primarily on improving the rights of tenants. A wider anti-capitalist narrative was largely absent particularly after the group had become established. The core aim of the group therefore was to build a community of tenants that would self-educate, offer mutual support and organise as a political force in order to promote the interests of tenants and secure their right to housing.

I.B – Tactics

In general, the group met once every week and at various stages there were also supplementary strategy sessions at which members would reflect on the general direction that the association was taking, would discuss any problems that had arisen and would

[620] This quote was taken from the Dublin Tenants Association's website, which is no longer functional.

[621] Interview was conducted with a founding member of the Dublin Tenants Association on March 3, 2018.

propose possible solutions to these problems. The activities of the organisation evolved over the duration of its existence and can be broadly divided into three categories namely, casework & legal education, campaigning & policy work and community building. Casework & legal education, which will be discussed in section three, was the predominant activity in the early months of the association's existence as the group sought to grasp the complexities of the Irish rental sector. After the members had developed a better understanding of the different dynamics at play and the different issues that tenants faced, a decision was made to engage in campaign work in order to promote the rights of tenants. This also involved developing policy positions as each campaign became linked to a specific set of policy proposals. For instance, the first campaign, which was launched in May 2016, combined a policy document which called for rent regulation and greater security of tenure for tenants, with a social media campaign aimed at highlighting Dublin's spiralling rental costs. The policy paper was submitted to the Joint Oireachtas Committee on Housing and Homelessness which was publishing a report on the housing crisis in Ireland. The campaign was entitled, '#rentripoff' and encouraged tenants to share stories of their difficulties living in Ireland's private rental sector through social media. This was followed by a second social media campaign launched in November 2016 entitled '#rentcontrolsnow'. The campaign linked in with the 'Secure Rents Campaign' which had been launched in October of that year and which involved a coalition of unions, political parties and the campaign group Uplift. Again, the campaign was linked to a policy submission, this time as part of the government's public consultation before the release of its 'National Rental Strategy' which was announced in December 2016. The strategy led to the introduction of a form of rent regulation through the creation of 'rent pressure zones' in which rents could not be raised by more than 4% per year.

In terms of community building the group organised a number of 'tenant forums' in 2017 which sought to bring together tenants in order to have discussions about issues pertaining to the private rental sector and to encourage tenants to become actively involved in the struggle to secure the right to housing. One such forum led to the group organising a protest outside of the offices of IRES, a Real Estate Investment Trust that was becoming increasingly active in the city. The protest was aimed at highlighting the increasing role of institutional investors in the rental market, their effect on rental prices in the city and their treatment of tenants living in their properties.

II – Legal Engagement – Casework

II.A – Introduction

As can be seen from the above discussion the group had some interaction with legal structures through the formulation of policy proposals designed to influence legislative changes. However, the primary way in which the group engaged with the legal system was through casework, that is, by aiding tenants who were facing difficulties in relation to their dwelling. This involved negotiating with landlords, informing tenants of their rights and, in some instances defending legal actions taken by a landlord against a tenant or assisting a tenant in bringing an action against her landlord. Assisting in legal actions would involve studying the relevant legislation, compiling evidence and accompanying the tenant to their Residential Tenancies Board (RTB) hearing. This was the most direct way in which the group encountered the legal system and this engagement, to a large extent, informed the other activities of the group.

Before beginning the substantive discussion on the merits of casework, it is necessary to supply a brief account of the legal structures which the group was engaging with. Since 2004 the private rental sector in Ireland has largely been governed by the Residential Tenancies Act.[622] The Residential Tenancies Board (originally the Private Residential Tenancies Board) or RTB was set up under the act and carries out a number of functions, namely keeping a register of tenancies, conducting research into and compiling statistics related to the private rental sector and finally and most importantly offering a dispute resolution system for landlords and tenants. The latter function took landlord and tenant disputes out of the ordinary courts system. However, the RTB does not have the full jurisdiction of a court and ultimately RTB orders must be enforced in the District Court if they have not been adhered to. Further, a decision of the RTB can be appealed to the High Court on a point of law. The Board offers a two-tier system of dispute resolution. At the bottom tier a potential litigant can choose between a mediation in which a mediator will try to aid the parties in coming to an agreement but will not provide a binding decision, or an adjudication in which a single adjudicator will hear evidence and arguments from both parties before publishing a binding determination. If the mediation fails or if one of the parties is unhappy with the adjudication decision an action can be brought at a tribunal hearing, the second tier of the system. The tribunal is composed of three members and is more formal than an adjudication. The tribunal hearing is a 'de novo'

[622] Residential Tenancies Act 2004. https://www.irishstatutebook.ie/eli/2004/act/27/enacted/en/html.

hearing in which new evidence can be submitted and fresh arguments made and therefore is not an appeal in the traditional sense. As mentioned, a tribunal determination can be challenged on a point of law in the High Court.

II.B – Initial Rationale for Carrying out Casework

Throughout the lifetime of the association, casework formed an essential part of the group's activities. Before giving an account of some of the practical issues related to carrying out this work it is important to consider the association's views on legal engagement and on the rationale for including casework as part of the practice of the organisation.

The first point to note is that the group did not talk about the legal system in abstract terms. There were no explicit discussions around members' views of the way in which the legal system tended to operate or whether it inevitably served particular interests. This does not mean that there were not discussions in relation to the likelihood of gaining redress through legal structures or the extent to which they should be engaged with, but simply that these issues were discussed on a practical and non-theoretical level. However, despite this lack of theoretical reflection the interviewee did believe that there were some shared understandings of the law amongst the group's members, stating that the explicit shared understanding of the legal system in relation to housing was that it 'benefits landlords and private property pretty systematically.'[623]

However, this was not a strict class instrumentalist view of the law. The interviewee argued that this bias in favour of landlords is not due to the inherent nature of the legal system but due to tenants failing to organise politically. He stated that the legal system is 'also a function of the power relations in a society. So, if working class people are very politically organised then the legal system will reflect that.' This informed the interviewee's opinion that the legal system is a site of struggle which is 'at the centre of politics.' Not only is it an institution which housing activists would inevitably have to engage with, but this engagement could be positive, the legal system could be used to 'promote the function of housing for need and social reproduction over housing as a commodity and asset.' This view sits more comfortably with the idea of a relatively autonomous legal system which is capable of recognising and registering the power of subaltern groups.

[623] Interview was conducted with a founding member of the Dublin Tenants Association on March 3, 2018.

The particular position taken up by the group in relation to legal structures may be better understood by considering the motivation behind including casework as part of the group's activities. The original rationale behind doing casework was fourfold. First, and at the most basic level, it was an opportunity to help tenants who were facing difficulties with their rental situation. The tenants whom the organisation assisted could not afford to engage a solicitor and so had limited options when it came to seeking legal help. Although there is a national charity in Ireland, Threshold, which does aid tenants who are in dispute with their landlord, this organisation is unable to meet the high demand for assistance. The association therefore saw casework as an opportunity to help tenants in this regard.

The second reason for carrying out casework was that it provided the association with an opportunity to interact with tenants who were suffering from the effects of a commodified housing sector and to build relationships with those tenants. At the most basic level one could say that the objective was to engage with tenants who might then become active in the organisation. Although this is true, it is important to understand the particular rationale behind this objective which was to use it as a process through which tenants could become politicised. The members saw casework as a way in which to cultivate a kind of political subjectivity in tenants, the interaction with the legal system would allow tenants to view their individual problem as being related to structural dynamics in Ireland's housing sector which were reflected in the legal rules that they were trying to navigate. Further this politicization would take place through a collective process whereby the tenant would hopefully develop the sense that the structural dynamics which had led to their particular difficulties could only be solved through the collective efforts of organised tenants. It was anticipated that if tenants, who were facing difficulties with their housing situation, came together to discuss those difficulties, they would begin to view the individual issues that they were experiencing as collective issues faced by tenants as a social group due to the structure of the rental sector and the architecture of power relations behind it.

In this process the legal aspect would be crucial as legal rules can be used as an interpretive guide to the structural dynamics of the housing system, in this case the rental sector. As I have noted, traditionally in the Marxist canon, law is perceived of as a mystifying force in society. The elision of socioeconomic context inherent in the legal form and the application of a set of ostensibly neutral rules by an impartial judge creates a false sense of objectivity to the law. Therefore, law helps to legitimate the status quo. However, at

another level the role in which the law takes in helping to structure capitalist society means that it can provide a map of the way in which that system works. The legal structures in society lay bare the architecture of capitalist accumulation and so can be used to exhibit to people the inequities of the system. At this level it can be said that law helps to demystify the power relations which structure capitalist society. In Chapter one I noted E.P Thompson's view that the ruling class benefit from law as both a coercive and ideological tool.[624] However, the law also acts as a constraint. Elites must, to some extent at least, play by the rules of the system from which they benefit. And these rules may sometimes constrain their actions. Here, I would like to propose that the legal form acts a mystifying force in society which helps to legitimate the status quo. However, since the capitalist system is both structured by, and reflected in, the legal form, legislation and legal decisions provide us with a map of how that system actually operates. Therefore, if the one is aware of the tendency of the legal form to obfuscate and can detect when it is acting in a mystifying manner, the legal system can actually help to reveal the system of capitalist accumulation.

The group felt that they could use the legal process to show tenants, whom they were assisting with legal problems, that those problems were caused by the structure of the rental system. For example, if a tenant was facing eviction because a landlord wished to sell the property, as is permitted under the Residential Tenancies Act, this would enable the tenant to see that in the rental sector the ability of landlords to alienate their property is more important than a tenant's right to a secure place to live. The law, therefore, although it often does so through arcane language, provides a transcription of the unacknowledged power relations which structure the housing system. And although it might be said that tenants are, in general, already aware that within the rental sector the position of landlords is privileged, gaining an understanding of how this operates in practice enables the tenant to see exactly how these processes play out and this can encourage tenants to engage with attempts to formulate counter strategies. Going through the legal process can therefore educate tenants on the legal and political structures which affect their lives, and this can lead to the development of political subjectivity. As the interviewee put it, 'hopefully that experience of interacting with the

[624] E.P. Thompson, *Whigs and Hunters: The Origin of the Black Act* (Penguin 1990).

law will politicise the tenant and make them want to know their rights and make them want to have more political power.'[625]

Related to this political subjectivisation of tenants was the idea of tenant empowerment. Here the theory was that by taking control of their housing situation by enforcing their rights, tenants would gain confidence and would feel empowered to do more outside the individual legal matter to try to change the rental system in Ireland. Again, this relates to the notion of politicising the tenant, giving them a sense that they have the ability, when working alongside other tenants to change their circumstances for the better. The group understood this notion of a relationship between political subjectivity and legal engagement not only in terms of the internal subjectivity of tenants but also in the sense that engaging with legal structures could help constitute tenants as a social group and thus gain political power. The interviewee put this in terms of a symbiotic relationship between legal recognition and political subjectivity, whereby the creation of an 'autonomous political power' by tenants external to the legal system would lead to the legal recognition of tenants' interests, a development which would further help to constitute tenants as a social and political group.

The third reason for engaging in casework was also coloured by political considerations. Here the idea was that engaging with the legal system could give the group political legitimacy and credibility. The belief was that, by acquiring legal knowledge and helping tenants to win actions against their landlords, the association would appear as a legitimate one in the eyes of tenants, and this would therefore encourage tenants to identify with the group. Having expertise and knowledge of how the legal system works would demonstrate that the association was more than simply a protest group but was willing to actively engage with the system in order to try and change it. The interviewee noted the following in relation to becoming knowledgeable in terms of legislation and policy and using this to your advantage '… if you know housing policy and the detail of it and then you find the points of attack and that gives you a kind of credibility, that you're really engaging with things.'[626] Engagement with legal structures through casework could confer legitimacy in other another sense as well. It could help the group to seem legitimate in the eyes of the wider public, not just tenants. Political actions such as protests could be seen

[625] Interview was conducted with a founding member of the Dublin Tenants Association on March 3, 2018.

[626] Interview was conducted with a founding member of the Dublin Tenants Association on March 3, 2018.

as more legitimate if the group has engaged with legal structures or has a legal argument which backs their point of view. As the interviewee stated,

> 'I think the law brings you into this whole issue of legitimacy and that's important for social movements to think about how to legitimise what they're doing and to find resources in society that give them legitimacy.'[627]

The final rationale behind casework was again linked to the notion of politicisation, this time of legal spaces. The idea was that the casework could be used in conjunction with political action and that this could become a source of empowerment for the tenant. For instance, if a protest was organised outside the RTB in conjunction with a tenant's case this could help to create a sense of solidarity amongst tenants and show the individual involved in the dispute that there was a collective of tenants supporting her. The case could also be linked to a wider campaign accompanied by a media strategy which could explicitly link the situation faced by the individual tenant with the wider structural problems which tenants were facing.

II.C – Benefits of Casework

Casework was in many ways a positive experience for the association. In terms of the initial rationale of simply helping tenants who were facing difficulties the group was remarkably successful, helping tenants to reach positive outcomes in a majority of cases. This was due to the knowledge and skills which the members gradually developed. From the beginning a core element of the group's work was legal education. Members spent time getting to understand the legislation and at the weekly meetings time was devoted to an education section in which a member of the group would discuss a section of the legislation and clarify the most important provisions. Members therefore learned how to interpret legislation and how to make arguments based on the relevant legislative provisions. The group also became aware of the types of arguments that were likely to have most impact at an RTB hearing, for example an argument solely based on moral or political considerations would likely be ignored whilst arguments based explicitly on the legislation were more likely to succeed. As a result, tenants who were assisted by the association were often better prepared than their landlord and had more coherent arguments which were linked to relevant legislative provisions. The group also learned the way in which compensation was calculated by the RTB and therefore were able to

[627] Interview was conducted with a founding member of the Dublin Tenants Association on March 3, 2018.

help tenants to present their case in such a way that they were more likely to be awarded any compensatory claim. The group publicised these wins through its website and on social media, raising the association's credibility and showing tenants that it was possible to win legal actions against their landlord. These legal wins also helped to energise the members of the association who were able to see that they were helping to improve the real-life conditions of tenants through, for example, stopping a landlord from evicting a tenant or assisting a tenant in resisting a rent increase. With Ireland's housing crisis worsening throughout the lifetime of the association it was important to be able to experience instances of success in order to keep up motivation. Not only was the association able to offer concrete legal assistance to tenants, but members also offered a level of support and solidarity to individuals who were often vulnerable and who were anxious as regards their housing situation. Tenants noted that they found such solidarity helpful particularly in instances in which the tenant was having to attend an RTB hearing as they often found the formality of RTB proceedings stressful and daunting, and found that having another tenant with them who could help demystify the process made the experience easier.

In terms of building relationships with tenants leading to their politicisation, the association had some success. As we shall see below there were numerous discussions as to how the group could change the way it carried out casework in order to encourage tenants to engage regularly in the group's activities in the long term. Despite these difficulties a number of tenants did become involved with the group after initially engaging through the association's legal work. Other tenants, whilst not becoming actively involved in the group stayed connected to the housing struggle in more indirect ways, for instance by coming to demonstrations or to public meetings held by the association. It could be said therefore that the association had partial success in terms of politicising tenants through casework, although not to the extent initially envisaged. I will discuss some of the reasons for this in section three and will provide a more general reflection on this issue in section four.

The biggest benefit however of carrying out casework was the insight that it gave into the practicalities of what tenants were experiencing and thus the merits of potential policy solutions. As noted, through casework the members developed a considerable level of expertise in the relevant legislation. Casework enabled the group to understand the way in which the legislation worked in practice and the situations in which tenants were finding themselves having particular problems. This helped to inform the policy

documents that the group produced and aided the association when choosing what issues to campaign on. In terms of policy the organisation was able to identify the deficiencies in the legislation governing the rental sector and then to consider the available policy responses. In turn the association could formulate their own coherent policy demands. The association's submissions to the Joint Oireachtas Committee on Housing and Homeless and for the consultation related to the National Rental Strategy were both heavily informed by the knowledge gathered by the group through reading and analysing legislation and through carrying out casework. Similarly, in terms of the campaigns the group engaged in, and the demands made as part of those campaigns, the knowledge the group had attained in terms of the practical issues which tenants were facing and the weaknesses in the legislation were crucial. For instance, whilst carrying out casework it became apparent to the group that it was proving impossible for tenants to assert their rights around illegal rent increases when the security of tenure provisions in the legislation were so weak. Tenants felt unable to challenge their landlord's illegal rent increase knowing that the landlord could easily evict them. Therefore, as part of the #rentripoff campaign, the association put forward policy demands arguing that in order for rent regulation measures to be effective the legislation needed to be amended in order to remove some of the situations in which a tenant could be evicted, for instance if the landlord wished to sell the property or if the landlord or their family member wished to move into the property. The policy demands of the association were therefore directly informed by the group's casework.

The attainment of knowledge and expertise through casework had other benefits. Firstly, it increased the confidence of the group. After the legal knowledge of the group developed, members facilitated workshops for other housing groups that were looking to increase their knowledge of tenants' rights in the private sector. Attempts were also made to demystify both the legislation related to the private rental sector and the legal process which tenants had to go through when involved in a dispute, with 'explainers' detailing tenants' rights and legal procedure written and posted on the group's website. The association also collaborated with an NGO in producing a tenant's rights leaflet that was distributed in Dublin City. This increased confidence led to a greater sense of credibility and legitimacy around the association. This was particularly evident in relation to the group's media work. When the group became engaged in campaigning requests by the media for interviews were frequent. The expertise of the group in terms of legislative knowledge enabled members to engage the media on their terms, not just as tenants

'telling their story', but as actors within the political field who were able to articulately put forward their view as to what was structurally wrong with Ireland's rental sector and what policies should be pursued in order to ensure the rights of tenants were protected. Often such media requests came after amendments to the legislation were announced. Members were able to respond coherently to these developments and were able to swiftly analyse what the changes would mean in practical terms and offer a view to the media as to whether those changes would be effective in dealing with the problems in the sector, often using their casework experience anecdotally to illuminate their point. In turn this gave legitimacy to the association in the eyes of tenants who viewed the group as a credible organisation that had a level of expertise, making it more likely that they might engage with the group.

II.D – Difficulties with Casework

Despite these benefits of engaging in casework there were also numerous difficulties related to its implementation. The most illuminating way to discuss these problems is by tracing the development of what was known as the group's 'casework procedure', that is the rules governing the way in which casework was carried out in practice. This procedure mutated and developed as the group began to recognise some of the difficulties related to carrying out such work and attempted to find ways of overcoming these difficulties. Its development therefore provides a map of the issues related to casework which confronted the group.

II.D.1 – First Phase

Initially the casework procedure foregrounded the collective aspect. A tenant would contact the group and would be encouraged to come to the weekly meeting. At the meeting the tenant would be encouraged to explain her situation and the difficulties she was experiencing to the group. Members would then collectively discuss the situation and the relevant legal provisions and would 'brainstorm' possible solutions. A member of the group known as the 'contact person' would then be assigned to the tenant and would be tasked with keeping in touch with her as her situation progressed. If the tenant's situation was such that it required bringing or defending an action in the RTB the group member assigned would assist her in preparing their case, would accompany her to the RTB hearing, and would often argue the case on the tenant's behalf if this was her preference. The tenant would be encouraged to engage with the group beyond her individual case

and to become involved in the association's organising. However, it was made clear that becoming involved in the group's activities was in no way a condition of continued assistance with the case. The rationale behind carrying out casework in such a fashion was that it immediately invoked a sense of collectivity and solidarity. The tenant could see that she had the support of a group of people who were willing to take time to listen to her situation and to attempt to find solutions. This, it was hoped, would motivate the tenant to join the association and to become involved in its activities.

II.D.2 – Second Phase

After a short period using this procedure members became aware of a problem which would occupy discussions on casework throughout the lifetime of the association. This was the capacity of the group to carry out casework in a way which provided avenues through which tenants could interact with the group beyond their immediate case whilst also allowing the group time and space to engage in other activities. The members realised quite quickly that the group nature of casework under the original model meant that the organisation had little time to explore other activities. This led to the first alteration of the casework in the summer of 2015. It was decided that when a tenant attended a meeting there would be a short collective discussion of his situation after which the tenant and their contact person would break off from the group and would finalise a plan of action. The contact person, or the tenant if he returned to further meetings, would provide regular updates to keep the group informed of how the tenant's situation was progressing and any useful information that had been learned. This new model, it was hoped, would free up more time for the group to discuss other potential activities at meetings. The members also decided to create the role of casework co-ordinator so that the group could keep track of the increasing number of tenants who were contacting the association for assistance.

II.D.3 – Third Phase

This new procedure was again short-lived as new issues emerged. Some of these problems were again linked to the collective nature of casework. For instance, it was felt that this collective element might be making tenants feel uncomfortable as they were having to discuss their problems in front of a group of strangers. In addition to this some members believed that the 'brainstorming' element of the procedure wasn't working as a form of participation, it tended to be chaotic and did not inspire confidence in the tenant that the

group members had a good knowledge of the legislation. The relationship between collective casework and the capacity to carry out other activities also re-emerged although in a somewhat different manner. This time it was related to the level of engagement by tenants with the group after their immediate issue had been resolved. Members believed that too much time was still being devoted to the group aspect of casework and that too few tenants were engaging with the group after the resolution of their immediate problem to justify devoting a substantial portion of the association's weekly meetings to such.

A new consideration also emerged, namely the ethics related to carrying out casework and the related question of legal liability. This issue surfaced after comments from people outside the association questioned whether the group should be representing itself as an organisation that had sufficient expertise to deal with legal issues. Some members shared these concerns and were worried whether the group was opening itself up to legal action if it gave inaccurate information or bad advice to a tenant in relation to their problem. Others were more confident in the levels of legal expertise which the group had attained. This issue also opened another debate within the group as to the nature of the group's ethos and as to how this was realised through its practice. One suggestion put forward to try and solve the question of ethics and legal liability was to carry out casework in a more traditional, formal and professionalised manner, eschewing the collective nature of casework and having more clearly defined rules as to how it was carried out. In response some members, whilst agreeing that the casework procedure needed to be amended, argued that to lose the collective element of casework and to formalise casework procedures risked creating the perception that the association was a 'service provider' akin to an NGO. This it was argued ran contrary to the collectivist and activist nature of the association and would lessen the possibility that tenants would become politicised and would wish to become involved in the group's activities. It was decided that a change needed to be made to the casework procedure but that it was important that any new procedure was in line with the group's activist ethos.

These matters were discussed at a strategy meeting in October 2015 leading to the second change in casework procedure. In terms of the collective nature of the casework it was decided that instead of dealing with the tenant's case as a group an assigned contact person would meet the tenant outside of the group's weekly meeting preferably immediately before the meeting so that the tenant could afterwards be invited to join the rest of the group. This it was hoped would free up time for the group to discuss other activities at their meetings, would make the tenant more comfortable in discussing her

issue and would allow information to be given to the tenant in a more precise manner. As to the question of tenant engagement, it was decided that the association would prioritise helping people who wished to bring a legal action before the RTB or who were facing such an action. It was hoped that this would reduce the chance of resources being dedicated to tenants who only wanted basic information as it was felt that those who were engaging in legal action may be more likely to join the group as a result.

As regards the question of the ethics and legal liability the group decided to draw up an information sheet and legal disclaimer to provide to tenants who were looking for assistance. The information sheet explained to tenants the ethos of the group and the way in which it operated. It also provided information on other legal services which the tenant could avail of in order to get further information and advice. The disclaimer reiterated to tenants that the group was not a professional legal service and that whilst the group endeavoured to give accurate legal information it would not be held liable if this were not the case. Members also decided that legal education sessions should be carried out more systematically in order to ensure that members had sufficient knowledge of rental sector legislation. It was hoped this new system would free up more time for other work, lead to greater engagement of tenants and would reduce the risk of liability whilst also ensuring tenants were aware of the underlying ethos of the group. It was also decided to produce a set of casework protocols in order to delineate the role of a contact person. First the protocols stressed the necessity of confidentiality in casework. Secondly, they emphasised that the role of the contact person was to inform the tenant of her rights and options but that they should never unduly encourage a tenant to take any action which may have negative consequences for her. Thirdly, the protocols required that the contact person make the tenant aware of the association's position as regards legal liability and must make it clear that the tenant was ultimately in charge of what course of action was taken. The protocols also set out rules pertaining as to who could act as a contact person. Members who wished to take on the role were required to participate in the group's legal educational activities and keep themselves informed as regards the relevant legislation. Further a contact person had to regularly attend meetings and had to act as a secondary contact person on at least two cases before becoming a primary contact person. Finally, the protocols stated that it was ultimately a decision of the association's steering committee as to whether a member could act as a contact person.

II.D.4 – Fourth Phase

The altered procedure remained in place until the group's second strategy meeting in April 2016 at which members continued to try and resolve casework related issues. Again, the problem of tenant engagement was prominent among these. Since the second alteration of the casework procedure, members would sometimes meet with tenants parallel to the group's weekly meeting but would often do so away from the meeting or would simply correspond with the tenant via email or through the association's social media pages. This meant that not only had the collective nature of casework been lost but there was little chance of a tenant engaging with the group beyond his immediate problem since he would have limited interaction with the group outside of his contact person. Members also expressed concern with the amount of pressure that came with casework especially when dealing with vulnerable tenants.

Thus, at the April meeting the group's members again discussed ways in which the casework procedure could be altered, and a new methodology was agreed. It was decided that all casework should take place parallel to the group's weekly meeting. The tenant would be invited to the meeting at the beginning of which they would be welcomed to the group and would be informed of how the association operated. They would then break off from the main meeting with their contact person who would assist them with the particular issue. After this had been done the tenant would be invited back to join the rest of the meeting. It was also decided to introduce the practice of 'one-to-one' whereby tenants would be encouraged to meet with the contact person outside the meeting to discuss their housing situation and how they might get involved with the group. It was hoped this altered procedure would lead to more long-term engagement with tenants. The group also decided to operate a system whereby two members would be assigned to each case in order to relieve some of the pressure the members were feeling when carrying out casework.

II.D.5 – Fifth Phase

The revised strategy was utilised until another strategy meeting in February 2017 where again casework was discussed. It was agreed that the altered procedure had worked quite well and to some extent had resolved the problem of giving tenants opportunities to interact with the wider group and also ensuring that casework was not monopolising the association's resources. However, there were still some concerns as regards these issues. Members felt that some tenants were not sufficiently involved in their own casework and

were overly reliant on the association in terms of preparing evidence before their RTB hearing. Members found this demoralising particularly if the tenant then chose not to engage with the group afterwards. Further, a significant amount of time was being devoted to giving basic legal information over the group's email and social media accounts with little chance of further interaction with the recipients of this information. Finally, members noted that, when acting as a contact person, they sometimes had no knowledge of the tenant's circumstances until the tenant attended a meeting. This made it difficult to inform the tenant of the relevant legal provisions and possible solutions as the contact person had had little time to consider the tenant's case. This risked the credibility of the contact person in the eyes of the tenant. This again raised the question as to whether the group's procedures relating to casework need to be further formalised, this time not in relation to questions of ethics or liability but instead to ensure the group was only assisting tenants who might potentially become involved in the group and to ensure that the provision of legal information was carried out in an efficient manner.

After this meeting the group produced its most detailed casework procedure to date. It was resolved that members needed to ensure the tenant was taking charge of her own situation and were not overly reliant on her contact person. It was also decided that no legal information would be given to tenants via email or social media. If a tenant had a basic information request, she would be directed towards other organisations who offer assistance. The group would assist tenants in three situations. Firstly, if they needed help in dealing with their landlord, secondly, if they were facing a legal action taken by their landlord and thirdly if they needed assistance in bringing a legal action against their landlord. The group also made the decision to turn away tenants rather than having members take on multiple cases in order to reduce members' workload. It was decided that a more formal procedure needed to be introduced in order to gather information from tenants about their circumstances before they came to a meeting. A set of questions was thus formulated which the tenant was expected to answer before she attended a meeting and which would inform the contact person of what the tenant's circumstances were, allowing the contact person time to formulate possible solutions. Tenants were also sent the group's information sheet and legal disclaimer before the meeting at which they would be asked to conform they read and understood it. Finally, data protection procedures were drawn up to ensure that any information collected was handled in accordance with data protection laws.

II.E – Suspension of Casework

In January 2018 the association decided to suspend casework indefinitely. This was largely due to capacity issues as the group did not feel that they had the resources to dedicate to casework. As this issue of capacity was a key concern throughout the lifetime of the association, I will leave an extended discussion on this topic until the final section.

III – Analysis

III.A – Theoretical Considerations

In this final section I will analyse the Dublin Tenant Association's interaction with legal structures through its casework, examining whether it met the initial rationale that lay behind the decision to carry out such work. This analysis will be framed by the theoretical considerations discussed in Chapter one. I will begin therefore by reminding the reader of some of the concepts discussed in that chapter which will be relevant to the analysis below.

In Chapter one I noted the nature of the legal form. Of particular importance was the insight that it operates to reproduce social relations by abstracting individuals form their socioeconomic context, viewing the subjects of legal disputes as formally equal. I highlighted that this means that legal argument fails to consider the motivations behind people's actions and does not consider the structural causes of those actions. I highlighted the legitimating function of the legal form which, through the idea of formal equality, creates the sense that a just outcome has been reached, despite the fact that the socioeconomic context of the dispute has been ignored. I commented on the constitutive nature of law, the way in which it structures and shapes how we view reality. I also noted that in the courtroom individuals are forced to conform to a 'juridical rationality' whereby the dispute is viewed in relation to certain concepts and categories which structure the arguments which are made. Finally, I discussed the alienating nature of the legal process. This is caused by the hierarchical nature of the courtroom, the technical language used, and the fact that legal actions are disputes between individual with opposed interests.

III.B – Assessing the Casework Rationale

I will now use these concepts to analyse the casework of the Dublin Tenants Association. The rationale for engaging in casework were as follows. Firstly, the group simply wished to assist tenants who were in dispute with their landlord. Secondly, the group hoped that

their legal work would create a space within which they could meet tenants and through the process of engaging with legal structures, politicise the tenant by linking their individual problem with the structural problems present in Ireland's housing sector. Thirdly, the group was interested in harnessing the legitimacy and credibility that was associated with legal structures. Fourthly, the group wished to politicise legal spaces, through for example protesting outside the RTB during a case or building a campaign around a particular case.

III.B.1 – Assisting Tenants

The initial rationale for carrying out casework was simply to assists tenants who were facing legal difficulties with their landlords. And, as I noted, this group was particularly successful in this regard, securing successful outcomes for tenants in the majority of the cases which they were involved in. This success was largely due to the level of expertise the members of the group gained through the legal education program and through the process of bringing cases. When arguing cases before the RTB, members of the association invariably had more knowledge of the legislation than the landlord, who was usually representing himself/herself. Even in instances in which an estate agent was representing the landlord, the members usually had more coherently crafted legal arguments. One interesting point to note is how quickly the members became aware that arguments based on political or socioeconomic context, or on moral arguments, were unlikely to find favour in the RTB, particularly at the tribunal level. The effect of the legal form could therefore be seen when members and tenants were engaging with the adjudication process. Another interesting point is that the success of the members may also suggest that the development of legal skills may go some way towards redressing the power imbalance between unequal parties to a dispute, such as a landlord and a tenant.

However, the potential for this to be reproduced on a greater scale is limited. The RTB's dispute resolution system was designed to provide a less formal arena through which to resolve landlord-tenant disputes. Although, at the tribunal level, there is a significant degree of formality, the mediation and adjudication processes are less formal than a courtroom setting. They key aspect in this regard is that landlords and tenants usually represent themselves or have a representative such as an estate agent or a housing activist. Parties rarely have professional legal representation. This played into the hand of the association's members when they were arguing cases. Generally speaking, landlords will have more substantial financial means than tenants, and will be more likely to be able to

afford professional representation. The RTB setting discouraged this, particularly at the more informal adjudication level. However, if tenants were to become hugely successful in winning cases, it is likely that landlords would increasingly employ professional legal representation. This would ultimately lead to the RTB becoming more akin to a courtroom and would lead to tenants having less success. This is not a criticism of the approach of the tenant's association. It was necessitated by the fact that socio-political arguments could not be made in the adjudication process. However, it shows that the nature of the legal form, in which actors with opposing interests are in dispute, and in which one of those actors are not necessarily equal in their ability to present their case, makes it difficult for individuals with lesser means to achieve the outcomes they want. Not only does the legal form tend to favour the protection of private property rights, but it gives and advantage to those who can afford to hire legal professionals to argue their case.

III.B.2 – Fostering Political Subjectivity

As I have noted the key reason for engaging in casework was to try and encourage tenants to become politically active in the struggle for better conditions in the private rental sector. Above I considered this in relation to three categories, the linking of individual problems to structural dynamics, the creation of a sense that politics needed to be done collectively, and finally the notion that engaging with legal structures could be empowering for tenants. As to the idea that the legal process would help reveal to the tenant the power dynamics that sit behind the housing system, and the necessity of a collective tenant solution to this, the group's methodology was not sufficiently thought through. Despite the fact that the group had discussed the idea abstractly, there was no consideration of how this would take place in practice. Each member who engaged in casework carried it out in their own particular way and although the casework protocols delineated to some extent the way in which the role was to be carried out, they did not go as far as giving guidelines as to how this structural connection was to be made. Therefore, the way in which the law helps to unveil the power structures that lay behind the housing system was not properly utilised by the group. The failure to consider how this connection could be made explicit may have been related to the group's focus on eschewing ideological positions in favour of organic modes of understanding and opposing the predominant power relations supporting Ireland's housing system. As I noted, the anti-capitalist emphasis of the group's work faded overtime. This was primarily

due to efforts to make the group more inclusive, to restrain from lecturing tenants as to the nuances of, for instance, Marxist theory. However, this played into the failure of the group to develop an understanding of how to show tenants the structural connection between their problems and the design of the rental market. It therefore inhibited the association's ability to help instil a political subjectivity in tenants.

In terms of the benefits of having a collective aspect to casework which would aid the fostering of political subjectivity it was clear, as we have seen, that the nature of legal practice made this unworkable in practical terms. The provision of legal information or offering of advice is ill suited to a group situation. It needs to be delivered clearly and concisely so that the recipient understands the legal situation and their options. If this is done in a collective setting there are numerous voices offering sometimes contradictory information and opinions. This leads to confusion and may lead to the tenant losing confidence in those offering the information. As a result, the association had to remove this collective aspect from its casework. Added to this was the problem that the legal process itself is quite individualising as a tenant's problem is presented as a private dispute between tenant and landlord. The lack of a collective element to casework therefore meant that tenants weren't given an opportunity to instead view that process as one of solidarity. The procedure which the group finally arrived at, with tenants working with the contact person parallel to the meeting but joining the main meeting afterwards, was an adequate compromise but for much of the association's lifetime casework was not the uplifting collective experience initially anticipated.

Another difficulty related to the idea of creating a sense of collectivity and solidarity is not necessarily related to the inherent nature of casework but involved deficiencies in the way the group carried out its work. In the early stages of the association the group was obliged to devote much of its time attempting to get to grips with legislation and policy ideas. This meant that the discussions at weekly meetings were often quite technical in nature. If a tenant wished to become active in the group, the only avenue open to them was to engage in such technical discussions. Needless to say, for many tenants this was an unappealing prospect. It was not until later in the association's lifetime that efforts were made to ensure that tenants had opportunities to engage with the group in more varied ways, through for example planning campaigns, designing leaflets and organising forums or protests

The group had also anticipated that casework would be empowering for tenants, that by learning their rights and asserting those rights tenants would gain the confidence to

engage in political action to improve their situations as renters. There is evidence from the casework which the association carried out to support this theory, as some tenants seemed to relish the opportunity to assert their rights and became emboldened to engage in a broader political struggle. However, many, even those who secured a favourable outcome in their case, found the process difficult and extremely stressful. The pressure felt by those experiencing problems with their living situation can be overwhelming and often, after tenants had been through the RTB process they had little appetite to engage in further struggle. This highlights the alienating nature of the legal form. As I noted, this has been linked to the hierarchical nature of legal proceedings, the formality, and the technical language used. However, it is primarily linked, I believe, to the competitive nature of the legal form, the fact that it is based on a dispute between two parties with opposing interests. And, as I have noted, often between two parties who are unequal. This is particularly the case in landlord tenant disputes, where landlords are generally of greater financial means and the consequences of defeat are much more severe for tenants than they are for landlords. This effect of the legal form is heightened by the notion of formal equality, as these disparities between the parties are not considered in the adjudication. Taken together, these factors made the RTB process extremely difficult and stressful for tenants.

A final issue I would like to discuss in relation to the connection between casework and politicisation, one which was not originally anticipated by the organisation, relates to the way in which casework was carried out, particularly after questions related to ethics and liability emerged. Above I discussed the debate which arose around the formalisation of casework procedures and the way in which the association represented itself to tenants. The key question was whether engaging with legal structures potentially demobilises political activity through the professionalisation and thus depoliticization of the relationship between those offering legal assistance and those receiving it. One view was against formalisation. Some members argued that the association would be representing itself to tenants as a service provider, that the impression would be given that the relationship between tenant and association was a professional one, stripped of the political significance that the group wanted to foreground. The concern was that the tenant would become a passive consumer of a service provided by the group and would therefore not engage on a deeper level.

The other view was that formalisation was necessary if the group was to carry out casework. The outcomes of the legal actions had important consequences for the tenants

involved. Losing their case may have led to a deterioration in their living conditions, economic hardship or even homelessness. The group had to take great care in order to ensure that the members of the group who were engaging in casework had sufficient knowledge of the legislation, that the tenant was made aware of their options and the consequences of particular actions, and that the tenant was aware of other organisations that could offer a second opinion. It was argued that the formalisation of procedures was also of benefit in terms of ensuring the sustainability of casework, ensuring that members were not overstretched or put under undue pressure. The members who proffered this view, also argued that the formalisation of processes could assist efforts to politicise tenants. They asserted that such politicisation was premised on an initial contact between the group and the tenant, an engagement which would be less likely if the tenant did not view the group as capable and credible. Further, they claimed that the formalisation of processes would make it easier for the contact person to link tenant's issues to the wider structural issues in the rental sector.

What is interesting about this debate and indeed about the different issues which emerged during the casework and efforts to politicise tenants, is that the legal form played a crucial role in structuring how the group operated. The technical nature of legal language and legislation meant that the group could not carry out the casework in the collective way it had originally intended to. This impacted their ability to create a sense of togetherness and solidarity amongst the tenants who engaged with the group. The technical nature of the legislation also meant that tenants who started engaging with the group found it difficult to participate in the meetings, as they did not have the necessary knowledge of the legislation. The alienating nature of the legal form also impacted the group's work. Efforts to encourage tenants to stay engaged with the group after their case was resolved was negatively impacted by the fact that many tenants found the legal process traumatising rather than empowering. Finally, the debate over whether or not to formalise the processes of the group, were, at their core, debates about how to structure the group's activities around the legal form. The nature of the legal form necessitated an approach to practice which some felt was in opposition to the ethos of an activist group. Indeed, the efforts by the group to refine the casework procedure can be seen as attempts to keep a sense of collective solidarity whilst also engaging with the legal form. This highlights the difficulty for activists who come into contact with the law, particularly if they are utilising legal practice. I noted Brabazon's insight that the neoliberal vision of atomised,

competitive individuals is partially constituted by the legal form.[628] It is this vision of human relations which activists are trying to counteract, as they instead try to create a sense of collective solidarity. However, as this chapter has shown, attempting to do this whilst engaging with the legal form is extremely difficult.

III.B.3 – Legitimacy & Credibility

The second rationale behind carrying out casework was the group's interest in gaining legitimacy and credibility through gaining legal knowledge. And it was this aspect of the organisation's activities which was most successful. As was noted above, the group gained a considerable level of expertise by getting an understanding of the legislation which governed the rental sector in Ireland and the policy solutions that were available that could help to secure the right to housing for tenants. In section one I discussed the fact that the law both reflects and shapes capitalist society. I argued that this means that it provides a map of capitalism, revealing the way in which the system operates. The group had hoped that they could use this feature of the law to link the individual problems of tenants to the structural contradictions of the rental sector. I noted that the group was not successful in this regard. However, I believe it is this feature of the law which enabled the group to gain the level of legitimacy and credibility that it did. The knowledge the members gained meant that they understood how the system worked and could use this to develop policy and to articulate what was actual cause of the problems that were being seen in the rental sector. This allowed the group to gain credibility with the tenants they were assisting, with the media, who frequently contacted the group for comment, and with the wider public. This is undoubtedly one of the most powerful benefits that engaging with legal structures can provide to social movements. It can help them to understand how the capitalist system works. This can help movements to gain legitimacy amongst the wider public, as they are able to explain the structure of the system and the inequalities that emerge due to its exploitative nature.

III.B.4 – The Politicisation of Legal Space

The fourth rationale behind carrying out casework was the belief that the group could combine it with political action, for instance having a protest in conjunction with an RTB hearing or linking a tenant's case to a wider campaign which the group was involved in.

[628] Honor Brabazon, 'Introduction: Understanding Neoliberal Legality' in Honor Brabazon (ed), *Neoliberal Legality: Understanding the Role of Law in the Neoliberal Project* (Routledge 2017) 7.

However, the group did not implement this idea in practice. This was largely due to apprehension within the group around politicising an individual's case. This politicisation of a case can be distinguished from the politicisation of a tenant through casework, the former involves a public element that is not necessarily present in the latter. The politicisation of a case involves inviting public attention to an individual's situation. This of course can be a powerful tool, but it can have adverse consequences too. For instance, if it attracts negative media attention and is therefore disruptive of the tenant's life. It can also have negative consequences in terms of the tenant's case. Legal adjudicators may look dimly upon the attempted politicisation of the case on which they are asked to provide a determination and therefore political actions such as protests may inhibit the tenant's chance of legal success. Such actions can only be carried out in situations where the association is confident that the tenant is fully aware of the potentially negative consequences of agreeing to linking their case to broader political actions. It is unfortunate that the group did not find solutions to these problems. The politicisation of legal spaces or the legal process can potentially be a powerful tool as it highlights the inequities of the legal process and the fact that this process tends to ignore the socio-political and economic context of the disputes which are before it. The politicisation of a depoliticised space can have symbolic resonance as the vision of reality put forward by the legal system can be ruptured. This is an area the group should have placed greater focus on.

Conclusion

In this chapter I have considered the work of the Dublin Tenants Association, particularly the legal practice which the group engaged in. I examined the rationale behind this casework, the benefits that came with engaging in such practice and the difficulties which emerged. I noted the success that the group had in assisting tenants. However, I highlighted that this approach may be difficult to maintain if their success meant that landlords began to seek legal representation. I noted the different problems related to 'politicising' tenants, the difficulty in engaging in collective work, the stress of casework and the alienating nature of the legal process. I linked these difficulties with the nature of the legal form, arguing that it necessitates an approach to practice which is at odds with the ethos of activist groups. However, I also noted the benefits of casework particularly the legitimacy and credibility that came with being able to successfully navigate the legal form. I argued that this may be one of the greatest benefits of engaging with legal

structurers for activists who are seeking to gain legitimacy with the wider public. Finally, I noted the potential of politicising legal spaces, but also the difficulties involved.

Chapter Seven - A Constitutional Right to Housing

Introduction

In my introduction to thesis, I noted my intention to investigate whether a constitutional right to housing might be of benefit to socialists in Ireland. The appeal for such a move has been formulated and developed both by civil society organisations[629] and by socialist political parties.[630] In 2014 it seemed as though a referendum on the issue may not be far off after the publication of the *Eighth Report of the Convention on the Constitution on Economic, Social and Cultural (ESC) Rights.*[631] The report articulated the findings of the Constitutional Convention, which was established in 2012 in order to consider changes to the Constitution. The Convention endorsed amending the Constitution to protect economic, social and cultural rights, specifically advocating for the inclusion of a justiciable right to housing. Further, it called for the insertion of a provision into the Constitution which, mirroring the obligation set out in Art 2 of the *International Covenant on Economic, Social and Cultural Rights*, would place an obligation on the State to progressively realise socioeconomic rights, subject to maximum available resources. The Convention's recommendations did not place any obligation on the government of the time to arrange a constitutional referendum. Nevertheless, the findings of the report were alluded to in the 2016 *Programme for A Partnership Government*, where it was noted that the matter would be referred to an Oireachtas Committee on Housing, which would provide a recommendation to government on the matter.[632] However, the report was instead refereed to the Oireachtas Finance Committee in a move which 'effectively buried the issue' of constitutional amendment for a number of years.[633]

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[629] Mercy Law Resource Centre, 'The Right to Housing in Ireland' (2016). https://mercylaw.ie/publications/.

[630] People Before Profit, 'General Elections Manifesto' (2016).

[631] The Convention on the Constitution, 'Eighth Report of the Convention on the Constitution: Economic, Social and Cultural (ESC) Rights' (March 2014). https://www.constitutionalconvention.ie/.

[632] 'A Programme for a Partnership Government' (May 2016). https://www.gov.ie/en/publication/8040b7-programme-for-government-programme-for-a-partnership-government/.

[633] Eoin Ó Broin, 'Home: Why Public Housing is the Answer' (Merrion Press 2019) 156.

Since 2016, a number of bills have been introduced by opposition parties and politicians with the aim of inserting the right housing into the Constitution. In 2016 Sinn Féin introduced the *Thirty-fifth Amendment of the Constitution (Right to a Home Bill).*[634] In 2017 the socialist bloc in Dáil Éireann, Solidarity-People Before Profit introduced its own attempt to attain constitutional protection for the right.[635] Both bills were defeated. In 2019 another failed attempt was initiated by Independent TD, Tommy Broughan.[636] The Solidarity-People Before Profit bill was reintroduced by the group in 2020 as the *Thirty-ninth Amendment of the Constitution (Right to Housing Bill) 2020* and has completed the Second Stage of the legislative process. Sinn Féin introduce a newly worded bill[637] in October 2020 which is currently at the Second Stage. A number of trade union and civil society campaigns have also sought to push the issue. The *Raise the Roof campaign*[638] which has fought for improved housing conditions in Ireland has explicitly called for a referendum to enshrine a right to housing into the Constitution. This has led to the creation of the *Home for Good* initiative[639] which is exclusively focused on the issue of promoting constitutional change in this area. The 2020 *Programme for Government* made reference to a referendum on housing although it is unclear exactly what form that might take.[640] The momentum towards such a referendum was stalled somewhat by the Covid-19 epidemic. However, the housing crisis continues unabated, and it seems likely that pressure will continue to mount for the insertion of a right to housing, in some form, into the Constitution. Therefore, it is necessary to inquire into what effect that might have.

As I noted in my introduction to the thesis, the question of whether a right to housing might be of benefit to the radical left in Ireland, requires a clarification of what the goals

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[634] Thirty-fifth Amendment of the Constitution (Right to a Home) Bill 2016 (Bill 32 of 2016). https://www.oireachtas.ie/en/bills/bill/2016/32/.

[635] Thirty-fifth Amendment of the Constitution (Right to Housing) Bill 2017 (Bill 41 of 2017) https://www.oireachtas.ie/en/bills/bill/2017/41/.

[636] Thirty-ninth Amendment of the Constitution (Right to Housing) Bill 2019 (Bill 47 of 2019) https://www.oireachtas.ie/en/bills/bill/2019/47/.

[637] Thirty-ninth Amendment of the Constitution (Right to a Home) Bill 2020 (Bill 37 of 2020) https://www.oireachtas.ie/en/bills/bill/2020/37/.

[638] See: https://www.raisetheroof.ie/.

[639] See: https://www.homeforgood.ie/who-we-are/.

[640] 'Programme for Government: Our Shared Future' (2020). https://www.gov.ie/en/publication/7e05d-programme-for-government-our-shared-future/.

of Irish socialists are with respect to the various housing struggles which they are involved in. I concluded that these struggles could be characterised as attempts to resist the neoliberal commodification of the housing sector. I then highlighted the fact that socioeconomic rights such as the right to housing, are based on the idea that certain areas of social life should not be exposed to the logic of the market. They therefore are potentially useful tool for resisting commodification of social goods. I noted that a constitutional right to housing could be of utility to the radical left in Ireland in two respects. First, it could be useful as a legal right as it could potentially impact housing policy and legislation. Secondly, it could be beneficial politically, as a campaign to insert the right into the Constitution could provide socialists with opportunities to criticise the inability of the capitalist system to protect essential social goods. Further, it could also give the radical left a platform to extol the benefits of a socialist system of organisation. I will consider the legal aspect of the right to housing in section one and two of this chapter. Section three will investigate the political aspect.

In section one I will consider the debate surrounding the relationship between the proposed right to housing and the constitutionally protected right to private property. The right to private property has been put forward by establishment parties as an obstacle to the enactment of progressive housing legislation. Thus, I will consider whether the constitution's private property provisions *currently* constitute a barrier to progressive housing legislation and whether it would continue to do so if a right to housing was inserted into the Constitution. This analysis will draw heavily upon the discussion of property rights caselaw carried out in Chapter three. Although the analysis of the political aspect of the right to housing will largely be reserved for section three, I will devote some space in section one to this element of the analysis. I will consider whether the debate surrounding the relationship between the right to housing and the right to property could offer an opportunity for socialists to open up a more fundamental debate on the concept of private property itself.

In section two, I will consider whether the legal protection of the right to housing would lead to meaningful changes to Irish housing policy. The form that this might take could range from a minimal bolstering of supports for those facing homelessness to more structural changes in macro housing policy. If the impact is more wide-ranging and systemic it could lead to a change in private rental sector regulation, planning regulation, and in policy related to the provision of public housing. Proceeding from the assumption that the insertion of a right to housing into the Constitution would not in and of itself

lead to a change in the housing policy of establishment parties, I will consider the likelihood that the Irish courts would take an assertive approach towards vindicating the right to housing by imposing positive obligations on the State to realise the right. This will involve a discussion of the form the right to housing may take, a consideration of the caselaw discussed in Chapter four in relation to the protection of socioeconomic rights, an examination of the way in which the right has been conceived in international treaties and by international bodies, and a discussion of the socioeconomic rights caselaw of the South African Constitutional Court. I will then consider whether a constitutionally protected right to housing would have meaningful impact in the areas in which activists have been operating.

Section three will consider the political implications for socialists of engaging with the debate around inserting a right to housing into the Constitution. I will recap some of theoretical discussion from Chapter one which are relevant to the question. I will then consider the status of socioeconomic rights such as the right to housing in light of this theoretical discussion. Next, I will a develop a socialist conception of the right to housing. Finally, I will consider the approach that the radical left should take towards the question of a constitutional right to housing.

I – Private Property versus the Right to Housing

Introduction

In Chapter three I discussed the Constitution's property rights provisions, detailing the caselaw that has emerged around Article 40.3 and Article 43. The reason for presenting that survey of judicial opinions was to provide background to an issue which has emerged in relation to discussions about providing constitutional protection for the right to housing. In recent years several pieces of draft legislation, proposed by opposition parties, and aimed at reforming the Irish housing sector, have been blocked by government on the basis that they would infringe the Constitution's private property provisions. This has led to questions as to the relationship between the right to housing and the right to private property.[641] In this section I will explore these issues. I will begin by considering the debate which has surrounded the question of whether the right to private property

[641] The right to private property I am referring to here is the right of an individual to private property protected by Article 40.3 but also regulated by Article 43.2., rather than the right to private property as an institution which is protected by Article 43.1.

constitutes an obstacle to progressive housing legislation. I will provide examples of bills which have been blocked by government on the basis that they may infringe this right, and the responses of socialist politicians who have argued that the constitutional protection of the right to private property does not constitute a barrier to progressive legislation. Secondly, I will consider the merit of the claim that the Constitution's private property rights constitute a barrier to progressive housing legislation, having regard to the caselaw review conducted in Chapter three. I will then consider whether the debate surrounding the relationship between the right to housing and the right to property could offer an opportunity for socialists to expose the negative impact of property rights and the very idea of private property.

I.A – Progressive Housing Legislation & the Right to Private Property – The Political Debate

In the years since the 2008 financial crash, numerous pieces of draft legislation aimed at regulating the Irish housing sector have been blocked or opposed by government parties on the basis that they could potentially infringe the Constitution's property rights provisions. These Bills have included proposals around debt and mortgage reform, draft legislation proposing vacant property levies, attempts to instigate planning reform and, most frequently, proposals aimed at improving security of tenure and rent certainty in the private rental sector. One Oireachtas briefing paper identified seventeen instances, during the period from 2009 – 2019, in which legislative Bills, relating to reform of the housing sector, were questioned or opposed on the basis of their alleged incompatibility with the property rights provisions.[642] The government opposition to the draft legislation has often been based on private advice received from the Attorney-General, the government's legal advisor.

Some proponents of inserting a right to housing into the Constitution have acknowledged that the Constitution poses a potential obstacle to progressive housing legislation[643] or at least accept that it is an area which requires clarification. Others, usually those further to the left of the political spectrum, have rejected that view. They have accused the

[642] Finn Keyes, 'Property Rights and Housing Legislation' (Briefing Paper (Enquiry 2019/715 Oireachtas Library & Research Service 2019).

[643] Home for Good, 'For the Common Good: The Housing Crisis & a Proposal to Amend the Irish Constitution' (Home for Good 2020). https://www.homeforgood.ie/resources/.

government of disingenuously relying on the property rights provisions in order to oppose legislation which challenges their market-oriented approach to housing policy. This suspicion has been reinforced by the fact that the advice provided to government by the Attorney-General is seldom made public, leading to questions regarding the neutrality and transparency of such advice and allegations that it has been used to serve the political interests of the government.[644]

There are several examples from the Oireachtas debates regarding bills aimed at reforming the housing sector, where progressive and radical left politicians have challenged the government reasoning as regards the constitutionality of draft legislation. For example, in 2017 the *Mortgage Arrears Resolution (Family Home) Bill 2017* [645] came before the Oireachtas. It proposed the creation of a mortgage arrears tribunal which would be empowered to make binding orders against banks and other financial institutions, requiring them to restructure mortgages as directed by the tribunal. In the Dáil debate, Solidarity-People Before Profit TD Richard Boyd Barrett implied that the alleged constitutional barrier to legislative reform in the housing sector was not always as absolute as members of the government had claimed.[646] He noted that previous concerns the government had expressed as regards the constitutionality of rent controls disappeared once sufficient public pressure was brought to bear. In the same debate, Solidarity-People Before Profit TD Paul Murphy stated that the concern for constitutionality is 'something the Government hides behind whenever it suits, saying it cannot do because it is unconstitutional. When it does not suit, it will be utterly forgotten.'[647] In 2018, the Government questioned the constitutionality of the *Urban Regeneration and Housing (Amendment) Bill*[648], which proposed certain measures to discourage land hoarding,

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[644] Finn Keyes, 'Property Rights and Housing Legislation' (Briefing Paper (Enquiry 2019/715 Oireachtas Library & Research Service 2019).

David Kenny & Conor Casey, 'A One-Person Supreme Court? The Attorney General, Constitutional Advice to Government, and the Case for Transparency' (2019) 42 Dublin U LJ 89.

[645] Mortgage Arrears Resolution (Family Home) Bill 2017 (Bill 88 of 2017). https://www.oireachtas.ie/en/bills/bill/2017/88/.

[646] Oireachtas Debate, 'Mortgage Arrears Resolution (Family Home) Bill 2017' (Dáil Éireann Debate, Vol. 958 (1), 12th July 2017).
https://www.oireachtas.ie/en/debates/debate/dail/2017-07-12/39/.

[647] Oireachtas Debate, 'Mortgage Arrears Resolution (Family Home) Bill 2017' (Dáil Éireann Debate, Vol. 958 (1), 12th July 2017).
https://www.oireachtas.ie/en/debates/debate/dail/2017-07-12/39/.

including an expansion of the definition of a vacant site and increased compulsory acquisition powers being given to local authorities. In the Dáil debate, Joan Collins, an independent socialist, responded to these concerns about the constitutionality of the Bill. In a remark indicative of the view of many on the left as regards the sincerity of government apprehensions in relation to the constitutionality of legislation, she noted that, once again, members of government had raised 'that hoary old chestnut about a conflict with property rights in the Constitution.'[649] She referred to the decision in *Re Article 26 and Part V of the Planning and Development Bill 1999*[650] discussed in Chapter three, and stated that it was her understanding that, in light of that decision, the Bill before the Oireachtas would withstand any constitutional challenge.

Sinn Féin's Eoin Ó Broin has put forward perhaps the most cogent responses to claims regarding the conflict between constitutional property rights and particular pieces of draft legislation. For example, in 2018 he responded to claims that the *Residential Tenancies (Prevention of Family Homelessness) Bill 2018*[651] was unconstitutional. The Bill proposed that landlords who had purchased their property through a government-sponsored buy to let scheme, which would have enabled them to avail of certain tax breaks, should be prohibited from evicting tenants on grounds that they wished to sell the property. Deputy Ó Broin also referred[652] to the decision in *Re Article 26 and Part V of the Planning and Development Bill 1999* in which the Supreme Court considered legislation which proposed that developers who applied for planning permission would be obliged to cede up to 20% of their property so that it could be used to develop social housing. In finding that Part V of the *Planning and Development Bill* did not infringe private property rights, the Supreme Court stated that the draft legislation was requesting that developers cede part of the value of their land, which had been enhanced due to State granted planning permission, so that

[648] Urban Regeneration and Housing (Amendment) Bill 2018 (Bill 63 of 2018). https://www.oireachtas.ie/en/bills/bill/2018/63/.

[649] Oireachtas Debate, 'Urban Regeneration and Housing (Amendment) Bill 2018 (Dáil Éireann Debate, Vol, 971 (1), 3 July 2018. https://www.oireachtas.ie/en/debates/debate/dail/2018-07-03/34/.

[650] [2000] 2 IR 321.

[651] Residential Tenancies (Prevention of Family Homelessness) Bill 2018 (Bill 110 of 2018). https://www.oireachtas.ie/en/bills/bill/2018/110/.

[652] Oireachtas Debate, 'Residential Tenancies (Prevention of Family Homelessness) Bill 2018 (Dáil Éireann Debate, Vol. 981 (2), 28 March 2019. https://www.oireachtas.ie/en/debates/debate/dail/2019-03-28/67/.

the State could provide affordable housing, a 'desirable social objective'.[653] Ó Broin stated that the draft legislation before the Dáil also had a desirable social objective: preventing child homelessness. He argued the draft legislation was similar to that considered in the *Planning and Development Bill Reference*, in that it essentially required landlords to cede a part of the value of their property which had been enhanced through State-provided tax breaks, and that this requirement was in accordance the principles of social justice and in pursued in the name of the common good.

I.B – Progressive Housing Legislation & the Right to Private Property – The Caselaw

I.B.1 – The Property Rights Caselaw

Despite these protestations from the left, the establishment parties have consistently relied upon the claim that the constitutional right to private property constitutes a barrier to the enactment of progressive housing legislation. But does this claim stand up to scrutiny? In Chapter three I discussed the caselaw that has developed in relation to those provisions. I identified a number of debates which have emerged from that caselaw relevant to the question of the extent to which the constitutional property rights of individuals can be restricted. The first of these debates was the controversy over the scope of protections provided by the Constitution for private property rights and the proper interpretation of the relationship between Article 40.3 and Article 43. The second issue was concerned with court's jurisdiction to determine whether legislation enacted by the Oireachtas had been passed with a view to regulating the exercise of private property rights in accordance with the principles of social justice and whether, in light of this, it was restricting those rights in order to reconcile them with the exigencies of the common good. These two issues were considered in the caselaw prior to the introduction of a proportionality test and in the caselaw in which the *Heaney* test was used.

I noted that since the introduction of the *Heaney* test a general trend can be discerned as to how the courts will approach their consideration of whether legislation is invalid due to its excessive restriction of private property rights. First the courts will consider the objective of the impugned legislation, using either the requirements of Article 43.2 or the wording of the preliminary step of the *Heaney* test as a guide. The means used to achieve this objective will then be considered. The key question is whether the means used constitute an unjust attack on the property rights of individuals, with the proportionality

[653] [2000] 2 IR 321, 354.

step of the *Heaney* test being used as a guide. In Chapter three I also noted that the courts have generally been deferential towards the legislature and have been hesitant to invalidate legislation unless there is clearly an excessive breach of private property rights. This deference has usually been expressed through allowing the legislature a wide margin of discretion in deciding whether the objective behind legislation either meets the requirements of Article 43.2 or of the preliminary step of the *Heaney* test. I also noted Walsh's assertion that the courts have generally not considered the step of the proportionality test which emphasises that individual property rights should be infringed as little as possible, and, as a result have generally found legislation to be valid. I noted that this deference towards the legislature had only rarely been explicitly linked to the separation of powers doctrine, but it seemed as though it was grounded in a reluctance to be seen to be interfering in matters of policy. Finally, I argued that the property rights caselaw seemed to reveal a tension between the liberal legal emphasis on the protection of private property, and the separation of powers doctrine, with the influence of the latter meaning that in some instances the courts will allow the property rights of individuals to be restricted. However, despite this general trend towards judicial deference to the legislature, there were a significant number of exceptions. As I have noted, the protection of private property is a key concern of liberal legalism and the courts have shown a willingness to invalidate legislation in cases of excessive infringement of private property rights.

I.B.2 – The Right to Housing Cases

In order to understand whether the Constitution's private property protections might constitute a barrier to progressive housing legislation, it may be beneficial to restrict our examination to cases in which issues associated with the right to housing were central. In Chapter three I discussed two cases, *Blake v Attorney General* [654] (the *Blake* case) and *Re Article 26 and Part V of the Planning and Development Bill 1999*[655] (the *Planning Reference* case) which are relevant in this regard.

The *Blake* case has often been held up as support for the proposition that the Constitution's protection of private property rights disallows any major interference with the rights of landlords. By contrast, the *Planning Reference* has been referred to by those

[654] [1982] IR 117.

[655] [2000] 2 IR 321.

who wish to argue that private property rights do not constitute a barrier to progressive housing legislation. The *Blake* case was concerned with a challenge to legislation which imposed rent restrictions on certain properties, and which provided tenants with considerable security of tenure. Chief Justice O'Higgins sought to determine whether the legislation constituted an unjust attack on the property rights of the landlords in question. What was key in his decision was the perceived arbitrary nature of the legislation, which only applied to dwellings built prior to 1941 and which sat within certain valuation limits. The legislation was a hangover from restrictions imposed after World War One and which had largely been lifted in the 1960s. The judge noted that no reasoning for their continued application solely to the particular dwellings in question had been offered. Chief Justice O'Higgins also noted that the restrictions applied to these properties irrespective of the means of the tenant or landlord and stated he could not find some other social necessity which could justify their existence. The judge ultimately ruled that the legislation was unconstitutional for infringing property rights

The *Blake* case is also linked to the other housing related case discussed in Chapter three, the *Planning Reference* case. The 1970s in Ireland saw a large rise in building and land prices.[656] One question which consequently emerged for political representatives and the civil service was how could the State reap the benefits from the increased value of land which had been enhanced by the provision of public services? Property speculators who bought land which subsequently become serviced with amenities were profiting from the increased value of the land, whilst the State saw no return. A committee was set up, chaired by Justice Kenny and tasked with finding a solution to the problem. The result, the *Kenny Report*[657], proposed a scheme which involved the identification of areas to be designated for development and allowed local authorities to attain the land through compulsory purchase, which it could then manage directly, or sell on to developers. However, the plan was never implemented. Keane suggests that one reason for this may been the fact that the committee had cited the *Rent Restrictions Acts* as evidence of the constitutionality of their approach.[658] These acts of course were successfully challenged in *Blake* and therefore questions were raised as to whether the plan set out in the *Kenny Report* would pass a constitutional challenge.

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[656] Ronan Keane, 'Land Use, Compensation and the Community' (1983) 18 (1) Irish Jurist 23, 26.

[657] Committee on the Price of Building Land, 'Report to the Minister for Local Government' (1973). https://www.thestory.ie/2009/12/17/the-kenny-report/.

[658] Ronan Keane, 'Land Use, Compensation and the Community' (1983) 18 (1) Irish Jurist 23, 29.

However, in the *Planning Reference* case, which took place over twenty years after the *Kenny Report* was published, the Supreme Court found that a scheme which had significant similarities to that proposed by the committee, did not infringe the Constitution's property rights provisions. As I noted in Chapter three, the Supreme Court considered whether the scheme in question under the given planning legislation, which obliged developers to reserve a portion of their land for the provision of social housing, constituted an unjust attack on the private property rights of those developers. Utilising the test set out in *Heaney*, the court found that it was within the competence of the Oireachtas to decide that the objective of the legislation – to ensure the provision of housing for those on low or moderate incomes – was socially just and required by the common good. Further, the court found that the means used to achieve this objective were appropriate as they were rationally connected to the objective and impaired the property rights of developers as little as possible and in a proportionate manner.

The difficulty in predicting whether or not the courts will invalidate social legislation which restricts individual property rights, at first seems to stem from the subjective nature of terms like 'arbitrary' 'rational', 'proportionate' and 'unjust attack'. Whilst the *Heaney* test provided a more detailed framework which could be used judge the validity of legislation, it did not remove the subjective elements from the decision. What one judge might consider a rational objective or a reasonable approach to achieving a particular social goal, another may find to be excessive interference. The *Blake* case and the *Planning Reference* show the different approaches which might be taken and the difficulty in predicting which route the courts will take. However, this subjectivity highlights the indeterminacy of both the constitutional text and the *Heaney* test. A judge's view of what the constitutional text is saying, or what is arbitrary or proportionate does have some influence in her ultimate decision. However, the central determining factor in judicial decisions around the validity of progressive housing legislation which interferes with private property rights, is the tension between the law's structural disposition towards protecting private property and the judiciary's strict interpretation of the separation of powers doctrine. What decides these cases is whether the judge places more emphasis on either of the factors. The judge's view on whether the protection of property rights is more important than judicial deference to the legislature, or vice versa, will influence her view as to what Article 43.2 is actually saying, or what is arbitrary or unjust. However, it is the judge's view of the former which determines the outcome of the case.

As I have noted, the general trend in the caselaw has been towards an emphasis on the separation of powers doctrine, even if not explicitly framed in those terms. Therefore, the property rights provisions do not constitute as significant a barrier to progressive housing legislation as establishment parties have suggested. However, the law's disposition towards protecting private property is a key determining factor in this caselaw. And there have been significant exceptions to the general trend of judicial deference towards the legislature and executive. The key question is whether a constitutional right to housing would constitute a determining factor in these decisions in the future, or whether it would impact the tension between private property rights protection and the separation of powers doctrine. I believe that the right would have a significant impact in further pushing the courts further towards favouring an approach which emphasises the separation of powers doctrine, and which therefore finds progressive housing legislation to be constitutionally valid. If a right to housing were to be inserted into the Constitution, it would make it clear to the courts that the right is valued in the constitutional order and would provide an extra inducement to the judiciary to refrain from interfering with legislation which seeks to vindicate the right. However, there is a limit to which the courts will allow private property rights to be restricted in pursuit of social goals. The liberal emphasis on the protection of private property, as an extension of the protection of liberty, will ensure that such legislation never threatens the ability of landlords, developers and others to commodify the Irish housing sector.

I.C – The Right to Housing & The Right to Private Property – A Political Opportunity

In section three of this chapter, I will discuss the political implications of attempting to secure a right to housing. As a precursor to that discussion, I wish to highlight one issue which is concerned with that political debate, but also with the issue of the Constitution's private property rights. In Chapter one, I noted the indeterminacy critique as it pertains to rights. I stated that one of the criticisms of the pursuit of rights-based strategies, which stems from the critique, is that the articulation of a right often leads to the formulation of a counter-right which can limit the efficacy of its counterpart. In terms of the right to housing in Ireland, the counter-right has already been articulated. The constitutional right to private property has been held up as a barrier to the enactment of progressive housing legislation which, in effect, is the attempt to actualise the right to housing. Therefore, the right to private property has been characterised by establishment politicians as an obstacle to the right to housing itself. This in fact, has provided a catalyst for calls to amend the

Constitution to include a right to housing. Solidarity-People Before Profit TD Paul Murphy encapsulated the position when he noted that as well as there being a principled rationale behind the Left's pursuit of a right to housing, there was also a pragmatic reason. The pragmatic rationale was that it would prevent the government from relying on the constitutional question as an explanation for its inaction on housing. He stated that arguing for the insertion of a right to housing into the Constitution was 'a way of saying: well, you say the Constitution is a problem, we don't agree with that, but we are going to insert a right to housing so we will remove all doubt from it.'[659] This approach takes the establishment conservative (and long-time governing) parties' characterisation of the relationship between the right to housing and the right to private property at face value: the latter trumps the former (and in fact conservatives do not even accept the premise of housing as a right in the first place). It then suggests that the insertion of a right to housing into the Constitution would rebalance the relationship between the two rights. If it were inserted into the Constitution the right to housing would be given stronger protection and the limiting effect of the right to private property would be curtailed. Indeed, as I discuss in section two of this chapter, this approach can be seen in the constitutional bills brought forward by Solidarity-People Before Profit,[660] which explicitly referenced the fact that the realisation of the right to housing would constitute an instance in which private property rights could be validly restricted.

But what if socialists went further? Rather than simply arguing that the insertion of the right to housing into the Constitution would limit the extent to which the right to private property could be used to constrain attempts to actualise it, socialists should argue that the right to housing in fact limits the right to private property or takes priority over that right. Instead of being viewed as a right which is necessarily limited by the right to private property, the right to housing could be characterised as an important limitation on the Constitution's property provisions. Further, socialists could use the debate surrounding the right to housing in order to foreground a conversation on the position of private property in Irish society. They could pose the question as to why private property rights are viewed as being sacrosanct when they are a barrier to the provision of decent affordable housing. Here, the cynical invocation by establishment parties of the right to

[659] Cate McCurry, 'Referendum on Right to Housing 'would spark debate on Ireland's housing crisis', *Irish Examiner* (Dublin 29 June 2021). https://www.irishexaminer.com/news/arid-40325048.html.

[660] Thirty-fifth Amendment of the Constitution (Right to Housing) Bill 2017 (Bill 41 of 2017). https://www.oireachtas.ie/en/bills/bill/2017/41/?tab=bill-text.

private property in order to block progressive legislation could be exposed and exploited by the radical left. They can use it as evidence that private property rights are a barrier to the protection of social goods. Thus, the debate surrounding the right to housing can offer an opportunity for socialists to link the concept of private property, a key pillar in the system of capitalist accumulation, to the abuses, exploitation and suffering that exist under that system. This negative impact of private property could become a key part of the socialist conception of the right to housing, a conception I will discuss in detail in section three of this chapter.

II – The Right to Housing as a Positive Right?

Introduction

In this section, I will consider whether or not a constitutional right to housing might lead to the courts imposing positive obligations on the Irish Government, to ensure the vindication of the right. Above, I discussed whether gaining constitutional protection for the right might protect progressive housing legislation against invalidation due to its interference with private property rights. If it does, as I argue it would, this would be of enormous benefit if a socialist or progressive government was to come into power in Ireland. However, we currently have a conservative Government, committed to neoliberal housing policies. In this case the legal barriers to progressive housing legislation are less important than the barrier put in place by the ideology of the Government. In order for the right to offer meaningful protection, when the Government is committed to policies that are leading to human rights abuses, it would have to be interpreted as imposing positive obligation on the State to ensure the right was vindicated.

This view may be criticised for assuming that the protection of the right might not, in and of itself, influence government policy before the courts come anywhere near the issue. Of course, it is likely that Irish governments will consider the right to housing when formulating housing policy and seeking to pass legislation. However, in my opinion the impact in this regard will be slight unless there is the threat of a court willing to actively ensure that housing policy respects the right to housing. Recent Irish Governments have shown a remarkable commitment to neoliberal approaches to housing, despite the prolonged housing crisis in Ireland and the consequent negative impact on government support. In my opinion, this commitment to neoliberal policies indicates that the mere presence of a constitutional right to housing will not in and of itself impact the approach to housing taken by recent governments.

As I have noted, the demands of housing activists in Ireland can be understood as a call for the decommodification of the country's housing sector. This overarching demand has been pursued through numerous housing struggles in which these activists have been engaged. This has included battles over social housing regeneration projects, attempts to improve the housing conditions of Romani and members of the Irish Travelling Community, protests against the closure of cultural spaces, and various other interventions. It would be interesting to consider the potential effects which a constitutional right to housing may have in each of these areas. However, due to restrictions of time and space I will limit my discussion to three areas. First, the demand for better supports for those experiencing homelessness, particularly the provision of adequate emergency accommodation. Secondly, the demand for the introduction of stronger protection for tenants in the private rented sector in order to prevent homelessness. Finally, the demand that the government move away from the marketization of the housing sector towards the largescale provision of state-owned social housing.

The question of whether the courts will interpret a constitutional right to housing as imposing positive obligations on the State, will be considered using the following schema. The first subsection will outline some of the factors which may influence the stance that the Supreme Court may take if a right to housing was given constitutional protection. Taking cognisance of these influencing factors, subsection two will consider the effect that a constitutional right to housing will likely have on the three categories of demands put forward by housing activists in Ireland.

II.A – Influencing Factors

To some extent any attempt to predict the practical effects of the constitutional protection of a right to housing will be conjectural. This is due to two factors. Firstly, the perennial problem of the indeterminacy of law and the consequent difficulty in anticipating the path of judicial deliberation. Secondly, ignorance as to the potential form of the provision. Indeed, the latter issue influences the former as without knowledge of the particular structure and language used to enunciate the content of the right, one cannot know the extent of interpretive license that will be available to the courts. Oren et al provide a classification of housing rights contained in national constitutions which

identifies three distinct categories.[661] The first, a direct acknowledgement of the right to housing, may take the form of a standalone article or may see the right to housing listed with other social rights. Further, this formulation may simply provide a recognition of the right, or it may delineate the corresponding duties of the state. The second and most common form of protection takes the form of embedded rights. This refers to those constitutions in which the right to housing is protected, but as a component of another right, for example the right to an adequate standard of living. Finally, Oren et al describe the implied constitutional protection of the right to housing whereby the existence of the right is enumerated from more general constitutional language. The effect that a constitutional right to housing may have on Ireland's housing sector will be considerably influenced by the particular form in which the right is expressed. For example, the opposition bills, mentioned in the introduction to this chapter, which have sought to amend the Constitution so that the right to housing is protected, have sought to amend either Article 43 (In the People Before Profit-Solidarity amendment and in the two Sinn Féin bills) or Article 45 (In the case of the Tommy Broughan bill). Mr. Broughan's bill seems to envision only a symbolic recognition of a right to housing in the Constitution, or at least one that is not enforceable by the courts, given that Article 45 is excluded from judicial cognisance. The original Sinn Féin bill, brought in 2016, sought to introduce an explicit right to housing into Article 43 alongside the private property clause, and sought to place an obligation on Government to take steps to ensure the right was realised. The second Sinn Féin bill, introduced to 2020, is similar but introduced an additional obligation specifically related to taking steps to end homelessness. The People Before Profit-Solidarity bill, originally brought in 2017 and reintroduced in 2020, seeks to clarify that the right to private property can be delimited to ensure the common good. It introduces a right to housing, not as a standalone right, but instead states that it is included in the common good exception to Article 43.

Sinn Féin's bills therefore envision there being an independent right to housing. Such a right could potentially form the basis of an action requiring the government to take positive actions in order to secure the right to housing. The People Before Profit-Solidarity bill is more narrowly focused on making it clear that the right to private property can be delimited in efforts to secure the right to housing. Therefore, it seems to

[661] Michelle Oren, Rachelle Alterman and Yaffa Zilbershats, 'Housing Rights in Constitutional Legislation: A Conceptual Classification' in Padraic Kenna (ed), *Contemporary Housing Issues in a Globalized World* (Ashgate 2014) 143.

be aimed at ensuring the right to private property cannot be invoked as a barrier to progressive housing legislation. As noted, we do not know what form the amendment will take. But the above discussion shows that much could depend on its particular wording.

Despite these constraints, it is still imperative to analyse the possibilities and potential pitfalls in anticipation of the insertion of the right to housing, in some form, into the Constitution. In order to do so, use must make use of whatever predictive resources are available. There are several potentially relevant considerations which must be considered. Firstly, it is reasonable to assume that the extent to which the right is protected will be influenced by the position that the Irish courts have adopted in relation to the traditional arguments surrounding socioeconomic rights, particularly their suitability to court-mandated enforcement. Secondly, we may consider the calls for a constitutional protection of the right to housing which mirrors, or which at least is influenced by, international and regional human rights instruments. Thirdly, it may be useful to consider the caselaw of another jurisdiction, that of South Africa, in order to examine the approach taken towards socioeconomic rights in that country.

II.A.1 – The Traditional Approach of the Irish Courts Towards the Protection of Socioeconomic Rights

In Chapter three I considered the approach which the Irish courts have taken towards the protection of socioeconomic rights. To briefly recall, the foundational case for what was to become the predominant approach of the Irish Supreme Court was *O'Reilly v Limerick Corporation*. Here Justice Costello relied upon a distinction between commutative and distributive justice to ground his view that were the courts to interfere with State policy as regards resource allocation they would be in breach of the separation of powers principle enshrined in the Constitution and therefore had no jurisdiction to do so. The *O'Reilly* case was concerned with an unenumerated right not explicitly contained in the Constitution. However, a similar approach was taken by the Irish Supreme Court in relation to Art 42.4 in *Sinnott v Minister for Education* and in relation to Art 42.5 in *T.D v Minister for Education*, cases dealing with explicit constitutional rights. In the former the majority of judges were of the view the court did not have jurisdiction to impose a mandatory obligation on the State to allocate resources in a particular manner. Justice Hardiman, approving Justice Costello's distinction between commutative and distributive justice in *O'Reilly*, set out four reasons why this was the case. Firstly, to do so would

offend the separation of powers; secondly, judges aren't sufficiently qualified to make policy related decisions; thirdly the judiciary is not democratically accountable for their decisions; and finally, the evidence based adversarial procedures of the courts were ill-suited for deciding policy issues. The narrow interpretation of the separation of powers set out in *O'Reilly* and *Sinnott* reappeared in the *T.D.* case in which the Supreme Court once again asserted that the courts should not impose mandatory obligations on the state on issues related to policy, except in the most extreme of circumstances. The latter case also saw the conflation by the Supreme Court of the arguments around imposing mandatory obligations and the separation of powers, with a broader antipathy towards the constitutional protection of socioeconomic rights, with a number of the justices arguing that the Irish Constitution does not and should not protect such rights.

The Irish Supreme Court has therefore offered scant protection for socioeconomic rights even if, as is the case with Article 42 and Article 42A, there are justiciable provisions protecting such rights. The rigid interpretation of the separation of powers adopted by the Court and the professed aversion to the idea of court protection of socioeconomic rights infers that a constitutionally protected right to housing would have little effect on Ireland's housing crisis or its housing sector more generally. If the root cause of the problems in Ireland's housing sector is the prevalence of neoliberal housing policies, a court system which has recoiled from any suggestion that it might interfere with policy formulation or implementation is unlikely prove an effective tool for countering current trends.

However, before abandoning any notion that the Irish courts could act as an agent for positive change in this regard, a few points should be made. First, one should note that in *T.D*, the view of Justice Murphy, who was opposed to the idea that the Constitution protects socioeconomic rights, was partially based on the argument that it was clearly not envisaged in 1937 that the Constitution should protect socioeconomic rights and the fact that the constitution had not since been amended to alter this situation, implying that there was no appetite to give constitutional protection to socioeconomic rights.[662] In his judgement on the case, Justice Hardiman also made comments pointing to the possibility of constitutional amendment leading to a different approach being taken by the courts, albeit an approach he himself thought objectionable.[663] It might be thought strange that

[662] [2001] 4 IR 259, 316-317.

[663] [2001] 4 IR 259, 361.

the judges should deny that the Constitution gives protection to socioeconomic rights, given the presence of Article 42.4 and Article 42.5. It seems, however, from the manner in which the Supreme Court Justices have spoken of these provisions, that they do not consider them to be socioeconomic rights in the modern sense. In terms of Article 42.4, this may be due to the fact that, as Quinn has suggested, the inclusion of an obligation on the Irish State to provide for free primary education was concerned with maintaining the relationship that existed between the Church and State leading up to the drafting of Bunreacht Na hÉireann, rather than any concern amongst the drafters for giving protection to socioeconomic rights.[664] Furthermore, the wording of Article 42.4, with the obligation being to 'provide for' free primary education, a deliberate weakening of the burden placed on the state, may be seen by the courts as differentiating it from modern socioeconomic rights. It is also a necessary implication from the treatment of the Supreme Court justices in *T.D* of the obligation stemming from Art 42.5 that they did not consider the correlative right to be a typical socioeconomic right. This may be due to the fact that the provision itself which places a duty on the State to provide care for vulnerable children, does not give any guidance as to what this obligation might entail.

The point here is that the judges in *Sinnott* and *T.D* seemed to view the obligations stemming from Article 42.4 and Article 42.5 as being different from those arising from other socioeconomic rights. This is evidenced by the fact that, despite the existence of these provisions, the justices did not consider the Irish Constitution to protect socioeconomic rights and by their assertion that situation could only be changed by the amendment of the Constitution and the explicit insertion of socioeconomic rights. And one might even consider this viewpoint understandable, given the deliberate partitioning of social justice principles from the list of justiciable rights set out in the Constitution. However, if the Constitution were to be amended to insert, for example, a justiciable right to housing, would this necessitate a different approach from Ireland's apex court?

In the following two sections, I will consider two approaches to socioeconomic rights that might influence the Irish judiciary's approach to interpreting a clearly justiciable right to housing. First, I will look at International human rights law jurisprudence, specifically that surrounding the International Covenant on Economic, Social and Cultural Rights. Then I will consider the jurisprudence of the South African Constitutional Court.

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[664] G. Quinn, 'Rethinking the Nature of Economic, Social and Cultural Rights in the Irish Legal Order', in C. Costello (ed.), *Fundamental Social Rights: Current European Legal Protection and the Challenge of the EU Charter on Fundamental Rights* (Dublin: Trinity College, 2001) 49.

II.A.2 – The International Human Rights Approach

In the introduction to this chapter, I mentioned the *Eighth Report of the Convention on the Constitution on Economic, Social and Cultural (ESC) Rights* published in 2014.[665] The convention recommended amending the Constitution to protect economic, social and cultural rights, and specifically endorsed the inclusion of a justiciable right to housing. Further, it advocated the insertion of a provision into the Constitution which, mirroring the obligation set out in Article 2 of the International Covenant on Economic, Social and Cultural Rights (ICESCR), would place an obligation on the State to progressively realise all established socioeconomic rights, subject to maximum available resources. Despite successive governments' side-lining of the Convention's proposal regarding the right to housing, the latter may provide some indication as to the approach which may be taken towards a constitutional right to housing if it is ever to be enshrined in the Irish Constitution. The particular formulation of the right to housing endorsed by the Convention was clearly influenced by that adopted in the ICESCR. Therefore, it may be useful to consider this treaty and the jurisprudence surrounding it.

The International Bill of Rights consists of the Universal Declaration of Human Rights (UDHR), and two treaties, the International Covenant on Civil and Political Rights, and the aforementioned International Covenant on Economic Social and Cultural Rights. The UDHR set out a list of ideals. The two covenants were developed in order to transform these ideals into binding positive law.[666]

The UDHR, adopted in 1948 contained reference to both civil and political rights, and to economic, social and cultural rights, making these rights 'interrelated and mutually reinforcing'[667] Socioeconomic rights had been prominent in a number of constitutions in the interwar period, most notably the Soviet Constitution of 1936, and were therefore not a conceptual novelty.[668] In the West, the view had emerged that the political extremism which had developed in the years prior to World War Two was the result of poverty and

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[665] The Convention on the Constitution, 'Eighth Report of the Convention on the Constitution: Economic, Social and Cultural (ESC) Rights' (March 2014). https://www.constitutionalconvention.ie/.

[666] Asbjorn Eide, 'Economic, Social and Cultural Rights as Human Rights' in Asbjorn Eide and Others (eds) *Economic, Social and Cultural Rights – A Textbook* (2nd Edition, Martinus Nijhoff, 2001) 17.

[667] Asbjorn Eide, 'Economic, Social and Cultural Rights as Human Rights' in Asbjorn Eide and Others (eds) *Economic, Social and Cultural Rights – A Textbook* (2nd Edition, Martinus Nijhoff, 2001) 15.

[668] Samuel Moyn, *The Last Utopia* (Harvard University Press, 2010) 49.

unemployment. This led to a belief that economic, social and cultural rights needed to be protected at some level in order to ward off similar fanaticism in the future. This motivation was reflected in Franklin D. Roosevelt's State of the Union Address in 1941, a speech that is often highlighted as a precursor to the UDHR, in which he referred to the need to guarantee freedom from want, a right since formulated as the right to an adequate standard of living.[669]

Despite the UDHR's recognition of economic, social and cultural rights, when it came to developing a legally binding treaty the UN General Assembly decided that two separate covenants should be published, one concerned with civil and political rights, the other with economic, social and cultural rights. The reason for this controversial decision has been subject to debate. Some ascribe it to the fundamental differences between the two sets of rights in terms of their applicability. We have heard these arguments or variations of them before in our discussion of the Irish socioeconomic rights caselaw. Unlike civil and political rights, it is argued, economic, social and cultural rights impose 'political' or resource-based obligations on States.[670] The latter, therefore should not be justiciable, as to recognise them as such would lead to an upsetting of the separation of powers. Others have argued that the reason for bifurcating the UDHR into separate covenants stems from the Cold War politics which were prevalent at the time of the birth of the ICCPR and the ICESCR. The US, and its Western allies favoured civil and political rights, whilst the socialist states, including the Soviet Union privileged economic, social and cultural rights.[671] Human rights, in other words, were a political football and the emergence of two separate covenants was the result of the political polarisation which existed in the decades following World War Two, rather than due to any inherent differences in the nature of the rights.

The ICESCR was adopted by the UN General Assembly in December 1966.[672] It came into force in January 1976. Whatever the reason for the uncoupling of the rights set out

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[669] Franklin D Roosevelt, *State of the Union Address*, 6 January 1941.

[670] E. Vierdag, 'The Legal Nature of the Rights Generated by the International Covenant on Economic, Social and Cultural Rights' (1978) 9 Netherlands Yearbook of International Law 69-105, 103.

[671] Abdullahi A. An-Na'im, 'To Affirm the Full Human Rights Standing of Economic, Social and Cultural Rights' in Ghai and Cottrell (eds), Economic, Social and Cultural Rights in Practice INTERIGHTS, 2004) 12.

[672] https://www.ohchr.org/en/instruments-mechanisms/instruments/international-covenant-economic-social-and-cultural-rights.

in the UDHR, the early decades of its existence were marked by the view that economic, social and cultural rights were different from civil and political rights. Influential in promoting this view were the classificatory schemes of two scholars. The first was that developed by the English sociologist T.H Marshall who argued that the different sets of rights emerged in historically distinct periods; civil rights in the eighteenth century, political rights in the nineteenth century and finally social rights in the twentieth century.[673] The second was the scheme of Karl Vasak, who argued that there were three generations of rights; negative rights, which corresponded to civil and political rights, positive rights which corresponded to economic, social and cultural rights, and solidarity rights such as the right to development and the right to peace.[674] As noted, the central critique of the rights set out in the ICESCR was that they should not be justiciable due to their resource distribution implications. This questions over their justiciability were also fuelled by a lack of clarity regarding the exact obligations that the ICESCR imposed on signatory States, an issue attributed to the vagueness of the wording of the Covenant.[675] However, a series of principles and clarifications have taken place in the years since the Covenant has come into force.

The first of these were the so-called 'Limburg Principles'[676] which were published in 1987 after a group of experts were convened to discuss the nature and scope of the rights set out in the ICESCR.[677] The document begins with some general observations. Principle 3 states that all human rights are 'indivisible and interdependent' and therefore economic, social and cultural rights should receive the same attention as civil and political rights. It also states that whilst the protection of the rights set out in the covenant is to be achieved progressively, some rights can become immediately justiciable, whilst others may be made justiciable overtime. The Limburg Principles also provide commentary on Article 2 of the

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673 Marshall, T. H., and Tom Bottomore, *Citizenship and Social Class* (Pluto Press, 1992).

674 Karel Vasak, 'A 30-Year Struggle: The Sustained Efforts to give Force of Law to the Universal Declaration of Human Rights' (November 1977) The UNESCO Courier 29.

675 Martin Scheinin, 'Economic Rights as Legal Rights' in Asbjorn Eide and Others (eds) *Economic, Social and Cultural Rights – A Textbook* (2nd Edition, Martinus Nijhoff, 2001) 30.

676 Limburg Principles on the Implementation of the International Covenant on Economic, Social and Cultural Rights. https://www.escr-net.org/resources/limburg-principles-implementation-international-covenant-economic-social-and-cultural.

677 Paul O'Connell, *Vindicating Socio-Economic Rights: International Standards and Comparative Experiences* (Routledge, 2012) 32.

covenant, which sets out the nature of State obligations. Article 2.1 of the ICESCR states that,

> "Each State Party to the present Covenant undertakes to take steps, individually and through international assistance and co-operation, especially economic and technical, to the maximum of its available resources, with a view to achieving progressively the full realization of the rights recognized in the present Covenant by all appropriate means, including particularly the adoption of legislative measures."

Principle 16 of the Limburg Principles states that parties to the ICESCR have an immediate obligation to take steps to fully realise the rights set out in the covenant. Principles 17-19 set out the type of measures that a state may take to ensure these rights are realised. These include legislative, administrative, and educational measures and, importantly, judicial remedies were appropriate. Principle 21 states that Article 2.1 places an obligation on states to move 'as expeditiously as possible towards the realization of the rights' contained in the covenant. Crucially, it states that the obligation to realise the rights progressively does not imply that states can defer their implementation. Steps to progressively realise the right must begin immediately. Principles 23 comments on the issue of resources stating that states are required to progressively achieve the realisation of the covenant's rights independently of whether its resources increase. The state must make effective use of the resources available. Also of particular importance is Principal 25 which states that states are required to ensure protection of minimum subsistence rights, irrespective of the level of the country's economic development. Finally, it is important to note the principles set out under Section D of the document which provides examples of what may constitute a violation of the covenant. Whilst noting the margin of discretion afforded to states in their efforts to meet their obligations under the covenant, Principle 72 states that there will be a breach of the covenant if, inter alia, a state fails to immediately implement a right that the covenant so requires and if a state deliberately slows or blocks the progressive realisation of a right.

The Limburg Principles therefore provide comprehensive guidance regarding the obligations that are imposed by the ICESCR. Many of the principles set out in the document were later adopted and expanded upon by the Committee for Economic, Social and Cultural Rights (CESCR) This body was established in the same year that the Limburg Principles were published. It is tasked with monitoring the implementation of the

ICESCR.[678] Part of its activities have involved publishing 'General Comments' which provide guidance on what states need to do in order to meet their obligations under the Covenant.

For instance, in order to elucidate the nature of the obligations that the ICESCR places on State Parties, CESCR has published its General Comment No. 3. Here, in a similar manner to the authors of the Limburg Principles, the Committee elaborated upon Article 2.1 of the covenant and the duty of states to take steps to progressively attain the full realisation of the rights contained in the Covenant using the maximum available resources.[679] The Committee reiterated that the concept of progressive realisation obligates the states to 'move as expeditiously and effectively as possible' towards the goal of fully realising the rights in question. Whilst noting that the concept of progressive realisability provides states with some necessary room to manoeuvre in their efforts to realise the rights in the treaty, the CESCR makes it clear that the aim of the Covenant is to establish clear obligations on states to fully realise the rights contained within it. Echoing the Limburg Principles, the CESCR stated that certain rights in the Covenant should be given immediate effect. The Committee also introduced two new concepts into the interpretation of the ICESCR. The first has become known as the principle of non-retrogression. Under this principle any deliberate measures that would lessen the protection of the rights set out in the Covenant would need to be justified by the state in question. The second novel interpretive concept was that of minimum core obligations, whereby a state would be deemed to be in violation of the Covenant if the 'minimum essentials' of the each of the rights were not satisfied.

It also worth briefly mentioning the Maastricht Guidelines. These were developed by a group of experts brought together by the International Commission of Jurists. The Guidelines were published on the 10th Anniversary of the Limburg Principles and reaffirmed many of those principles along with the jurisprudence of the CESCR in the intervening years. What is of particular note in relation to the guidelines is that they introduce the 'respect, protect and fulfil' typology, much used in relation to civil and political rights, into the interpretation of economic, social and cultural rights.

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[678] https://www.ohchr.org/en/treaty-bodies/cescr/introduction-committee.

[679] OCHR, 'CESCR General Comment No. 3: The Nature of the States Parties' Obligations (Art. 2. Para. 1 of the Covenant)' (14 December 1990) Document E/19991/23.

The CESCR has also published guidance specifically in relation to the right to adequate housing in its General Comment No. 4.[680] Article 11 (i) ICESCR obliges signatories to protect the right to adequate housing as part of the wider duty to protect the right to an adequate standard of living. The first point to note in relation to the CESCR's interpretation of this right is the broad nature it has ascribed to it. The right refers not just to a basic right to shelter but also to the adequacy of the housing, assessed by examining a number of factors such as the strength of security of tenure, the availability of services and infrastructure, affordability, habitability, accessibility, location and cultural adequacy. Secondly, the right should be protected for all people regardless of income or access to economic resources. Thirdly, the right places an obligation on the State to give priority to groups living in unfavourable conditions and not to prioritise advantaged groups at the expense of others. Fourthly the Committee notes that a 'general decline in living and housing conditions, directly attributable to policy and legislative decisions by State parties, and in the absence of accompanying compensatory measures, would be inconsistent with the obligation under the Covenant.'[681] The Committee also highlights the desirability of each State adopting a national housing strategy, setting out objectives, identifying resources and the most cost-effective way of utilising them, and setting out a timeframe for the implementation of the measures needed to realise the right.

The CESCR has also carried out a number of reviews of Ireland's fulfilment of its obligations on under the Covenant. The recommendations advanced by the Committee can also be useful in imagining the types of obligations that a constitutional right to housing, informed by human rights principles, might place on the Irish State. The Committee recommended that the Irish State endeavour to make its policies more effective in responding to the needs of the population.[682] Secondly, it urged the Irish State to increase its provision of social housing. It also recommended the introduction of legislation as regards private rent levels and an increase in rent subsidies. In relation to homelessness the Committee requested that Ireland take whatever measures were necessary to meet the needs of homeless people or those at risk of homelessness.

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[680] OCHR, 'CESCR General Comment No. 4: The Right to Adequate Housing (Art. 11 (1) of the Covenant) (13 December 1991) Document E/1992/23.

[681] OCHR, 'CESCR General Comment No. 4: The Right to Adequate Housing (Art. 11 (1) of the Covenant) (13 December 1991) Document E/1992/23 para 11.

[682] CESCR, 'Concluding Observation on the Third Periodic Report of Ireland' (8 July 2015) E/C.12/IRL/CO/3, Paras 26 & 27.

Finally, the Optional Protocol to the ICESR needs to be acknowledged. This treaty, which was adopted by the United Nations General Assembly in 2008 allows for individuals to bring a complaint against a State Party for breach of the ICESCR, that will be heard by the Committee on Economic, Social and Cultural Rights. It is hoped that the jurisprudence stemming from this mechanism will help further clarify the extent of the State obligations in relation to the ICESCR and will further promote the protection of the rights contained within it, including the right to adequate housing. However, this process has been a slow, with a limited number of countries ratifying the Protocol to date. Consequently, to date, the caselaw stemming from the mechanism has been limited.

It is clear therefore, that since its inception in the 1970s, the nature of the rights set out in the ICESCR has become clear. It is now beyond question that within the United Nations' architecture, economic, social and cultural rights are to be considered 'bona fide legal rights that generate binding normative obligations under International law'.[683]

Therefore, if a constitutional right to housing, along the lines of that expressed by the voting preferences of the Constitutional Convention, were to come to bear it would seemingly place obligations on the Irish State that could have far reaching consequences for Ireland's housing sector. The state would be required by the Constitution to move as quickly as possible to ensure that a right to adequate housing, broadly defined was protected. There would also be an immediate obligation on the State to ensure certain minimum standards were met and that those living in unfavourable conditions were prioritised in the State's housing policy. More specifically, the obligation stemming from the right could put pressure on the State to meet the demands of activists by introducing the measures necessary to tackle homelessness and legislation protecting tenants in the private rented sector, and by increasing the provision of social housing.

I will leave further discussion of the impact that the jurisprudence relating to the ICESCR might have on the Irish judiciary's approach to a justiciable right to housing to Section *II.B.* Before that discussion, I will consider the approach taken by national courts of South Africa in interpreting the justiciable socioeconomic rights set out in that country's constitution.

[683] Joe Will and Ben TC Warwick, 'Contesting Austerity: The Potential and Pitfalls of Socioeconomic Rights Discourse' (Summer 2016) 23(2) Indiana Journal of Global Legal Studies 629-664, 639.

II.A.3 – Socioeconomic Rights in South Africa

Another factor that might influence the way in which the Irish judiciary would interpret a justiciable right to housing is the approach of courts in other jurisdictions. In this section I will detail the jurisprudence of the South African Constitutional Court. The South African Constitution[684] which was developed in the aftermath of the downfall of the apartheid regime, and which came into force in February 1996, is seen perhaps as the most progressive constitution in the world regarding the protection of economic, social and cultural rights. It contains an extensive Bill of Rights which includes both civil and political rights and economic, social and cultural rights. It is therefore useful to examine the caselaw which has emanated from this Constitution as it may provide insight into how the Irish Supreme Court might approach the protection of a justiciable right to housing. As noted, the South African Constitution contains a Bill or Rights which contains provisions protecting socioeconomic rights. Section 7 places an obligation on the State to respect, protect and fulfil the specific rights contained within it. Section 23 contains various labour rights including the right to join a trade union. Section 26 sets out a right to adequate housing and obliges the State to take reasonable measures to progressively realise this right, subject to available resources. It also prohibits arbitrary evictions. Section 27 states that everyone has the right to have access to healthcare, food and water and social security. Again, the State must ensure the progressive realisation of these rights. The section also states that no-one can be refused emergency medical treatment. Section 28 sets out rights pertaining to children including rights to basic nutrition, shelter, healthcare services and social services. The section makes no reference to progressive realisability or available resources and so it would seem that these rights became effective once the Constitution came into force, and derogation cannot be justified by reference to resource constraints. Section 29 (1) (a) sets out the right to basic education, which again would seem not to be impacted by concerns regarding progressive realisability or resources. Section 29 (1) (b) sets out a right to further education. However, this is subject to the aforementioned provisos. The South African Constitution gives a Constitutional Court extensive powers of judicial review and broad remedial powers with respect to constitutional matters.[685]

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[684] The Constitution of the Republic of South Africa. https://www.gov.za/documents/constitution/constitution-republic-south-africa-1996-1.

[685] Paul O'Connell, *Vindicating Socio-Economic Rights: International Standards and Comparative Experiences* (Routledge, 2012) 53.

The Constitutional Court has adjudicated on a number of high-profile cases regarding economic, social and cultural rights. The first of these was *Soobramoney v. Minister for Health, KwaZulu-Natal.* [686] The case involved a man who was refused kidney dialysis treatment by a hospital. The hospital was of limited resources and therefore had strict criteria regarding who would be admitted to its treatment programme. The man did not meet these criteria. He brought a legal action claiming that the refusal to offer him treatment breached, inter alia, Section 27 of the Constitution related to healthcare. He sought an order compelling the hospital to offer him treatment. The Constitutional Court rejected the applicant's claim. Justice Chaskalson rejected any claim based on Section 27 (3) of the Constitution, which prohibits the refusal emergency medical treatment, ruling that the applicant did not need emergency assistance but ongoing medical attention which was not guaranteed under the provision[687]. As to claims brought under Section 27 (1) and (2), the judge noted the resource related provisos contained in those sections.[688] The judge then highlighted the problem of the limited resources of the Department of Health in that region of South Africa and acknowledged that a consequence of this was that the hospital in question could only provide dialysis to a limited number of patients.[689] Referring to decisions around resource distribution he stated that, 'a court will be slow to interfere with rational decisions taken in good faith by the political organs and medical authorities whose responsibility it is to deal with such matters.'[690]

The *Soobramoney* judgment relied therefore on a deferential position regarding the separation of powers, providing the government with a margin of discretion in relation to the distribution of resources. The decision seemed to signal that the South African Constitutional Court would interpret the Constitution's economic, social and cultural rights provisions in a restrictive manner.

However, a different approach was taken by the Court in *Government of the Republic of South Africa v Grootboom.*[691] The case involved a community living in squalid conditions who

[686] 1997 (12) BCLR 1696 (CC).

[687] *Soobramoney* at Paragraph 21.

[688] *Soobramoney* at Paragraph 22.

[689] *Soobramoney* at Paragraphs 24 – 26.

[690] *Soobramoney* at Paragraph 29.

[691] 2000 (11) BCLR 257 (CC).

claimed that the government should provide them with emergency accommodation. They based their claim on two provisions of the constitution. First, they argued that the right to adequate housing set out in Section 26 obliged the government to provide them with emergency accommodation. Secondly, they relied on the rights of children set out in Section 28, arguing that these rights entitled the children (and by extension their parents) of the community to be provided with immediate shelter.

In the Constitutional Court, Justice Yacoob rejected the claim based on Section 28, holding that to impose immediate obligations on the State with regard to that right would lead to those with children receiving preferential treatment over those who did not.[692] In terms of Section 26, the judge rejected an approach which relied on the jurisprudence of the CESCR by identifying a minimum core of the right to access to adequate shelter. He stated that the minimum core of a particular right would vary depending on the situation, and that the court did not have necessary information before it to make such a determination in this case.[693] Justice Yacoob stated that 'the real question in terms of our Constitution is whether the measures taken by the state to realise the right afforded by section 26 are reasonable.'[694] He went to describe what reasonable measures may look like, stating that they 'must establish a coherent public housing programme directed towards the progressive realisation of the right of access to adequate housing within the state's available means.[695] He stated that a reasonable programme would 'clearly allocate responsibilities and tasks to the different spheres of government and ensure that the appropriate financial and human resources are available.' [696] However, he also pointed out that a margin of discretion must be afforded to the state regarding what measures to take. He noted that a court, when assessing the reasonableness of measures would not suggest alternatives but would limit itself to determining whether the actual measures proposed by the government were reasonable.[697]

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[692] *Grootboom* at Paragraph 71.

[693] *Grootboom* at Paragraph 34.

[694] *Grootboom* at Paragraph 33.

[695] *Grootboom* at Paragraph 41.

[696] *Grootboom* at Paragraph 39.

[697] *Grootboom* at Paragraph 41.

Ultimately the court found that the government's housing programme failed the reasonableness test as failed to make provision for the most vulnerable[698] and made a declaratory order requiring the State to make such provision.[699] The *Grootboom* case therefore introduced a reasonableness test into South African socioeconomic rights jurisprudence and in doing so showed a willingness to interpret the Constitution's socioeconomic rights provisions as placing positive obligations on the State.

In *Minister of Health v. Treatment Action Campaign (TAC)*[700], a number of civil society organisations brought an action against the State. They claimed that, by limiting access to an antiretroviral drug that could prevent the mother-to-child transmission of HIV, the Government was in breach of its obligations under Section 27 of the Constitution which related to healthcare rights, and its obligations under Section 28 regarding the rights of children. Although the drug was being provided to the State free of charge, the Government had decided to limit its availability to a restricted number of health centres. This was justified on several grounds including concerns regarding the efficacy and safety of the drug, and questions about the cost of providing supplemental services such as training and counselling. The Government had proposed to limit the availability of the drug until these issues had been resolved. In the High Court it was held that the Government had acted unreasonably on two grounds. First, in failing to make the drug available in the public sector wherever a doctor had indicated that it was medically necessary to do so. Secondly in failing to set out a timeframe for a national programme of administering the drug.

In upholding this decision, although varying the order made, the Constitutional Court made a number of important points. After making it clear that the rights in question were justiciable under the Constitution, the Court rejected the contention that Sections 27 and 28 of the Constitution created a minimum core obligation in respect of the rights they protected, an obligation which existed separately to the duty to progressively realise those rights. The sections did not create minimum core obligations. The only duty stemming from them was the obligation to take reasonable steps to progressively realise the rights, subject to available resources.[701] The Court then discussed the issue of reasonableness,

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[698] *Grootboom* at Paragraph 69.

[699] *Grootboom* at Paragraph 99.

[700] 2002 (10) BCLR 1075 (CC).

[701] *TAC* at Paragraphs 26 -35.

reiterating the point made in *Grootboom* that it is not for the courts to decide what reasonable measures should be taken, but simply to evaluate whether the measures taken by the Government had been reasonable. Such evaluations may have budgetary implications but were not rearranging budgets.[702]

The Court stated that whilst it made sense for the Government to limit the availability of the drug whilst it gathered information surrounding safety, efficacy and logistics, the question remained as to whether such a plan was reasonable given that there were mothers and babies who needed treatment but were being denied access to the drug.[703] Ultimately the Court found that the concerns over efficacy, safety and logistics were overstated and that they could not justify a failure to provide the drug on a wider basis.[704] The Court found therefore that Government had acted unreasonably in its decision not to make the drug more widely available in the public sector in cases where a doctor had indicated it was medically necessary to do so. This meant that the entire policy of the government would have to be reviewed.[705] It was held that hospitals that had the capacity to administer the drug should do so, and the government had to take reasonable steps to ensure the drug was available throughout the public health sector.

The Court also commented on its powers regarding the issuing orders. It was stated that whilst the separation of powers meant that there are some issues which are 'pre-eminently' within the competence of specific arms of government, there were no bright lines on this matter.[706] The role of the courts was to evaluate government policy against the backdrop of the Constitution. If finding that the executive had failed in its constitutional obligations intruded upon its area of competence, such an intrusion was mandated by the Constitution.[707] The Court rejected any distinction between declaratory and mandatory orders, stating that both could have policy and budgetary implications. It was stated that the courts had the power therefore to make mandatory orders and could exercise supervisory jurisdiction in order to sure the Government met its obligations

[702] *TAC* at Paragraphs 36-39.

[703] *TAC* at Paragraphs 15-17.

[704] *TAC* at Paragraph 64.

[705] *TAC* at Paragraph 95.

[706] *TAC* at Paragraph 98.

[707] *TAC* at Paragraph 99.

regarding socio-economic rights.[708] However, orders made should not preclude the Government from having choice in its policy formulation.[709] In this case the Court's findings did mean that the Government's policy would have to be changed, but the Government was free to formulate a new policy as long as it met the constitutional requirement to 'provide reasonable measures within available resources' for the progressive realisation of the rights in question.[710]

O'Connell notes that the *TAC* case is seen by many as the high watermark of South Africa's socioeconomic rights jurisprudence.[711] Here the use of the reasonableness test had major implications for government policy and resulted in remedial action which impacted the lives of many women and children. However, it should be noted that relevant factor in the court's decision was likely that the drug was being provided to the State for free and therefore ordering the government to extend the programme had relatively minor resource implications.

The final case we will consider is that of *Khosa v. Minister of Social Development.*[712] The case involved a number of applicants from Mozambique who had permanent residence but not citizenship status in South Africa. They sought to challenge aspects of the country's social welfare legislation which prohibited non-South Africans from enjoying certain social assistance benefits. They argued that this prohibition constituted discrimination. They based their claim on Section 27 of the Constitution regarding the right to social assistance, read in conjunction with the guarantee of non-discrimination set out in Section 9.

In the Constitutional Court, Justice Mokoro stated that this case was unlike previous cases concerning economic, social and cultural rights as here there was a question of unfair discrimination.[713] After finding that the rights set out in Section 27 may apply to people who were not South African citizens,[714] she then considered the fact that the legislation

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[708] *TAC* at Paragraph 106.

[709] *TAC* at Paragraph 114.

[710] *TAC* at Paragraph 122.

[711] Paul O'Connell, *Vindicating Socio-Economic Rights: International Standards and Comparative Experiences* (Routledge, 2012) 61.

[712] 2004 (6) BCLR 569 (CC).

[713] *Khosa* at Paragraph 44.

[714] *Khosa* at Paragraph 47.

differentiated between those who had citizenship status and those who did not. She stated that in order for such a differentiation to be constitutionally legitimate it must not be arbitrary and that there must be a 'rational connection between that differentiating law and the legitimate government purpose it is designed to achieve.'[715] However, she went on to say that a rational connection would not by itself be enough as Section 27 required a standard of reasonableness which was a higher requirement than rationality.[716] She found that the exclusion of permanent residents under the legislative scheme was discriminatory and unfair. She rejected government claims that extending the legislation to non-citizens would involve an impermissible financial burden on the state.[717] Noting the impact this exclusion would have on the dignity of those concerned, she held that the legislation in question did not constitute a reasonable measure under Section 27. Accordingly, she ordered that the wording of the legislation be changed to include permanent residents.

The South African Constitutional Court therefore has been willing, unlike the Irish Supreme Court, to interfere with policy and to place positive obligations on the State in order to ensure the protection of socioeconomic rights. Through its reasonableness test, the Court has shown a willingness to evaluate State policy in way that both obliges a reformulation of that policy whilst also allowing the Government a margin of discretion in the exact nature of that reformulation. The South African approach has been much praised. But it also has its critics. I will examine this criticism in the following section where I discuss the approach likely to be taken by the Irish courts towards a justiciable right to housing.

II.B – The Constitutional Approach?

So, what approach might the Irish courts take towards a justiciable right to housing. One might argue that the amendment of the Constitution to include such a right would mean that the Supreme Court would be obliged to take a different position with regard to the separation of powers, its ability to impose positive obligations on the State, and ultimately its role in protecting socioeconomic right. This is especially the case given that in the judgments in *Sinnott* and *T.D.* the Supreme Court emphasised that their position was at

[715] *Khosa* at Paragraph 53.

[716] *Khosa* at Paragraph 67.

[717] *Khosa* at Paragraph 82.

least partly based on the fact that, politically and institutionally through the lifetime of the State, there seemed to have been no mainstream appetite to give judicial protection to socioeconomic rights.

In my opinion, it is unlikely the Irish courts would adopt the more expansive attitude towards socioeconomic rights interpretation implied by the jurisprudence of the CESCR or the South African Constitutional Court. The rigid notion of the separation of powers seems one that is deeply imprinted in judicial thinking in Ireland. It is difficult to imagine the Supreme Court departing significantly from the positions expressed in the aforementioned judgements and intervening forcefully in areas which, up until now, it has deemed to be outside its jurisdiction.

However, even if a more expansive approach was taken, I argue that it would still be unlikely to impact the neoliberal housing policy seen in Ireland in recent years. This is because the approach taken by the CESCR and by the South African Constitutional Court towards socioeconomic rights is based on a politically and ideologically neutral vision of such rights. This dominant approach to human rights attempts to maintain a distance from particular ideological viewpoints and argues that the protection of human rights can be secured without questioning whether underlying ideological, political and economic structures are contributing to rights violations.

UN human rights mechanisms have been marked by this approach and have traditionally been steadfast in their agnosticism over whether any particular economic model is more or less conducive to human rights and are unwilling to indict capitalism or neoliberalism as inimical to socioeconomic rights.[718] In its General Comment No 3, CESCR has noted its ambivalence towards the particular economic policy that a government ascribes, as long as it protects the rights contained in the Covenant. In General Comment No. 4 the Committee similarly notes that the provision of housing may be achieved through both public and private means. The problem with such an approach is that underlying political and economic structures that to contribute to human rights violations are ignored. Socioeconomic rights are not protected under neoliberal capitalism because that economic system inevitably leads to widening inequality. Unless focus is placed on the dynamics of that system, the violations of socioeconomic rights will never be adequately addressed.

[718] Paul O'Connell, 'Let Them Eat Cake: Socio-Economic Rights In An Age Of Austerity', *Human Rights and Public Finance* (1st edn, Hart 2013) 76.

The implications of the non-political approach to socioeconomic rights can be seen in South African experience. Undoubtedly there have been some successes in that country in vindicating economic, social and cultural rights. However, the overall result has been disappointing given the ostensibly transformative nature of the South African Constitution. The decisions of the courts in South Africa have not led to significant progress being in relation to tackling economic inequality. Criticism of the South African approach has been directed primarily at the incoherent nature of the reasonableness test and the failure of the courts to delineate minimum core obligations. David Bilchitz has written that the approach taken in South Africa had led to a failure to give meaningful content to the rights in question or to provide a consistent standard against which government action can be measured.[719] Marius Pieterse argues that this failure to delineate the specific content of socioeconomic rights, something which could be achieved by identifying minimum core obligations, leads to the actual material needs of those whose rights are being violated being forgotten. He states that the approach of the South African courts,

> '…conceives of socioeconomic rights not as separately enforceable rights to particular goods or services, but rather as a single, overarching guarantee that socioeconomic policies may be abstractly reviewed for their adherence to certain principles of good governance.[720]

Many of the critics of the reasonableness approach argue that the solution is to place focus on delineating the content of the rights in question.[721] However, I argue that the failure to take such an approach is precisely because it would expose the fact that the meaningful protection of socioeconomic rights is impossible under neoliberal capitalism. If a clear content of the right was identified, it would quickly become clear that neoliberal policies are unable to protect it. The failure to delineate content has allowed the South African court to avoid interference with policy in a more meaningful way and has meant

[719] See, David Bilchitz, Giving Socioeconomic Rights Teeth: The Minimum Core and its Importance, (2002) 119 S. Afr. L. J. 484.

[720] Marius Pieterse, 'Eating Socioeconomic Rights: The Usefulness of Rights Talk in Alleviating Social Hardship Revisited' (August 2007) 29 (3) Human Rights Quarterly 769-822, 811.

[721] David Bilchitz, Poverty and Fundamental Rights: The Justification and Enforcement of Socio-Economic Rights (Oxford: Oxford University Press, 2007) 183-196.

that the decisions of the court have done little to challenge the socioeconomic status quo in the country.[722]

It could be argued that the approach put forward by the CESCR of identifying minimum core obligations might lead to the content of rights being better developed. However, I would argue that the reason the CESCR has chosen to focus on minimum obligations is because a more expansive development of the content of rights would likely lead to a conflict with neoliberal policymakers. Unless there is a move towards an approach to human rights that is willing to criticise and challenge neoliberal policies, it is unlikely that they will be useful tool for tackling socioeconomic inequality.

Therefore, in my opinion, even if the jurisprudence of the CESCR of the South African Constitutional Court was influential on the Irish courts approach towards a constitutional right to housing, it would still provide the Irish judiciary with plenty of scope to avoid meaningfully interfering with State policy when it comes to housing. It would allow the courts to adopt an abstract standard of review with which to evaluate State action without having to criticise the ideological positions of the Government which lead to violations of the right to housing. Even if the court did go some way to delineating the content of the right to housing, I contend that, given the traditional deferential approach of the Irish courts towards the legislature, the result in terms of protecting the material needs of those whose rights are being violated would be minimal. I therefore believe it is unlikely that a constitutional right to housing would lead to the Irish courts interfering with Irish housing policy and placing significant positive obligations on the Irish State with regard to the protection of the right.

Having considered some of the factors which may influence the way in which a constitutional right to housing would be protected by the courts we will now consider what the protection of the right may mean in practical terms for our three categories of activist demands.

[722] Marius Pieterse, 'Eating Socioeconomic Rights: The Usefulness of Rights Talk in Alleviating Social Hardship Revisited' (August 2007) 29 (3) Human Rights Quarterly 769-822. 815.

II.C – Influence on Three Categories of Demands

II.C.1 – Homelessness

As of January 2022, there are 9,000 homeless people living in Ireland according to official statistics.[723] They are housed in emergency accommodation which usually consists of hotel rooms or co-living family hubs, with people sometimes living in such accommodation for years. Added to this is the problem of hidden homelessness with people forced to live in overcrowded conditions. Currently there is no statutory obligation on local authorities, who are tasked with dealing with homelessness in their area, to provide emergency accommodation when a person is homeless.[724] Activists have sought better support for those living in homelessness particularly in relation to the standard of emergency accommodation.

It is in this area that I suggest a constitutional right to housing could have most impact. Given that exposure to homelessness is the most egregious breach of someone's right to housing and since human rights protections are most immediately concerned with providing a basic floor of protection for the particular right, I contend that a human rights approach would be most suited to protecting those living in homelessness. I would also argue that the Irish courts would be most inclined to break with their traditional approach to socioeconomic rights in instances in which people are living in homelessness and there has been a clear failure of government policy.

The constitutional protection of a right to housing could lead to the imposition of a statutory obligation on local authorities to give preference to those presenting as homeless in their allocation of social housing. This could place an obligation on the State to review the provision of emergency accommodation and place a requirement on the State to undertake steps to find more suitable accommodation for those living in emergency accommodation within a specified period.

II.C.2 – Private Rented Sector

The second set of activist demands relates to strengthening tenants' rights in the private rented sector. Recent decades have seen a rapid expansion in Ireland's private rented

[723] Sorcha Pollak, 'Number of Homeless People in State Passes 9,000' *The Irish Times* (Dublin 07 January 2022). https://www.irishtimes.com/news/social-affairs/number-of-homeless-people-in-state-passes-90001.4771257.

[724] Mercy Law Resource Centre, 'The Right to Housing in Ireland' (2016) 6.

sector with thousands of low- and middle-income families unable to access social housing or secure finance to enable them to buy a home. This expansion had led to increased regulation of the sector. However, this regulation is relatively weak with numerous exceptions to security of tenure provisions, and limited rent control measures.

Here, the issue is whether or not a right to housing could act as a counterbalance to landlords' right to property. As I have noted, recent legislative attempts at strengthening the protection of tenants in the private rented sector have been frustrated by government claims that any further restrictions on rent increases or any further strengthening of security of tenure provisions, would infringe upon the property rights of landlords. And, as discussed above the constitutional protection of the right to housing would likely be a factor that would influence the Supreme Courts view of progressive housing legislation which interferes with private property rights. A constitutional right to housing would therefore make it more difficult for the government to dismiss attempts to strengthen tenants' rights and could provide the courts with the opportunity to clarify the extent to which such rights may be limited. This may lead to some strengthening of tenants' rights. However, as I discussed, there is a limit to which the courts will allow private property rights to be restricted.

II.C.3 – Provision of Social Housing

The ultimate aim of housing activists in Ireland has been to campaign for the large-scale provision of State-owned housing so that people of all incomes can access social housing. In Ireland, successive right-wing governments' primary response to the housing crisis has been to encourage foreign investment in order to expand the private rental sector rather than to look to dramatically expand the social housing sector. Due to the scale of the current crisis, greater efforts have been made in recent years to increase the number of new social houses provided by the State but demand far outstrips supply. Added to this is the way in which recent governments have taken a marketized approach to social housing, preferring to provide social housing applicants with rent subsidies for the private rental sector.

This is the area in which I argue a constitutional right to housing would have the least impact, given that any intervention by the courts would likely involve a dramatic incursion into the policy realm. As I have mentioned, the Irish courts have been reluctant to partake in such actions. Added to this is the fact that even human rights approaches to housing and human rights mechanisms allow the State a wide discretion as to policy

implementation and are not necessarily averse to market approaches to housing provision. The requirement to progressively realise the right to housing may impose some limits on the way in which the State operates in this regard. However, not to the extent demanded by housing activists.

Conclusion

Overall, the conclusion I draw is that a constitutional right to housing, unless worded in a detailed and prescriptive manner would have limited impact on the commodification of housing. It may help those victims of housing commodification who have been made homeless and may have some impact in terms of strengthening the rights of private sector tenants. But I would suggest that the impact on macro housing policy which promotes the commodification of housing, and which has led to the housing crisis would be minimal.

III – A Constitutional Right to Housing – The Political Aspect

Introduction

This section will interrogate the question of the utility of a constitutional right to housing as a political tool and tactic. By this I mean whether it will aid socialists in their efforts to persuasively criticise government housing policy and in drawing attention to radical left arguments around housing. As I have noted, the housing crisis in Ireland has been a key point of focus for socialist parties and activist groups. The process through which a right is inserted into the Constitution, if indeed this happens, would undoubtedly place additional attention on the housing issue in Ireland. Therefore, it is imperative that socialists develop a coherent approach to the issue, thinking about housing in relation to political strategy. The analysis in section one and two of this chapter should inform that approach. However, there are also other aspects to contemplate when considering the particular attitude the radical left should take as regards the question of a constitutional right to housing. My examination of these additional aspects will draw upon the theoretical discussion in Chapter one, particularly the arguments related to rights. The section will be divided as follows. In subsection one I will discuss some of the analysis mentioned in Chapter one which is relevant to the question of whether it is theoretically coherent or politically prudent for socialists to engage in tactics and strategy which are centred upon promoting the vindication of rights. In subsection two I will consider the relationship between these debates and socioeconomic rights such as the right to housing.

In subsection three I will consider a particular 'socialist' conception of the right to housing, which I will argue the radical left in Ireland should adopt and which would allow socialists to critically engage with the question of a constitutional right to housing.

III.A - Critiques of Rights & Responses

III.A.1 – Critiques

From my discussion in Chapter one, a number of critiques can be discerned as regards the utility of rights-based strategies as a tool of political struggle. One of the critiques is seen in Marx's discussion about the nature of civil and political rights in *On the Jewish Question.* As noted in my review of those comments in section two, Marx criticised the abstract nature of such rights. In order to be of universal application, they must abstract away from material reality and therefore they are unable to impact the inequalities of the private sphere.[725] Thus, it is argued abstract civil and political rights are ineffective in terms of transforming material reality and so are of limited use as a tool of emancipation. Another analyses of rights which I discussed was the class-instrumentalist account put forward by Steve Lukes.[726] Lukes argued that rights are presented as being representative of the interests of society at large or as stemming from man's 'natural' essence. However, in reality they accord with and promote the interests of the capitalist class. Therefore, rights act as ideological tools of the ruling class, promoting their specific interests, whilst appearing to promote the general interest. They therefore legitimate the underlying exploitative system. I also noted Lukes' view that rights tend to promote the reconciliation of class conflict. Rights abuses are presented as the result of the natural conflict which exists in society rather than as the result of the structural imperatives of capitalism. Thus, rights-based litigation resolves conflict in a superficial manner which seems progressive, but which fails to deal with the underlying structural problems which cause the abuses. As a result, the structural coordinates of capitalism are left untouched, and the system perpetuated.

A result of this effect of legal rights is that individuals, even sometimes activists can place too much faith in the legal system and in its ability to reach just outcomes through the vindication of legal rights, due to a misplaced belief that the process of rights vindication

[725] Karl Marx, 'On the Jewish Question' in Robert C. Tucker (ed), *The Marx-Engels Reader* (2nd edn, Norton & Company 1978) 40-44.

[726] Steven Lukes, 'Can a Marxist Believe in Human Rights?' (1981) 4 Praxis International 334.

can do more than superficially manage the antagonism caused by class conflict. This excessive faith in the legal system can lead to the problem of political demobilisation whereby activists focus their energies on the legal process to the detriment of their political activities, activities which should be emphasised given that, unlike legal rights, they could potentially challenge the capitalist system. This warning against excessive faith in legal rights is reinforced by the indeterminacy critique which I also discussed in Chapter one. The fact that the meaning of rights and rights discourse is manipulable and open to interpretation, and the fact that the articulation of a right often leads to the articulation to a counter right, means that it may be a mistake for socialists to devote too much energy to securing the protection of certain rights.

III.A.2 – Responses

A number of theorists have put forward responses to these critiques, particularly the comments of Steven Lukes. For instance, Drucilla Cornell has sought to defend the radical left's support for civil and political rights.[727] Cornell's argument is based on Marx's view, set out in *On the Jewish Question*, that political emancipation was a necessary if insufficient step towards human emancipation. She has argued that this dialectical approach towards social development prompted a view of rights and other bourgeois norms as limited and incomplete expressions of human emancipation. Civil and political rights, in this view, are recognised as being insufficient, and as potentially being a source of ideological deception, given that they abstract away from the material inequalities of civil society and are unable to substantively address or impact these inequalities. However, rather than reject these norms, socialists, Cornell argues, should engage with the appeal towards true human emancipation which is inchoate within them. Cornell views rights as containing something which sits in opposition to the logic of exploitative capitalist relations and believes socialists should focus on the development of this aspect of rights. The development of this 'utopian kernel' of rights can be achieved through two related processes. The first is to critique liberal rights, to emphasise the utopian vision to which they are pointing, and to highlight the fact that their abstract nature means that they continually fail to get us closer to that vision, given their inability to impact material inequality. The second approach is for socialists to develop their own conception of rights, independent of liberal formulations. Cornell has also argued that Marx did not reject all moral norms such as rights, only abstract norms which are presented as

[727] Drucilla Cornell, 'Should a Marxist Believe in Rights?' (1984) 1 Praxis International 45, 45-46.

transhistorical and naturally universal.[728] William McBride[729] and Paul O'Connell[730] have argued that the meaning of rights is not to be found in abstract concepts but is produced through human struggle. Socialists therefore can develop their own conception of rights, the content of which will be linked to addressing the material inequalities that oppressed people suffer under. Amy Bartholomew was argued that abstract rights can be filled with principles which give the right concrete content.[731] They can be fleshed out and made more responsive, if not to the needs of specific individuals, certainly to the needs to certain sections of society. These two processes, critiquing liberal rights, and developing a socialist conception of rights, are complimentary, in that a developed socialist formulation of rights will provide a standard against which liberal rights can be criticised, due to their failure to address material inequality.

Socialists must therefore determine their own conception of rights, one which is addressed directly to social reality. David Renton's argument, that a socialist conception of rights should focus on outcomes, rather than simply on whether the right in question has been given institutional protection, is also relevant here.[732] Instead of focusing on the abstract claim behind the right, activists must link the content of the right to a particular outcome. They must make it clear that the right can only be considered to be vindicated if a specific outcome is reached, an outcome which poses a challenge to capitalist accumulation. Thus, when socialists are highlighting the inadequacies of abstract liberal rights they must link the vindication of the right to a particular outcome, pointing to the fact that the liberal conception of the right is unable to generate that result. Socialists must therefore treat rights as a means towards a particular outcome rather than an end in and of themselves. This socialist conception of rights must, as Paul O'Connell and others have noted, be based on the idea that rights abuses are structural, they are necessarily caused by an exploitative capitalist system.[733] Socialists must therefore understand the

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[728] Drucilla Cornell, 'Should a Marxist Believe in Rights?' (1984) 1 Praxis International 45, 52.

[729] William L. McBride, 'Rights and the Marxian Tradition' (1984) 1 Praxis International 57, 69.

[730] Paul O'Connell, 'On the Human Rights Question' (2018) 40 (4) Human Rights Quarterly 962, 981.

[731] Amy Bartholomew, 'Should a Marxist Believe in Marx on Rights?' (1990) 26 Socialist Register 244, 257.

[732] David Renton, 'Do Socialists Still Have an Alternative Concept of Rights' (June 2013) 64 Socialist Lawyer 32-34.

[733] Paul O'Connell, 'On the Human Rights Question' (2018) 40 (4) Human Rights Quarterly 962, 981.

structures of capitalism which cause rights abuses and formulate a conception of rights which expresses this. Linking abuse to structure in this way will, overtime, make it clear that the conflictual nature of society is linked to the capitalist system. This, in turn will help to demonstrate the shortcoming of liberal rights which fail to address these structural issues.

Developing a socialist conception of rights which is directly concerned with material reality, which links the vindication of a right to a particular outcome, one which can only be achieved if the structure of capitalism is altered, and which is based on the idea that human rights abuses are caused by the structural of capitalism, can help ensure that the dangers outlined above are avoided. Rights cannot be a tool of ideological deception if it is clear that their violation is caused by the system of capitalist accumulation and that their vindication demands a change to that system. Similarly, they cannot be a tool used to reconcile class antagonism if their focus is on the abuses caused by the class structure and if their vindication poses a challenge to it.

The critique of liberal rights, which also forms part of this approach will also help to guard against the development of faith in the legal system to achieve the outcomes which socialists want. The juxtaposition between a socialist conception of rights and its liberal counterpart (which will be the form considered in formal legal actions), will mean that activists will be aware that that it is improbable that court decisions will lead to an outcome that poses a serious challenge to capitalist relations. This does not mean of course, that the legal system should not be engaged with. As I have discussed elsewhere in the thesis, legal cases may lead to outcomes that socialists can benefit from. However, it protects against a belief that significant social change can be achieved through legal structures and so lessens the possibility that activists will neglect their political activities in the belief that their preferred outcomes will be achieved through the courts. This process will be aided by the promulgation of the view, necessitated by the indeterminacy critique, that the vindication of liberal rights can lead to a variety of outcomes, some potentially progressive, others reactionary. Socialists must view liberal rights therefore as tools to be utilised if the prevailing political context means it is possible that a positive outcome could be achieved. But they must also be subject to socialist critique, through which they are shown to be limited weapons that cannot engender radical social change without the necessary accompanying political action.

III.B – Socioeconomic Rights and Challenging Capitalist Relations

Up until now have been discussing the criticism of rights and the related responses which were primarily associated with civil and political rights. Of course, the right to housing is qualitatively different in some respects. Socioeconomic rights were not conceived or categorised as such during the time in which Marx was writing and therefore were not explicitly subject to his critique in the same way. A question therefore arises as to how the above debate relates to such rights.

When one examines the different aspects of socioeconomic rights it becomes clear that many of the traditional Marxist critiques of rights do not apply as forcefully as they do to civil and political rights and that some of the aspects of the socialist conception of rights, discussed above, are already present within them. For instance, the criticism that the abstract nature of rights mean that they cannot impact material reality does not seem appropriate when we consider a right such as the right to housing. The content of the right to housing is directly connected with material reality: the fact that many individuals do not have access to adequate housing. It highlights this issue and demands that changes are made to that material situation. This also means that the potential for socioeconomic rights to be used as tools of ideological deception are diminished. They place a focus on material inequality rather than trying to deceptively abstract away from it. Therefore, when Cornell argues that identifying and developing the utopian kernel within bourgeois rights is a step in the process towards altering material reality[734], we can say that the right to housing already takes a half-step in this direction, by pointing towards the need to change that reality by virtue of their content.

However, this is only a half-step. The fact that the content of a right to housing is directly concerned with material reality does not mean that its vindication in the courts will lead to substantial material change. In section two of this chapter, I argued that providing constitutional protection to a right to housing would have minimal impact on the material realities of the Irish housing sector. The question is whether the presence of a constitutionally protected right to housing gives the sense that change is happening, that material inequalities are being addressed, when in fact little changes in reality? If so, it could still prove to be an ideological tool of the ruling class despite its ostensible focus on changing material reality? One could point to EP Thompson's defence of legality, discussed in Chapter one, and argue that socioeconomic rights must occasionally impact substantive inequality. And this is doubtless true to some degree. The legal protection of

[734] Drucilla Cornell, 'Should a Marxist Believe in Rights?' (1984) 1 Praxis International 45, 49.

socioeconomic rights has led to occasional victories. However, their ability to engender serious social change is limited and thus their potential to operate as weapons of ideological deception is real.

In section two I discussed some of the ways in which the potential for socioeconomic rights, such as the right to housing, to achieve material change have been blunted. The way in which such rights have been characterised in human rights treaties, and have been developed by human rights courts and institutions, has restricted their ability to engender actual material change. The primary culprits in this regard are the qualifications of progressive realisability and maximum available resources. To endorse an approach to rights which allows for these caveats is undoubtedly sensible if your goal is to achieve gradual reform of a system you believe can be reformed. If you believe the capitalist state can be slowly coaxed into devoting more resources into protecting economic rights and that the underlying logics of capitalist accumulation won't fatally undermine such attempts, then it makes sense to advocate a gradual reformist approach that seeks to strengthen the protection of socioeconomic rights without threatening the underlying economic system. However, for socialists, who believe that the logic of the capitalist system precludes the sustained protection of basic social goods, such an approach is hollow and unviable. If your view is that the exploitative nature of the capitalist system renders it structurally incapable of safeguarding basic social goods, then the qualifications to the immediate and complete commitment to their protection read as readymade justifications for the failure to do so. The cyclical nature of capitalism's economic downturns means that commitment to the protection of socioeconomic rights can be continually deferred until 'after the crisis', and the progressive realisability and maximum available resources provisos connected to these rights can facilitate this deferral, whether intentionally or not. Undoubtedly the problem of enforcement of human rights treaties, whose legitimacy often relies on the support of the entity accused of human rights breaches, makes it more difficult to ensure that the provisos aren't simply used to avoid obligations. Consequently, it could be argued that if a socioeconomic right was placed in a constitutional setting, where no question of voluntary adherence arises, the court enforcing the right could ensure the strict interpretation of those qualifications. However, given my analysis above as to the attitude of the Irish courts towards imposing positive obligations on the legislature, it seems unlikely that future governments would be compelled by the courts, to any great extent, to allocate resources in a particular way in order to ensure the protection of the right to housing. Therefore, there is still work to do

if socioeconomic rights are to be consistent with the socialist conception of rights outlined above. But the above discussion provides us with tools with which we can begin to develop a socialist conception of the right to housing in Ireland. In the following section I will consider this conception, one which would enable socialists to critically engage with the debates surrounding the constitutional protection of the right to housing both before and after any constitutional amendment is made.

III.C – A Socialist Right to Housing

III.C.1 – How to Conceive of a Socialist Right to Housing

As I noted above, the right to housing at least partly dodges one the main criticisms of rights which has come from Marxist legal theory, the idea that rights aren't directly concerned with, or capable of, fundamentally impacting material reality. We could say that the utopian kernel of the right to housing, that people should have access to affordable, good quality housing, is already partially developed within the conception of the right. I also pointed out that this benefit of the right to housing could be undermined since the legal protection of the right does not translate into its vindication. Socialists must therefore develop their own conception of right to housing, one which is centrally concerned with the question of whether material inequalities are being addressed and one which is informed by the struggles of ordinary people under a neoliberal housing system. In order to do this, socialists must highlight particular outcomes which will result if the right is meaningfully vindicated. These outcomes have already been pointed through the struggles that activists have engaged in. For instance, if a right to housing was meaningfully vindicated, everyone should have access to good quality affordable housing. In order to ensure such housing was provided, the state would intervene in order to increase the provision of public housing. Planning laws would be such that the provision of public housing on public land was prioritised. Those renting in the private sector would have robust security of tenure and rents would be capped at affordable levels. Housing would be accompanied by resources such as access to education and health facilities and spaces in which people could engage in community life. Homelessness would be given immediate priority, with adequately funded services providing holistic support to those at risk. Of course, there are many other outcomes which could be listed. The point is that socialists must make it clear that having a constitutional right to housing is meaningless unless these other outcomes are reached.

Socialists must also concretely and persuasively link the breaches of the right to housing over the past decades to capitalism. They must highlight the fact that high rents, evictions and soaring homelessness are not random occurrences but are outcomes necessitated by a system in which housing is commodified and used primarily as a vehicle for profit generation. Attempts to do this can be seen in protests against the selling off of public land to property developers and in efforts to expose and criticise the fact that successive governments have actively worked to attract vulture funds and investment trusts into the Irish housing market. It can be seen in attempts to bring attention to the issue of vacant properties and land hoarding and in struggles against the gentrification of parts of Dublin and other cities. These issues must be explicitly linked to the right to housing and it must be argued that the protection of that right requires that housing is removed from the logics of the market, is considered a basic social need, and is treated accordingly.

III.C.2 – The Socialist Right to Housing and the Constitutional Campaign

Of course, socialists in Ireland are already highlighting these market agendas and abuses, and often doing so through the discourse of rights. The key point here is that the entire process of demanding a constitutional right to housing, of campaigning for it, of securing it and of seeking its meaningful vindication can provide an overarching, popular form through which the radical left's claims about housing could be channelled. The campaign for gaining and enforcing the constitutional protection of the right would provide a platform through which socialists could articulate a consistent message, about the shortcomings of the liberal conception of the right to housing, about the inability or unwillingness of the courts to provide meaningful protection to the right, about the structural incapacity of neoliberal capitalism to provide basic social goods, and thus about the need for radical social and political change so that social goods such as housing can be provided and protected.

Socialists should thus critically engage with the process of seeking constitutional protection for the right to housing. They must develop and deepen their analysis and tactical engagement by fleshing out a coherent socialist conception of the right to housing along the lines outlined above. The second step is to highlight the different ways in which people have been suffering under a market-led housing system to the idea of human rights abuses. Third, socialists must connect this suffering and these abuses to the logic of capital accumulation and to the structures of capitalist system. Fourthly the radical left must communicate and promote the socialist conception of the right in the context of

clear political strategy, coherently and consistently linking it to outcomes which socialists wish to achieve – outcomes which necessarily will result in a challenge to capitalist accumulation.

This promotion of the socialist conception of rights must be accompanied by a critique of the default liberal form of right that would be likely to receive constitutional protection. Socialists must critique this narrower conception of the right to housing at source, at the moment it is articulated and put forward for inclusion in any constitutional amendment. This critique must continue after the right has gained constitutional protection. Socialists must undermine any conception of the right which presents its protection as requiring minimal interference with underlying economic relations. In this eventuality, they must be clear in their scepticism that the right which has been enacted will be able to achieve the outcomes needed to structurally alter Ireland's housing system. Of course, socialist politicians, parties and activist groups must be sensitive to political context. An outright condemnation of a particular proposed right to housing may not be prudent if it is unclear whether the amendment would be passed. However, given the current political context, and the fact that at the 2020 general election the housing issue was key in the minds of many voters, and was in itself the single biggest election issue for more than a quarter of those voters[735], it seems unlikely that this would be the case. If a right is inserted into the Constitution, socialists should use their own conception of the right as the standard against which to judge the effectiveness of the version given constitutional protection. If the latter falls short in terms of addressing the issues which socialists argue need to be addressed, then it must be criticised. At the same time, they must highlight how the socialist conception of rights could avoid these failings and could actually lead to the vision of society which the liberal conception of the right to housing points to but cannot reach.

The assertion of a socialist characterisation of the right to housing, informed by the needs of those suffering at the hands of the neoliberal commodification of housing, will undoubtedly be met with claims of utopianism and impracticality. It is in the interests of those who benefit from capitalist exploitation to characterise challenges to that system of accumulation as unrealistic and impossible to achieve. Such accusations are similarly

[735] Harry McGee, 'Election 2020: Exit Poll Confirms Health, Housing, Homelessness of Most Concern to Voters' *Irish Times* (9 Feb 2020). https://www.irishtimes.com/news/politics/election-2020-exit-poll-confirms-health-housing-homelessness-of-most-concern-to-voters-1.4167030.

directed at socialist demands when they are not articulated in the form of rights. The advantage of expressing these demands in the form of rights is the sense of legitimacy that is attached to rights discourse. In Chapter one I noted Duncan Kennedy's assertion that rights discourse brings a sense of objectivity to a subjective political claim.[736] For some, claims around security of tenure for tenants or the need to build affordable housing appear to have greater legitimacy if they appear as necessitated by a particular right. This is not a cynical or 'bad faith' use of rights. Socialists must discount conceptions of right which view them as an end in and of themselves. Rights are a vehicle for promoting particular political idea and socialists can tactically utilise this form in order to bring an end to capitalist exploitation which causes suffering and hardship.

[736] Duncan Kennedy, 'The Critique of Rights in Critical Legal Studies' in Wendy Brown and Janet Halley (eds), *Left Legalism/Left Critique* (Duke University Press 2002) 184.

Conclusion

Introduction

This thesis has documented my investigation into the question of whether radical left parties and activists in Ireland can engage with legal structures in a manner that might help to advance their objectives. This question was investigated using the Irish housing crisis as a lens. I focused on the housing question as it has been the largest and most persistent issue in Irish politics since the financial crash of 2007-2008. Consequently, it has provoked a significant response from Irish socialists who have been involved in attempts to organise those suffering under the crisis. It therefore seemed an obvious area in which to examine the central research question.

I carried out this examination by investigating three case studies. The first two of these were concerned with instances in which activists have had concrete engagement with legal structures. In the case of the Apollo House occupation, I studied an instance in which activists sought to defend against an attempt to have them evicted from their place of protest. In the second instance the legal practice of the Dublin Tenants' Association was explored. As is commonly the case with issue specific movements, the two groups studied did not explicitly identify as radical left or socialist. However, both contained members who identified with the socialist tradition, and both positioned themselves, to some extent as being in opposition to neoliberal housing policies. This latter fact means that their interactions with the legal system raised the same questions that would emerge if an explicitly socialist group were involved. Therefore, these interactions constituted suitable areas of study. The third case study involved the consideration of a potential interaction between socialists and Ireland's legal infrastructure, as I contemplated the approach Irish socialists should take towards the proposal that the right to housing should be inserted into the Irish Constitution.

I – Background and Theoretical Framework

I began the thesis by highlighting the link between housing and capitalist accumulation, and by providing some background to the Irish housing crisis, linking the structural problems which had led to the crisis to the pursuit of neoliberal housing policies and the commodification of Ireland's housing sector. After this introduction, I set out a theoretical framework which would inform the thesis. This framework was centred on

Marxist legal theory and the work of the Critical Legal Studies movement. However first, a brief account of liberal legal theory was provided, since Marxist and critical legal theories are often based on a critique of liberal legalism. The key concepts related to liberal legal theory were highlighted, the notion of negative liberty and its corollary, the protection of private property, the idea of the Rule of Law, the concept known as formal equality and the formalist method of legal interpretation.

Discussion then turned to the central tenets of Marxist theory and to the development of Marxist legal theory. I set out Marx's early analysis of the legal system, based on a critique of the public-private divide found in bourgeois societies. I placed particular focus on Marx's comments about law and rights in *On the Jewish Question* and his comments in *The German Ideology,* noting the structural link he made between the law and private property. I also discussed his insight that the abstract nature of political emancipation, premised on the idea of formal quality, rendered it impotent as a force for resolving the material inequalities present in society. The theoretical chapter then highlighted the importance of Marx's theory of historical materialism, the idea that the material relations engendered by the capitalist mode of production give rise to corresponding legal, political and cultural relations. I highlighted the different ways in which this theory has been interpreted by Marxist theorists.

A number of different Marxist theories of law were then identified, the 'crude materialist' approach, the 'class-instrumentalist' approach, the 'relative autonomy' approach and the 'commodity-form' theory. I also noted the importance of critical legal theory. Through my discussion of the different approaches to law I highlighted the importance of a number of concepts. First of these was the idea of formal equality, the liberal notion that all should be treated as equal before the law. I discussed the mystification thesis the assertion formal equality helps to legitimate the exploitative class system by creating a sense of justice whilst ensuring underlying material relations are untouched. An example was provided of an analysis which utilised this theory in order to argue that rights are simply an ideological tool of the ruling class. Another theory discussed was that which sees law as being constitutive of social relations, helping to shape how we view the world. Another was the notion that the legal process is alienating, as it is based on hierarchical relationships which disempower people who come into contact with it. Further, I highlighted the critique of legal formalism put forward by critical legal theorists known as the indeterminacy thesis. I discussed the implications of this thesis for the view that rights can be an effective tool of social change.

After noting the particular insight provided by the commodity form theory of law I focused on the influence of the legal form, highlighting the work of Robert Knox and Honor Brabazon who have discussed the implications of this form for activist engagement with law. They have noted the importance of the depoliticising aspect of the legal form and the fact that legal argument typically fails to consider the motivations behind people's actions or the structural causes of moments of dispute. I also highlighted the contention that in the neoliberal era, dissent is increasingly channelled towards legal structures, so that activists are compelled to conform to a judicial rationality when justifying their actions. Finally, I considered Knox's theory of 'principled opportunism' and Brabazon's idea of a 'subversive use of law', noting that both of these theories propose an engagement with law which is influenced by the broader strategic aims of activists. They view law sceptically, realising its limited utility as a tool of social change, but arguing that it may be useful in the right circumstances.

After setting out the theoretical framework of the thesis I began laying the groundwork for the third case study, the investigation into whether Irish socialists should engage in any campaign to constitutionalise the right to housing. I will consider this case study in the following section, before making some observations about the Apollo House and Dublin Tenant's Association case studies.

II – A Constitutional Right to Housing – Possibilities and Limitations

My central argument regarding the utility of a right to housing, was that its potential impact should be measured in two respects. First the legal aspect of the right should be considered. The right might be useful if it can help to ensure that progressive housing legislation is not struck down due to its interference with private property rights. It could also be of benefit if it encourages the courts to place positive obligations on the State to ensure the right is vindicated. I also argued that the political aspect of a campaign to constitutionalise the right should be considered. Such a campaign could be useful if it can provide the radical left with an opportunity to criticise capitalism's inability to protect basic social goods and if it can also provide a platform for the radical left to argue why a socialist system of organisation is better suited to this task.

I will recall my consideration of the legal aspect of the right to housing first. I argued that a useful way to ascertain whether the right to housing can help to ensure that progressive housing legislation survives constitutional challenge, or whether it will encourage the courts to place positive obligations on the State to vindicate the right, would be to

consider previous caselaw in these areas. Thus, I decided to examine caselaw in which social legislation has been challenged on the grounds that it infringes private property rights to see what approach the courts had taken. Further, I examined other instances in which litigants asked the courts to apply constitutional protection to socioeconomic rights and to place obligations on the State to vindicate such rights.

Before embarking on this examination of the caselaw, I provided a discussion of Irish constitutionalism in Chapter two. Here the idea of a constitution was linked to the liberal concepts of negative liberty, the protection of private property, and the regulation of state intervention. The role of the courts in liberal constitutional systems, particularly the use of judicial review, was also noted. I highlighted the tendency of such courts to view rights in a negative manner, i.e., as protecting against state interference, rather than imposing obligations on the state to intervene in the private sphere. Finally, the doctrine of the separation of powers was discussed. This doctrine is sometimes used to justify limiting the ability of the courts to interfere in the sphere of government action. The chapter then moved to a discussion of Irish constitutionalism. My central argument here was that *Bunreacht na hÉireann* establishes a liberal constitutional order in Ireland. I noted the role of the courts in the Irish constitutional system, the presence of a system of judicial review, the acknowledgment of the separation of powers doctrine, and the provisions in the Constitution pertaining to personal rights. I demonstrated that the countervailing forces in Ireland of that time could not significantly challenge the establishment of the liberal order in Ireland, and that any impact which they did have were mediated through social teaching of the Catholic church. This was reflected in the strong protection given to property rights in the Constitution, and the decision to exclude the majority of socioeconomic rights from judicial cognisance.

The examination of the property rights caselaw in Chapter three involved a discussion of the different approaches the Irish courts have taken to the question of whether property rights can be restricted by legislation which has a social purpose. I highlighted the difficulty in linking one approach to any particular outcome as regards the validity of the legislation. However, the most noticeable trend was the extent to which the courts were willing to rule that legislation was valid, despite the fact that it interfered with the property rights of individuals. This deference towards the legislature was most visible in the view that the exclusive or primary jurisdiction to consider whether the requirements of Article 43.2 had been met, rested with the Oireachtas. This deference was rarely explicitly justified by reference to the separation of powers doctrine but did seem to be grounded

in a reluctance to interfere with matters of policy. I concluded that the caselaw thus revealed a tension between the liberal protection of private property and the separation of powers principle, with judicial reticence regarding interference in policy matters sometimes leading to the enactment of legislation which resulted in property rights of individuals being restricted.

Focus then moved to the caselaw which has emerged regarding socioeconomic rights. Chapter four considered a number of instances in which litigants had sought to convince the courts to oblige the State to vindicate such rights. I noted the caselaw regarding unenumerated rights, showing that the judicial willingness to enumerate negative rights did not extend to a preparedness to identify rights which imposed a positive obligation on the State to provide for the welfare needs of its citizens. I also considered the caselaw regarding Article 42.4 and Article 42.5 of the Constitution. In this caselaw there were a number of High Court decisions in which judges were willing to interpret these articles as imposing positive obligations on the State, and some instances in which the court was willing to make a mandatory order, compelling the State to vindicate the right. However, I then noted the Supreme Court decisions which restricted the scope of the rights, and which made it clear that mandatory orders would be exceptional in nature. I highlighted the various arguments made by the Supreme Court judges to justify their decisions, again noting the influence of the separation of powers doctrine and the judicial reluctance to interfere in the policymaking of the Oireachtas.

In conclusion, the caselaw considered made it clear that the Irish courts, with some exceptions seen in High Court decisions, have not been willing to interpret the Irish Constitution as placing significant positive obligations on the Irish State to vindicate socioeconomic rights. I argued that this aversion to providing protection to positive rights approach reflected the liberal aversion to encouraging State intervention in the private sphere. Even in those cases in which the courts were willing to impose positive obligations on the State, the decision would have likely impacted only a small number of people. Therefore, it is highly unlikely an Irish court would rule that a socioeconomic right placed extensive obligation on the State, in a situation in which a large number of people would potentially benefit. I highlighted the influence of the separation of powers argument, with the courts resisting interference in questions of policy determination and resource allocation. I contended that the caselaw ultimately reflected the liberal aversion to state intervention and towards socioeconomic rights. However, unlike with the property rights caselaw, this attitude is complemented by the separation of powers

doctrine. This, I argued, explains the Irish Supreme Court's attitude towards socioeconomic rights.

Chapter seven provided the substantive discussion relating to the utility of a constitutional right to housing for Irish socialists. I began by offering examples of progressive housing legislation which have been blocked on the grounds that they would excessively interfere with the right to private property and by noting the comments of socialist politicians who have accused the Government of disingenuously relying on this argument in order to block legislation to which it is opposed. I then provided my observations regarding the property rights caselaw set out in Chapter three. Analysing this caselaw was challenging as it was difficult to discern particular trends from the judicial decisions. It was somewhat surprising that the courts in a liberal constitutional order were willing to allow legislation which interfered with private property rights. In my examination of the caselaw I had searched for discernible trends which might explain why the courts were willing to allow this restriction. Ultimately, I determined that the key factor was the tension between the liberal impulse to protect private property and judicial respect for the separation of powers principle. I argued that the judiciary's view on which of these factors was more important was the determinative factor in the property rights cases. This, I argued showed that the law, the text of the Constitution, or steps of the *Heaney* tests, were indeterminate. They were not the crucial factor in deciding these cases. Instead, the judiciary's view of what constituted an unjust attack, or what was arbitrary or proportionate, was influenced by whether it thought the protection of private property should be emphasised over judicial deference to the legislature or vice versa.

I noted that generally the courts had taken a deferential approach towards the legislature and executive, with some important exceptions. The key question was whether a right to housing would influence the judiciary's view of the appropriate balance between private property rights and the separation of powers doctrine. I argued that it would, as it would make it clear to the judiciary that the right was valued in the constitutional order, and this would push judges further towards the deferential approach when it comes to questions of progressive housing legislation. However, I also highlighted the importance of the protection of private property in liberal constitutional orders. Therefore, there would be limits to which the judiciary would allow it to be restricted.

I also discussed the question of whether a right to housing might lead to the courts imposing obligations on the Government in order to ensure the right is vindicated. I noted that this aspect of the right to housing was important, given that the current

conservative government was unlikely to enact progressive housing legislation of its own volition. I noted the different factors which might influence the judiciary in deciding whether to interpret the right to housing as imposing. First, the wording of the provision which inserts the right into Constitution is important, that is, whether it explicitly places obligations on the State, or whether it is characterised simply as a delimitation on the right to private property. Secondly, the socioeconomic rights caselaw set out in Chapter four. Here I noted that the determining factor in the caselaw was the separation of powers doctrine. I argued that unlike the case of the property rights decisions, the separation of powers doctrine was not in conflict with the structural impulses of liberal thought. In fact, it complements liberalism's emphasis in curtailing state interference in the private sphere. I argued that this caselaw which showed that the judiciary, particularly the Supreme Court, was averse to interpreting the Constitution as imposing positive obligations on the Government, indicated that it is unlikely a right to housing will be interpreted as doing so.

I considered a third factor which might impact the way in which a right to housing will be interpreted by the Irish courts. The report of the 2014 Constitutional Convention recommended the insertion of a right to housing which was similarly formulated to the rights set out in the International Covenant on Economic, Social and Cultural Rights. This formulation of the right, as has been interpreted by the Committee on Economic, Social and Cultural Rights, envisions positive steps being taken by states in order to ensure the protection and vindication of the right. I posited that if the constitutional right to housing in Ireland was formulated in that way, it may lead to the courts taking a more active approach in imposing obligations on the Government to vindicate the right. Fourthly I looked at the South African experience of socioeconomic rights litigation which showed that the country's Constitutional Court was willing to go some way in interfering the government policy and to impose positive obligation on the State, However, I ultimately concluded that it is unlikely that the Irish courts will interpret a right to housing as imposing positive obligations on the Government. This conclusion was based on the judiciary's approach to the separation of powers doctrine. I also argued that even if a human rights approach was taken by the courts, such an approach tends to focus on minimum obligations and is also reticent towards prescribing particular policy approaches or to questioning the underlying political and economic systems which lead to rights violations. As a result, I argued that the legal impact of the right would be marginal in terms of impacting the housing policy of the current Irish Government. If

the courts were to impose any obligations on the Government, it would be in the area of homelessness as it is in this area where a minimum obligations approach could yield significant results. However, in macro policy areas such as the provision of social housing, the right to housing is unlikely to have significant impact.

It is clear from the preceding discussion that the radical left must have a precise and coherent legal analysis as regards the potential impact of the right to housing. Socialists must be aware of the different effect that the right could have. For example, the fact that it may help to ensure that progressive housing legislation is passed will be extremely useful if socialists are to be in government in the future, but it is less likely to be of utility if conservative parties are in power. The radical left must also be aware that the right to housing in unlikely to impact the policy of a conservative government as the courts are unlikely to compel the executive to act in a particular manner.

What is also crucially important is that activists must be clear as to the determinative factors behind judicial reasoning and the significance of particular decisions. This will ensure that socialists do not become preoccupied with matters such as textual interpretation or with the proper application of judicial creations such as the proportionality test. Instead, they will be able to identify the causal factors in legal decision-making. For example, in the caselaw I examined, the judiciary has been willing to allow progressive housing legislation which infringes upon private property rights to stand. And, as I noted it will be even more likely to do so if a right to housing is inserted into the Constitution. But this should not be interpreted as meaning that the judiciary is not centrally concerned with ensuring that the system of property relations is maintained. The cases in Chapter three were concerned with interference in the property rights of a limited number of individuals. In none of those cases was there any hint of judicial scepticism towards the right to private property as a general institution. My analysis has shown that the reason why the judiciary allowed the restriction of property rights in certain instances, was that it placed significant emphasis on the separation of powers doctrine. It shows that the judiciary is not a progressive force that is enthusiastic about prioritising the common good over the property rights of individuals. Instead, it is concerned with ensuring the integrity of the constitutional order and is willing to allow the restriction of individual property rights in certain circumstances in order to ensure that integrity is maintained.

This is an important point, as a lazy analysis might lead activists to believe that the judiciary is a more progressive institution than it actually is. This, in turn, could cause

socialists to believe that the courts might be willing to impose obligations on the Government to ensure that the right to housing was vindicated. A more careful analysis has shown that, in the cases where litigants have sought a positive interpretation of socioeconomic rights, the liberal aversion to state interference in the private sphere has aligned with judicial concerns regarding the separation of powers, and therefore the courts have been unwilling to interpret constitutional rights in a positive manner. Equally however, my analysis has shown that socialists must avoid presuming that the courts would never allow interference with private property rights. Other factors can also influence the judiciary's decisions. To fail to understand this, may lead to opportunities being missed to win favourable decisions in the courts which may benefit the socialist cause.

In the right to housing chapter I also considered the political aspect of the question regarding the utility of a constitutional right to housing. The analysis of this aspect of the question began in section one of the chapter where I argued that the characterisation of the right to private property as a counter right to the right to housing provides a political opportunity for the radical left. I asserted that socialists should argue that the right to housing in fact constitutes a limitation on the right to private property. Further I contended that the presentation of the right to private property as a restriction on the right to housing could be turned into an opportunity for socialists to publicly question the position of private property in Irish society. The radical left could highlight the fact that establishment politicians were characterising that the right to private property as a barrier to the protection of basic social good and could pose the question of whether society would be better off if such stringent protection wasn't provided to that right. Thus, the debate surrounding the right to housing can offer an opportunity for socialists to link the concept of private property a key pillar in the system of capitalist accumulation, to the abuses, exploitation and suffering that exist under that system.

I continued my analysis of whether the right to housing might be a useful political tool for the radical left by developing a socialist conception of the right. I argued that traditional Marxist critiques of rights could be viewed as criticisms of their liberal formulation rather than as a complete rejection of rights. I noted some key aspects of those criticisms and identified the particular way in which the socialist right to housing would have to be formulated in order to overcome them. First, the socialist conception of the right to housing would have to be directly concerned with altering material relations. In order to ensure that is the case socialists must explicitly connect the

protection of the right with particular outcomes, for example the ending of homelessness, or the largescale provision of social housing. Further the right must be based on the idea that rights abuses are not random occurrences but are caused by the structural problems associated with capitalist accumulation. Socialists must therefore argue that high rents and evictions are not an inevitable part of any social system but are caused by the exploitative nature of the capitalist system. I argued that the campaign to constitutionalise the right to housing could provide a popular form, through which the radical left's claims about housing could be channelled. It could provide a platform for socialists to criticise liberal conceptions of the right to housing which fail to challenge capitalist relations, to highlight the ways in which people suffer under a neoliberal housing system, to demonstrate how this suffering is connected to the structures of capitalism, and to extol the virtues of the socialist system of organisation.

The political aspect of the right to housing could therefore offer important opportunities to Irish socialists. Indeed, the political aspect of seeking to constitutionalise the right may be more important to the radical left than the limited benefits the legal protection of the right might provide. Here, I would like to reintroduce Robert Knox's notion of 'principled opportunism' and Honor Brabazon's idea of the 'law as politics'. Although not all aspects of these theories are compatible with the analysis carried out in relation to the right to housing, I believe they provide a useful framework for understanding the relationship between the legal aspect and the political aspect of the campaign to gain constitutional protection for the right. To recap, Knox argues that, given the limiting nature of the legal form, which operates to reproduce capitalist social relations, socialists must be sceptical about the potential for radical social change to be achieved through legal structures. Similarly, Brabazon argues that legal engagement should not be based on a belief in the utility and legitimacy of the legal form. However, both theorists argue that, given the right circumstances, and engaged with in the appropriate way, the legal system can offer activists opportunities to further their objectives. Therefore, law is not utilised due to a utopian belief in its ability to achieve social change. Instead, it is engaged with as it may be of limited utility in advancing particular claims. Knox explains the approach that should be taken towards legal engagement through a discussion of tactics and strategy. Tactics are smaller interventions that are engaged in order to advance the broader strategic goal. What is key it that the legal tactic is seen as subordinate to the political strategy. The legal system is only engaged with if such engagement will likely advance that

strategy. Brabazon similarly views the decision to engage with the law as being dependent on its ability to help achieve broader political goals.

In my opinion the question of whether socialists should engage with the campaign to constitutionalise the right to housing can be best understood through the 'principled opportunism' and 'law as politics' framework. To understand why, we must first identify the broader strategic aim. As I noted in the introduction to the thesis, the ultimate objective for the radical left is to install a socialist system in Ireland. This can be achieved by highlighting the exploitative nature of capitalism and by demonstrating the superior nature of a socialist system of organisation. The tactic in this instance is engaging with legal structures by arguing that a right to housing should be given constitutional protection. This tactic is utilised not in the belief that this protection of the right will lead to radical social change. As I have noted, the impact of the right to housing is likely to be limited. However, engaging in the legal tactic helps to further the broader strategic goal. As I have discussed, engagement with the campaign to constitutionalise the right to housing would provide socialists with opportunities to criticise the exploitative nature of capitalism and to advocate for a socialist system of organisation. The legal tactic therefore furthers the broader political strategy.

III – Apollo House – Juridical Rationality & Political Debate

In this chapter I considered the Apollo House occupation. This moment of dissent was mediated through the legal form as the activists were compelled to argue their case in court, in order to avoid a coercive eviction. I considered the implications of this mediation from two sides. First, I considered the arguments made in court and in the judge's decisions. I also considered the political impact of the legal mediation of the dispute.

In terms of the former, I highlighted the centrality of the concept of private property. This concept, which of course is based on material relations, shaped the way in which the protest was viewed in the courtroom and the arguments which the different parties made. The property 'owners' in the case, Mazars, focused their argument largely on this core issue. The protestors were forced to develop an argument which recognised the centrality of the concept of private property to the dispute, one which asked the court to restrict the right in favour of the interests being defended by the protestors. I noted the potential for rupture if that argument succeeded, but also the unlikelihood that it would, given the structural disposition of law towards the protection of private property. The judge also placed the central focus of his judgments on the issue of private property, making it clear

that its protection is a core concern of liberal legality. This means that socialist activists must be aware that, in instances in which their protests involve the infringement of property rights of individuals or companies, it is highly unlikely that they will be successful inside the courtroom. The law's structural disposition towards the defence of private property means that courts are unlikely to grant favourable decisions to activists, who are infringing the property rights of others. This should be considered by radical left activists in deciding the method of protest they utilise and the utility of engaging with legal structures.

I also noted the use of health and safety arguments by Mazars. I discussed how this argument allowed Mazars to appear as being concerned with the public interest but framing their legal action as one which was concerned with the safety of the protestors and of the residents of Apollo House. Finally, I examined the question of whether the legal form operated to denude the courtroom dispute of socioeconomic context. The protestors tried to introduce the political context of the dispute into their legal arguments. They argued that the public interest, the rights of the residents of Apollo House not to be rendered homeless, should allow the restriction of the property rights of Mazars. In his final decision, the judge disregarded the political context of the protests, using the separation of powers doctrine as justification. Thus, the socioeconomic context was unable to determine the final outcome. However, I submitted that this context may have influenced the judge's decision to grant the stay on the injunction, suggesting the legal form is not able to completely strip the socioeconomic context from a legal dispute. Therefore, it may not be completely futile to try and bring socioeconomic context into a courtroom argument if it could lead to the judge nuancing his or her decision in a way that furthers the objectives of the activists in question.

In terms of the impact of the legal form on the political debate surrounding the occupation I also made a number of observations. First, the illegality of the occupation. This undoubtedly helped bring more media and public attention to the protest. It is unlikely that it would have received the same attention if the building had been hired legally. I concluded therefore that illegality can be a useful tool for bringing public attention to a protest. I also highlighted the fact that the illegality of the protest did not receive much attention in the national media, nor did it seem to deter support for the protest. I stated that this seemed to contradict Brabazon's contention that, in the neoliberal period, dissent is judged through a procedural morality, that is, on whether it assumes a legitimate form.

However, I noted a number of reasons why the illegality of the protest may not have been focused upon. The scale of the housing crisis may have meant the people were willing to ignore the illegality of the protest. Further, the fact it was the property rights of a receiver that were being infringed may also have caused people to disregard the illegal nature of the occupation. I also argued that the protestors themselves framed their actions as civil disobedience. This form of protest foregrounds the moral aspect of what the dissenters are doing, highlighting the gap between this morality and the rules of the legal system. The fact that protest, framed as civil disobedience, was not condemned due to its illegality tells us two things. First, civil disobedience is widely seen as a legitimate form of protest. Therefore, it passes the 'procedural morality' test. Secondly, the tendency of the neoliberal legal form to decontextualise protest is not absolute. Notions of morality and justice, which exist outside the legal form, still have influence. Activists must therefore consider the form that their protest takes. This may not impact the outcome of legal proceedings, but it may have influence in the way protest is viewed by the general public. Framing the dissent as being concerned with protecting a moral norm which the law seems to disregard, may also be useful in engendering public support.

The second observation I made regarding the political impact of the legal form was concerned with the influence of administrative law arguments in the political sphere. I noted how government and DCC officials regularly made comments highlighting health and safety issues regarding the occupation, comments which mirrored those made by Mazars in the courtroom. I stated that this shows how the reach of the legal form is able to extend outside the courtroom, and to shape how we view the political realm. I also noted that the political rationale for making health and safety arguments was the same as that which encouraged Mazars to make them in court. Government and council officials sought to undermine the occupation whilst appearing to be primarily concerned about public safety. However, I also noted the activists' efforts to resist this move. The protestors managed to turn the debate into one about the standards in state provided homeless accommodation. I argued that this highlighted that, without a judge to make a determination, the utility of resorting to health and safety arguments in order to shut down dissent, is limited in the political sphere.

Thirdly, I noted the failure of the activists to criticise the court decision. I highlighted the influence of the formalist notion of judicial interpretation in the public sphere. Legal judgments are deemed legitimate as they are seen as rational, neutral and objective. This legitimacy means that legal decisions are potentially an important political tool, as they

can help to shape the way in which protest is viewed by the wider public. Therefore, it was important that the protestors challenged the legitimacy of the that decision. This is an important issue for activists. The symbolic power of judicial decisions must be considered before engaging with the legal system. If activists are likely to lose in court, this could have negative consequences for public support for their actions. Further, activists must be prepared to criticise court decisions which do not go in their favour. Socialists must therefore have a critique of the law and judicial decision making. If they are to avoid appearing as being critical of the court's decision, simply because it did not go in their favour, activists must have a coherent and consistent critique of the law's disposition towards protecting and reproducing capitalist social relation. This can help to counter the mystifying nature of the legal form which acts to legitimate the current order. Socialists must be clear that legal structures are part of the exploitative system to which they are opposed.

Finally, I noted the symbolic impact of unpopular legal actions and the fact that this impact was diminished in the Apollo House case due to the fact that the State wasn't party to proceedings. I argued that if NAMA was legally in charge of the property at the time of the protest, they may have been reticent to take legal action, given that the eviction of homelessness activists by the State, would have been a public relations disaster. They may have therefore been more willing meet the demands of the protestors. If they had been compelled to take the legal action to evict the protestors, this would have put a further spotlight on the government's record as regards homelessness and the wider housing crisis. Again, this is something that activists might consider. Would the party which they are protesting against be likely to bring court proceedings or would they be hesitant to do if it would negatively impact public perception? If it is the latter, this may make it more likely that the party in question would be open to negotiating with the activists and potentially meeting their demands.

IV – The Dublin Tenants Association – Navigating the Legal Form

In Chapter six I considered the activities of the Dublin Tenant's Association, a tenant activists' group of which I was a member of. The aim of the group was to politicise tenants so that they would organise in an effort to improve conditions in the private rental sector. I gave a brief overview of the different activities of the group, the legal education programme, the campaigning and policy work and the efforts at community building. However, my main focus was on the legal practice or 'casework' of the group. The

rationale for carrying out casework was fourfold, assisting tenants who were in dispute with their landlords, politicising tenants by linking their individual issue to the structural problems of the private rental sector and convincing them that these problems could only be solved through collective action., engaging with and understanding the law as a method of cultivating legitimacy as a group, and politicising legal spaces. I then analysed these different rationales by discussing the benefits and difficulties that came with engaging in casework. Some interesting points emerged form that discussion.

In terms of assisting tenants, I noted how successful the group was in achieving favourable outcomes when going through the Residential Tenancies Board's (RTB) adjudicative process. I attributed this success to the knowledge and expertise which the group had accumulated, due to its legal education programme and due to its experiences in preparing and arguing cases before the RTB. This suggests that the difficulty that laypeople have in understanding legislation, which is often written in extremely technical language, can be overcome if activists are committed to a process of education. It also suggests that activists can become proficient in preparing and arguing cases and that these skills may be helpful in counteracting the law's disposition towards favouring property owners such as landlords. However, I noted that the success of the association was unlikely to be reproduced on a larger scale, as it was primarily due to the fact that the landlords typically didn't have professional representation. If it became clear that landlords needed such representation to be successful in disputes with their tenants, it would likely lead to an increase in legal professionals arguing cases in the RTB and would consequently made it more difficult for tenants to have success.

The second rationale for engaging in casework was to politicise tenants by linking their specific issue to the structural problems in the private rental sector and by showing the tenants that these problems could only be solved through collective action. I noted a range of difficulties that emerged in relation to this process. First was the problem in helping tenants to see the structural link between their issue and the larger architecture of the private rental system. I had noted the idea that the law's facilitative and constitutive functions meant that it could provide a map of the capitalist system, allowing those who gained knowledge of the operation of the law, to understand the dynamics of capitalism. I argued that this transcriptive function of law would facilitate the linking of individual issues to larger structural problems. However, in practice this did not work as a system was not developed to guide the way in which this process would take place. But this does not mean that it would not have worked if such a system were developed. I am still of the

opinion that the transcriptive function of law is something that should be better harnessed by activists in their efforts to understand, and ultimately overcome the capitalist system.

I also highlighted the problem with carrying out casework collectively, as the members discovered that the provision of legal information wasn't suited to a group situation. Further, I noted the fact that the technical nature of legal language meant that tenants who were coming to the group for the first time, found it hard to get involved in meetings, as they didn't have the requisite knowledge to engage in discussions. I discussed the fact that the RTB process, generally speaking, did not seem to be an empowering one for tenants, noting that both tenants and the association members who were assisting them found the process quite stressful. Finally, I noted the discussion around the formalisation of processes, and whether this would run counter to the collective ethos of the group, as the relationship between members and other tenants could become depoliticised.

I linked all of these issues to the nature of the legal form, arguing that the particular aspects of that form underpinned all these difficulties. As a result, the legal form structured the way in which the group operated. The technical nature of legal language made it impossible to carry out groupwork collectively and made it difficult for tenants to participate in the group's discussion. The alienating nature of the legal form meant that the tenant did not want to engage with the group after his case was finished as the legal process was traumatising. Members also found this process difficult. I argued that this was due to the alienating nature of the legal process, caused by the hierarchical structure of legal settings, the technical language used, but also the competitive aspect of the legal form, where opposing parties are in dispute with one another. There is often a disparity in power and resources between the parties to a dispute and, particularly in those between landlords and tenants. I also noted that the consequences of losing are much more severe for the latter. Finally, I highlighted the fact that the legal form ignores these disparities when adjudicating on the dispute. The influence of the legal form also influenced the debate around formalisation, as it necessitated an approach which ran contrary to the one which some of the activists thought the group should be taking.

The third rationale for engaging in casework, was the attempt to gain legitimacy and credibility through gaining legal knowledge. I noted that this approach was particularly successful. I argued that it was here that the transcriptive nature of law, its ability to map the structure of the capitalist system, was of most benefit to the group. The legal knowledge of members allowed them to understand the structural problems of private rental sector. This enabled them to gain credibility with tenants, with the media, and with

the wider public as they could articulate what was going wrong in the sector and what needed to be done to address it.

Finally, I noted the fourth rationale, the aim to politicise legal spaces, for example organising a protest in conjunction with a tenant's legal hearing. I noted that this could potentially be a powerful tool as it could help bring the political and socioeconomic context, which the legal from attempts to conceal, into a courtroom setting. This can have a symbolic resonance as it challenges the vision of reality that is projected in legal spaces. However, I noted that there were issues which made it difficult to carry out in practice. The main issues were the concerns around publicising an individual's particular circumstances, as it could attract negative media attention. It could also mean that adjudicators may view the tenant negatively if the protest had been disruptive. However, it is an area I believe the group should have placed more emphasis on.

It should be clear from this discussion that the legal form influenced and structured the way in which the tenant's association operated. The efforts of the group to constantly refine the way in which it conducted casework can be characterised as an attempt to negotiate the group's position as regards the legal form. In some ways the interaction was successful. The transcriptive nature of law meant that, as the group gained legal expertise, they were increasingly able to understand how the rental sector operated and the power dynamics which existed within it. This enabled the group to gain legitimacy amongst tenants and the wide public. The idea of politicising legal spaces is an area which, as I have noted, the group failed to explore. However, this is an approach that would be interesting to study further. There were also however, many difficulties associated with engaging with the legal form. It makes it challenging for activist groups, who are seeking to politicise tenants through a process of collective empowerment, to carry out their work. Indeed, on reflection, I am of the opinion that engaging in legal practice is not a suitable approach if the goal is to politicise tenants and encourage them to become involved in struggle. I argued above that the linking of individual issues to structural problems may be possible, if a process is developed for doing so. However, the transcriptive potential of law may be better suited to the task of gaining legitimacy, than to the attempt to politicise tenants during their engagement with an inherently depoliticising and alienating process. Therefore, activists should not dismiss the idea of engaging in legal practice, or at least taking time to understand the legal structure of the particular arena in which they are operating. But they must also be aware of the depoliticising and alienating influence of the legal form.

Conclusion

To conclude, in response to my central research question, whether legal engagement can be of benefit to Irish socialists in furthering their political objectives, my view is that it can, although in a limited way. Through the three case studies examined in this thesis, I have shown the variety of ways in which socialists can engage with legal structures. I have discussed a defensive legal action, in which activists were compelled to engage with legal structures so that they could continue their political protest. I have investigated an instance in which activists have chosen to engage in a legal practice as part of their political struggle. Finally, I have considered the benefits of engaging in a campaign to gain legal protection for a right. The case studies have shown the multiple ways in which the law can impact upon political struggle, from influencing the way that individuals interact, as in the case of the tenant's association, to shaping the public perception of how protest and struggle are viewed by the wider public, as I demonstrated in in my study of the Apollo House occupation.

For me, the key theoretical insight which has assisted my analysis is the nature of the legal form. I noted Evgeny Pashukanis' development of the commodity form theory, and I believe that this theory provides particular insight into the operation of law. The key aspect of the legal form, which determines its tendency to reproduce capitalist social relations, and which limits its utility as a tool of social change, is the notion of formal equality and the associated idea of the abstract legal subject. The elision of socioeconomic context which results from these aspects of the legal form means that it is limited in its utility as a tool for activists, as the foregrounding of the material inequalities caused by capitalism are key to socialist attempts to overcome that system of organisation. It means that activists are limited in the arguments they can make when trying to justify an occupation. It means that the courts are averse to imposing obligations on the State to improve the material realities of people's lives. It means tenants felt traumatised by an adjudicative process in which they could not explain the material factors which caused them to be late on their rent.

However, this thesis also showed that the influence of the legal form is not absolute and that it can be engaged with in ways that can benefit activists. The Apollo House study showed that if activists frame their protest in a particular way, for example, as being acts of civil disobedience, then the delegitimating powers of the legal form can be counteracted. The study of the tenant's association demonstrated that law can reveal and transcribe the dynamics of capitalist structures and that this might help socialists to gain

knowledge of the system and to develop counterstrategies to challenge it. This knowledge can help activists to gain legitimacy with the wider public. The right to housing study revealed that legal discourse can be engaged with in a way that does not lead to its legitimation, but which exposes the limited nature of liberal legal thought.

What is key for socialists if they wish to engage with legal structures is to ensure that this engagement fits within their broader political struggle. Law must be seen as a limited tool that should only be utilised if it is clear that this will further the strategic political objective. In order to ensure that this is the case, socialists must engage in careful legal analyses which avoid lazy assumptions, and which identifies the determining factors in legal outcomes. This will allow activists to be confident that the particular legal tactic they employ will assist the broader political aim.

Bibliography

Legislation

Mortgage Arrears Resolution (Family Home) Bill 2017 (Bill 88 of 2017)

Residential Tenancies (Prevention of Family Homelessness) Bill 2018 (Bill 110 of 2018)

Residential Tenancies Act 2004.

Thirty-fifth Amendment of the Constitution (Right to a Home) Bill 2016 (Bill 32 of 2016)

Thirty-fifth Amendment of the Constitution (Right to Housing) Bill 2017 (Bill 41 of 2017)

Thirty-ninth Amendment of the Constitution (Right to Housing) Bill 2019 (Bill 47 of 2019)

Thirty-ninth Amendment of the Constitution (Right to a Home) Bill 2020 (Bill 37 of 2020)

Urban Regeneration and Housing (Amendment) Bill 2018 (Bill 63 of 2018)

Caselaw

Ireland

Attorney General v Southern Industrial Trust and Simons [1960] 94 I.L.T.R 161

Buckley and Others v Attorney General and Others [1950] I.R. 67

Blake v Attorney General [1982] IR 117

Central Dublin Development Association Limited v Attorney General [1975] 108 ILTR 69

Chaulk v R [1990] 3 SCR 1303

Cox v Ireland [1992] 2 IR 503

Crotty v Taoiseach [1987] IR 713

Crowley v Minister for Education [1980] IR 102

Daly v Revenue Commissioners [1996] 1 ILRM 122

DB v. Minister for Justice [1999] 1 IR 29

D.G. v. Eastern Health Board [1997] 3 IR 511

FN v Minister for Education [1995] IR 409

G v. An Bord Uchtala [1980] IR 32

Heaney v Ireland [1994] 3 IR 593

Iarnród Éireann v Ireland [1995] 2 ILRM 161

Jorg Dreher v Irish Land Commission [1984] ILRM 904

Murtagh Properties Ltd v Cleary [1972] IR 330

O'Callaghan v Commissioners of Public Works [1985] IR 486

O'Donoghue v Minster for Health [1996] 2 IR 20

O'Reilly v Limerick Corporation [1989] ILRM 181

Pigs Marketing Board v Donnelly [1939] IR 413

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

Re Article 26 and Part V of the Planning and Development Bill 1999 [2000] 2 IR 321

Re Article 26 and the Health (Amendment) (No 2) Bill 2004 [2005] 1 ILRM 401

Ryan v. Attorney General [1965] IR 294

Sinnott v Minister for Education [2001] 2 IR 545

State (Quinn) v. Ryan [1965] IR 70

T.D. v. Minister for Education [2001] 4 IR 259

The State v Frawley 1976] IR 365

India

Consumer Education and Research Centre v. Union of India [1995] INSC 91

Miss Mohini Jain v. State of Karnataka [1992] INSC 184 (30 July 1992).

People's Union for Civil Liberties v. Union of India Writ Petition (Civil) No.196/2001 (23 July 2001) Unreported ('PUCL case').

Shantistar Builders v. Narayan Khimalal Totame (1990) 1 SCC 520.

South Africa

Government of the Republic of South Africa v. Grootboom 2000 (11) BCLR 257 (CC).

Khosa v. Minister of Social Development 2004 (6) BCLR 569 (CC).

Minister of Health v. Treatment Action Campaign (TAC) 2002 (10) BCLR 1075 (CC).

Soobramoney v. Minister for Health, KwaZulu-Natal 1997 (12) BCLR 1696 (CC).

Books

Abdullahi A. An-Na'im, 'To Affirm the Full Human Rights Standing of Economic, Social and Cultural Rights' in Ghai and Cottrell (eds), Economic, Social and Cultural Rights in Practice INTERIGHTS, 2004) 12.

Achtenberg E, & Marcuse P, 'The Causes of the Housing Problem' – in Bratt R, Hartman C, and Meyerson A (eds), *Critical Perspectives on Housing* (Temple University Press 1986)

Alexander L, 'Introduction' in Larry Alexander (eds), *Constitutionalism: Philosophical Foundations* (Cambridge University Press 1998)

Arthur C, 'Editor's Introduction' in Arthur C, (ed) *The German Ideology* (Students Edition, Lawrence & Wishart 1970)

David Bilchitz, *'Poverty and Fundamental Rights: The Justification and Enforcement of Socio-Economic Rights'* (Oxford University Press, 2007)

Brabazon H, 'Introduction: Understanding Neoliberal Legality' in Brabazon H, (ed), *Neoliberal Legality: Understanding the Role of Law in the Neoliberal Project* (Routledge 2017)

Brabazon H, 'Dissent in a Juridified Political Sphere' in Brabazon H, (ed), *Neoliberal Legality: Understanding the Role of Law in the Neoliberal Project* (Routledge 2017)

Baars G, '*The Corporation, Law, and Capitalism: A Radical Perspective on the Role of Law in the Global Political Economy'* (Haymarket 2020)

Cain M, and Hunt A, *Marx & Engels on Law* (Academic Press 1979)

Chubb B, *The Politics of the Irish Constitution* (Institute of Public Administration 1991)

Collins H, *Marxism and Law* (OUP 1984)

Asbjorn Eide, 'Economic, Social and Cultural Rights as Human Rights' in Asbjorn Eide and Others (eds) *Economic, Social and Cultural Rights – A Textbook* (2nd Edition, Martinus Nijhoff, 2001)

Engels F, 'The Housing Question' in *Marx and Engels Collected works* Vol. 23 (International Publishers 1988)

Feuerbach L, *The Essence of Christianity* (first published 1854, Cambridge University Press 2012)

Fields B, *The Catholic Ethic and Global Capitalism* (Ashgate 2003)

Freeman M, *Lloyd's Introduction to Jurisprudence* (Sweet & Maxwell 2001)

Hardin R, *Liberalism, Constitutionalism, and Democracy* (OUP 1999)

Harvey D, *Limits to Capital* (2nd edn, Verso 1999)

Hay D, and others, *Albion's Fatal Tree: Crime and Society in Eighteenth-Century England* (Verso 2011)

Hearne R, 'A Home or a Wealth Generator: Inequality, Financialisaton and the Irish Housing

Crisis' – in Wickham J (ed), *Cherishing All Equally 2017: Economic Inequality in Ireland* (TASC 2017)

Hegel G, *Philosophy of Right* (Knox T, (ed), first published in 1896, OUP 1952)

Hegel G, *The phenomenology of Mind* (Baillie J, (tr) 2nd edn, Allen & Unwin 1949)

Heywood A, *Politics* (3rd edn, Palgrave MacMillan 2007)

Hobbes T, *Leviathan* (Noel Malcolm (ed) Clarendon Press 2012)

Hogan G, *The Origins of the Irish Constitution, 1928-1941* (Royal Irish Academy 2012)

Hook S, *From Hegel to Marx* (University of Michigan 1972)

Hunt A, 'Marxist Theory of Law', in Paterson D(ed), *A Companion to Philosophy of Law and Legal Theory* (1st edn, Blackwell 2010)

Hunter R, 'Contesting the Dominant Paradigm: Feminist Critiques of Liberal Legalism', in Munro V, and Davies M, (eds), *The Ashgate Research Companion to Feminist Legal Theory* (1st edn, Routledge 2013)

Jessop B, *The Capitalist State* (Martin Robertson Oxford 1982)

Katznelson I, *Marxism and the City* (OUP 1992)

Kay R, 'American Constitutionalism' in Alexander L, (ed), *Constitutionalism: Philosophical Foundations* (Cambridge University Press 1998)

Kelman M, *A Guide to Critical Legal Studies* (Harvard Univ. Pr. 1987)

Keane R, 'Property in the Constitution and in the Courts' in Farrell B, (ed), *De Valera's Constitution and Ours* (Gill and Macmillan 1988)

Kennedy D, 'Three Globalizations of Law and Legal Thought: 1850 – 2000' – in Trubek D, and Santos A, (eds), *The New Law and Economic Development: A Critical Appraisal* (Cambridge Univ. Pr 2010)

Kennedy D, 'The Critique of Rights in Critical Legal Studies' in Brown W, and Halley J, (eds), *Left Legalism/Left Critique* (Duke University Press 2002)

Knox R, 'Marxist Approaches to International Law' in Orford A, Hoffmann F, and Clark M, (eds), *The Oxford Handbook of the Theory of International Law* (OUP 2016)

Lefebvre H, *The Urban Revolution* (Robert Bonnono (tr), University of Minnesota Press 2003).

Lenin V, *The State and Revolution* (first published 1917, 2nd edn, Penguin 2009)

Lipton F, *The Constitution of Ireland 1937 - 1987* (Institute of Public Administration 1987)

Madden D, and Marcuse P, *In Defense of Housing: The Politics of Crisis* (Verso 2016)
Marshall, T. H., and Tom Bottomore, *Citizenship and Social Class* (Pluto Press, 1992)

Marx K, *The Economic & Philosophic Manuscripts of 1844* (Struk D, (ed) International Publishers 1964)

Marx K, 'Critique of Hegel's Doctrine of the State' in Livingstone R, and Bents G, (trs), *Karl Marx: Early Writings* (Penguin 1975)

Marx K, 'A Contribution to the Critique of Hegel's Philosophy of Right. Introduction' in Livingstone R, and Bents G, (trs), *Karl Marx: Early Writings* (Penguin 1975)

Marx K, 'On the Jewish Question' in Tucker R (ed), *The Marx-Engels Reader* (2nd edn, Norton & Company 1978)

Marx K, *Capital Volume 1* (Penguin 1990)

Marx K, and Engels F, 'The German Ideology' in Tucker R, (ed) *The Marx-Engels Reader* (2nd ed, W.W Norton & Company 1978)

Marx K, 'Preface to A Contribution to the Critique of Political Economy' in Tucker R, (ed) *The Marx-Engels Reader* (2nd ed, W.W Norton & Company 1978)

Marx K, 'Theses on Feuerbach' in Arthur C, (ed) *The German Ideology* (Students Edition, Lawrence & Wishart 1970)

McCabe C, 'Sins of the Father: The Decisions that Shaped the Irish Economy' (2nd edn, The History Press Ireland 2013)

McLellan D, *Marx Before Marxism* (2nd edn, Penguin 1972)

Miéville C, *'Between Equal Rights: A Marxist Theory of International Law* (Brill 2005)

Morgan D, *The Separation of Powers in the Irish Constitution* (Round Hall Sweet & Maxwell 1997)

Samuel Moyn, *The Last Utopia* (Harvard University Press, 2010)

Ó Broin E, 'Home: Why Public Housing is the Answer' (Merrion Press 2019)

Paul O'Connell, 'Let Them Eat Cake: Socio-Economic Rights in An Age of Austerity', *Human Rights and Public Finance* (1st edn, Hart 2013) 76

O'Connell P, *Vindicating Socio-Economic Rights: International Standards and Comparative Experiences*, (Routledge 2012)

Oren M, Alterman R, and Zilbershats Y, 'Housing Rights in Constitutional Legislation: A Conceptual Classification' in Kenna P, (ed), *Contemporary Housing Issues in a Globalized World* (Ashgate 2014)

Pashukanis E, *Law & Marxism: A General Theory* (Pluto Press 1989)

Poulantzas N, *Political Power and Social Classes* (New Left Books: London 1973)

Poulantzas N, *State. Power. Socialism.* (New Left Books 1978)

Saunders P, *Social Theory and the Urban Question* (2nd edn, Routledge 1986)

Martin Scheinin, 'Economic Rights as Legal Rights' in Asbjorn Eide and Others (eds) *Economic, Social and Cultural Rights – A Textbook* (2nd Edition, Martinus Nijhoff, 2001)

Singer P, *Marx: A Very Short Introduction* (1st edn, OUP 2000)

Stimson S, 'Constitutionalism and the Rule of Law' in Dryzek J, and others, (eds), *The Oxford Handbook of Political Theory* (Oxford University Press 2006)

Thompson E, *Whigs and Hunters: The Origin of the Black Act* (Penguin 1990)

Ward A, *The Irish Constitutional Tradition: Responsible Government and Modern Ireland, 1782-1992* (Irish Academic Press 1994)

Quinn G, 'Rethinking the Nature of Economic, Social and Cultural Rights in the Irish Legal Order', in Costello C, (ed.), *Fundamental Social Rights: Current European Legal Protection and the Challenge of the EU Charter on Fundamental Rights* (Dublin: Trinity College, 2001)

Journal Articles

Balbus I, 'Commodity Form and Legal Form: An Essay on the "Relative Autonomy" of the Law (1977) 11(3) Law & Society Review 571

Bartholomew A, 'Should a Marxist Believe in Marx on Rights?' (1990) 26 Socialist Register 244

Barrington D, Private Property under the Irish Constitution (1973) 8 (1) Irish Jurist (NS) 1

Bilchitz D, Giving Socioeconomic Rights Teeth: The Minimum Core and its Importance, (2002) 119 S. Afr. L. J. 484

Brabazon H, 'Occupying Legality: The Subversive Use of Law in Latin American Occupation Movement' (2017) 36 (1) Bulletin of Latin American Research 21

Brabazon H, 'Yelling 'Fire' in a Crowded Occupation: Cynical Fire Hazard Claims and the Technocratic Containment of Dissent [2020] 29(4) Social & Legal Studies 549

Bourdieu P, 'The Force of Law: Toward a Sociology of the Juridical Field' (1987) 38 The Hastings Law Journal 814

Byrne M, 'Generation Rent and the Financialization of Housing: A Comparative Exploration of the Growth of the Private Rental Sector in Ireland, the UK and Spain' (2020) 35(4) Housing Studies 743.

Cain M, 'The Main Themes of Marx' and Engels' Sociology of Law' (1974) 1(2) British Journal of Law and Society 142

Coffey D, 'The Need for a New Constitution: Irish Constitutional Change 1932-1935', (2012), 48 Irish Jurist 283

Cornell D, 'Should a Marxist Believe in Rights?' (1984) 1 Praxis International 45

Douzinas C, 'A Short History of the British Critical Legal Conference or, the Responsibility of the Critic' (2014) 25 (2) Law and Critique 188

Gabel P, and Harris P, 'Building Power and Breaking Images: Critical Legal Theory and the Practice of Law' (1982-1983) 11 N.Y.U Review of Law & Social Change 369

Gearey A, 'Change is Gonna Come: Critical Legal Studies and the Legacies of the New Left' (2013) 24(3) Law and Critique 211, 215

Gordon R, 'Law & Ideology' (1988) 3(1) Tikkun 15

Hogan G, 'Directive Principles, Socioeconomic Rights and the Constitution', (2001), 36 Irish Jurist 175

Hogan G, 'The Constitution, Property Rights and Proportionality' (1997) 32 Irish Jurist 373, 377

Hunt A, 'The Critique of Law: What is Critical about Critical Legal Theory' (1987) 14(1) Journal of Law & Society 5, 7

Jessop B, 'On Recent Marxist Theories of Law, the State and Juridico-Political Ideology' (1980) 8 International Journal of the Sociology of Law 339

Keane R, 'Land Use, Compensation and the Community' (1983) 18 (1) Irish Jurist 23

Kenny D & Casey C, 'A One-Person Supreme Court? The Attorney General, Constitutional Advice to Government, and the Case for Transparency' (2019) 42 Dublin U LJ 89

Klare K, 'Law-Making as Praxis' (1979) 40 Telos 123

Kitchin R, and Others, 'Placing Neoliberalism: The Rise and Fall of Ireland's Celtic Tiger' (2012) 44 Environment and Planning 1302

Knox R, 'Marxism, International Law, and Political Strategy' (2009) 22(3) Leiden Journal of International Law 433

Knox R, 'Strategy & Tactics' (2010) 21 Finnish Yearbook of International Law 193

Llewellyn K, 'A Realistic Jurisprudence: The Next Step' (1930) 30 Colum. L. Rev. 431

Llewellyn K, 'Some Realism about Realism: Responding to Dean Pound' (1931) 44(8) Harvard Law Review 1222

Lukes S, 'Can a Marxist Believe in Human Rights?' (1981) 4 Praxis International 334

Mayer M, 'First World Urban Activism: Beyond Austerity Urbanism and Creative City Politics' (2013) 17(1) City 5

McBride W, 'Rights and the Marxian Tradition' (1984) 1 Praxis International 57

Miliband R, 'Marx and the State' (1965) 2 Socialist Register 278

Murray T, 'Socioeconomic Rights and the Making of the 1937 Irish Constitution', (2016) 31:4 Irish Political Studies 502

Murray T, 'Contesting a World-Constitution? Anti-systemic Movements and Constitutional Forms in Ireland, 1848-2008', (2016), 22:1 Journal of World-System Research 77

Norris M, and Coates D, 'How Housing Killed the Celtic Tiger: Anatomy and Consequences of Ireland's Housing Boom and Bust' (2014) 29 Journal of Housing and the Built Environment 299.

O'Callaghan C, and Others, 'Topologies and Topographies of Ireland's Neoliberal Crisis' (2015) 19 (1) Space and Polity 31

O'Connell P, 'On the Human Rights Question' (2018) 40 (4) Human Rights Quarterly 962.

O'Mahony C, 'Unenumerated Rights after NHV' (2017) 40 Dublin U LJ 171

Pieterse M, 'Eating Socioeconomic Rights: The Usefulness of Rights Talk in Alleviating Social Hardship Revisited' (August 2007) 29 (3) Human Rights Quarterly 769-822

Rathinam F and Raja A, 'Courts as Regulators: Public Interest Litigation in India' (April 2011) 16 (2) Environment and Development Economics 199-219, 203

Renton D, 'Do Socialists Still Have an Alternative Concept of Rights' (June 2013) 64 Socialist Lawyer

Sultany N, 'The State of Progressive Constitutional Theory: The Paradox of Constitutional Democracy and the Project of Political Justification' (2012) 47 Harv CR-CL L Rev 371

Tushnet M, 'The Critique of Rights' (1993) 47 (1) SMU Law Review 23

Vasak K, 'A 30-Year Struggle: The Sustained Efforts to give Force of Law to the Universal Declaration of Human Rights' (November 1977) The UNESCO Courier 29

Verkuil P, 'Separation of Powers: The Rule of Law and the Idea of Independence' (1989) 30 Wm & Mary L Rev 301, 303

Vierdag E, 'The Legal Nature of the Rights Generated by the International Covenant on Economic, Social and Cultural Rights' (1978) 9 Netherlands Yearbook of International Law 69-105

Vincent A, 'Marx and Law' (1993) 20(4) Journal of Law and Society 371

Waldron J, 'Separation of Powers in Thought and Practice' (2013) 54 BC L Rev 433

Walsh R, 'Private Property Rights in the Drafting of the Irish Constitution: A Communitarian Compromise (2011) 33 Dublin University Law Journal

Walsh R, The Constitution, Property Rights and Proportionality: A Reappraisal (2009) 31 Dublin U. L.J. 1

Webb J, 'A Progressive Critique? The Contribution of Critical Legal Scholarship to a Marxist Theory of Law' (1985) 19(2) The Law Teacher 98, 98

Will J. and Warwick B, 'Contesting Austerity: The Potential and Pitfalls of Socioeconomic Rights Discourse' (Summer 2016) 23(2) Indiana Journal of Global Legal Studies 629-664.

Reports

A Programme for a Partnership Government (May 2016)

CESCR, 'Concluding Observation on the Third Periodic Report of Ireland' (8 July 2015) E/C.12/IRL/CO/3

Committee on the Price of Building Land, 'Report to the Minister for Local Government' (1973)

Finn Keyes, 'Property Rights and Housing Legislation' (Briefing Paper (Enquiry 2019/715 Oireachtas Library & Research Service 2019)

Home for Good, 'For the Common Good: The Housing Crisis & a Proposal to Amend the Irish Constitution' (Home for Good 2020)

Mercy Law Resource Centre, 'The Right to Housing in Ireland' (2016)

Mercy Law Resource Centre, 'Second Right to Housing Report: The Right to Housing in Comparative Perspective (2018)

OCHR, 'CESCR General Comment No. 3: The Nature of the States Parties' Obligations (Art. 2. Para. 1 of the Covenant)' (14 December 1990) Document E/19991/23

OCHR, 'CESCR General Comment No. 4: The Right to Adequate Housing (Art. 11 (1) of the Covenant) (13 December 1991) Document E/1992/23

People Before Profit, 'General Election Manifesto' (2016)

The Convention on the Constitution, 'Eighth Report of the Convention on the Constitution: Economic, Social and Cultural (ESC) Rights' (March 2014)

UNGA, 'Report of the Special Rapporteur on Adequate Housing as a Component of the Right to an Adequate Standard of Living, and on the Right to Non-Discrimination in this Context' (18 January 2017) A/HRC/34/51

'Home Sweet Home: Emergency Housing Plan' (*Tuleftforum.com*, 2017) <http://www.tuleftforum.com/wp-content/uploads/2012/04/HSH_report_print.pdf> accessed 6 January 2021

Newspaper Articles

Anderson N, 'Activists Claim Win as Apollo House to Host Homeless Over Christmas' *Irish Independent* (Dublin, 22 December 2016) 16

Bray A, and Larkin L, 'Papers Served on Apollo House' *Irish Independent* (Dublin, 20 December 2016) <https://www.independent.ie/irish-news/courts/papers-served-on-apollo-house-35309775.html> accessed 2 January 2021.

Byrne L, 'Apollo House Campaigners Claim Victory as Government Confirm Two New Homeless Accommodation Facilities' *Irish Independent* (Dublin, 9 January 2017) <https://www.independent.ie/irish-news/news/apollo-house-campaigners-claim-victory-as-government-confirm-two-new-homeless-accommodation-facilities-35354021.html> accessed 11 January 2021

Clarke V, 'Council 'Concerned' Over Safety Claims in Apollo House' *Irish Times* (Dublin, 22 December 2016) <https://www.irishtimes.com/news/social-affairs/council-concerned-over-safety-claims-in-apollo-house-1.2915366> accessed 4 January 2021

Clarke V, 'Apollo House Accommodation 'Substandard', Council Chief Says' *The Irish Times* (Dublin, 28 December 2016) <https://www.irishtimes.com/news/ireland/irish-news/apollo-house-accommodation-substandard-council-chief-says-1.2919209> accessed 6 January 2021

Coveney S, 'Minister Coveney' Statement on Agreed Arrangements for People Currently Accommodated in Apollo House - Rebuilding Ireland' (*Rebuilding Ireland*, 2021) <https://rebuildingireland.ie/news/statement-on-apollo-house-arrangements/> accessed 4 January 2021

Cullen P, 'Apollo House Protestors to Meet Owners over Occupation' *The Irish Times* (Dublin, 18 December 2016) <https://www.irishtimes.com/news/ireland/irish-news/apollo-house-protesters-to-meet-owners-over-occupation-1.2910660> accessed 31 December 2020

Edwards E, 'Apollo House Campaigners May Take Court Action to Force End to Homelessness' *Irish Times* (Dublin, 23 December 2016) <https://www.irishtimes.com/news/social-affairs/apollo-house-campaigners-may-take-court-action-to-force-end-to-homelessness-1.2916508> accessed 5 January 2021

Fegan J, 'Act of Highly Organised 'Civil Disobedience' and Humanity' *Irish Examiner* (Dublin, 19 December 2016) <https://www.irishexaminer.com/news/arid-20435818.html> accessed 1 January 2021

Fegan J, 'Coveney: 'I Will Work with Apollo House Activists' *Irish Examiner* (Dublin, 21 December 2016) <https://www.irishexaminer.com/news/arid-30769496.html> accessed 3 January 2021

Fegan J, 'Arm in Arm, Activists Stand Together at High Noon' *Irish Examiner* (Dublin, 12 January 2017).https://www.irishexaminer.com/opinion/commentanalysis/arid-20438718.html. accessed 12 January 2021

Daly G, 'Nama Puts Kelleher's Irish Assets on Sale' *Sunday Times* (London 6 April 2014) 3

Edwards E, and McGreevy R, 'Turning Apollo House into 'Cash Cow' is Upsetting - Trade Union Official' *Irish Times* (Dublin, 3 December 2018). https://www.irishtimes.com/news/social-affairs/turning-apollo-house-into-cash-cow-is-upsetting-trade-union-official-1.3718895> accessed 15 January 2021

Edwards E, 'Apollo House Not an Ending but a Beginning, Activists Pledge' *The Irish Times* (Dublin, 13 January 2017) 5.

Griffin D, 'Apollo House Homeless Action Triggers Loss of Fire Insurance Cover' *The Irish Times* (Dublin, 20 December 2016) <https://www.irishtimes.com/news/ireland/irish-news/apollo-house-homeless-action-triggers-loss-of-fire-insurance-cover-1.2912989> accessed 2 January 2021

Healy T, 'Apollo House Occupiers can Stay Until After Christmas Court Rules' *Irish Independent* (Dublin, 21 December 2016) <https://www.independent.ie/irish-news/courts/apollo-house-occupiers-can-stay-until-after-christmas-court-rules-35312495.html> accessed 3 January 2021

Holland K, 'Home Sweet Home Group Plans Mass Movement to Challenge Housing Policy' *Irish Times* (Dublin, 23 January 2017) 8

Holland K, and others, 'Homeless Should be Allowed Stay in Apollo House, Says Zappone' *The Irish Times* (Dublin, 19 December 2016) <https://www.irishtimes.com/news/social-affairs/homeless-should-be-allowed-stay-in-apollo-house-says-zappone-1.2911420> accessed 1 January 2021

Holland K, 'Former Owner Backs Aim of Occupation' *The Irish Times* (Dublin, 21 December 2016) 6

Holland K, 'Home Sweet Home Ordered to Vacate Apollo House Next Month' *The Irish Times* (Dublin, 21 December 2016) <https://www.irishtimes.com/news/social-affairs/home-sweet-home-ordered-to-vacate-apollo-house-next-month> accessed 3 January 2021.

Holland K, 'Apollo House Campaigners Got Almost €200,000 in Donations' *Irish Times* (Dublin, 6 February 2017) 7

Holland K, 'Occupy Nama: City Property Taken Over to House Homeless' *The Irish Times* (Dublin, 16 December 2016) <https://www.irishtimes.com/news/social-affairs/occupy-nama-city-property-taken-over-to-house-homeless-1.2907854> accessed 14 December 2020

Holland K, 'Apollo House Occupation Started with Facebook Post' *The Irish Times* (Dublin, 19 December 2016) <https://www.irishtimes.com/news/social-affairs/apollo-house-occupation-started-with-facebook-post-1.2912167> accessed 1 January 2021

Holland K, 'Legal Notice Served on Activists Occupying Dublin Office Block' *The Irish Times* (Dublin, 17 December 2016) <https://www.irishtimes.com/news/social-affairs/legal-notice-served-on-activists-occupying-dublin-office-block-1.2910168> accessed 31 December 2020

Holland K, 'Apollo House Activists Claim Breakdown in Trust with Minister' *The Irish Times* (Dublin, 10 January 2017) <https://www.irishtimes.com/news/social-affairs/apollo-house-activists-claim-breakdown-in-trust-with-minister-1.2932118> accessed 11 January 2021

Holland K, and Edwards E, 'Activists Refuse to Leave Apollo House After Court Ruling' *Irish Times* (Dublin, 11 January 2017) <https://www.irishtimes.com/news/social-affairs/activists-refuse-to-leave-apollo-house-after-court-ruling-1.2932832> accessed 11 January 2021

Holland K, 'Campaign Intent on Continuing Conversation' *Irish Times* (Dublin, 13 January 2017) 5

Holland K, 'Apollo House: Some Homeless Residents Leave the Property' *The Irish Times* (Dublin, 22 December 2016) <https://www.irishtimes.com/news/social-affairs/apollo-house-some-homeless-residents-leave-the-property-1.2915986> accessed 4 January 2021.

Irish Examiner, 'Sinn Féin Urges People to Sign Online Petition after Group Takes Over Nama Building in Dublin' (Dublin, 16 December 2016) <https://www.irishexaminer.com/news/arid-30768906.html> accessed 30 December 2020.

Irish Examiner, 'Apollo House Resident can Stay Put Until January 11, High Court Says' (Dublin, 21 December 2016) <https://www.irishexaminer.com/news/arid-30769582.html> accessed 4 January 2021.

Irish Examiner, 'Apollo House Residents can Stay Put Until January 11, High Court Says' (Dublin, 21 December 2016) <https://www.irishexaminer.com/news/arid-30769582.html> accessed 4 January 2021

Irish Examiner, 'High Court Hears Campaigners Don't Believe There are Enough Beds for Homeless in Dublin' (Dublin, 21 December 2016) <https://www.irishexaminer.com/news/arid-30769533.html> accessed 4 January 2021

Irish Examiner, 'Dublin City Council CEO Questions Celebrity Endorsement of Apollo House Sit-in' *Irish Examiner* (Dublin, 28 December 2016) <https://www.irishexaminer.com/news/arid-30770210.html> accessed 6 January 2021.

Irish Examiner, 'Home Sweet Home to Vacate Apollo House as Deal Struck with Simon Coveney' (Dublin, 9 January 2017) <https://www.irishexaminer.com/news/arid-30771704.html> accessed 11 January 2021.

Irish Examiner, 'Last Remaining Homeless Person Leaves Apollo House' (Dublin, 12 January 2017) <https://www.irishexaminer.com/news/arid-30772199.html> accessed 12 January 2021.

Irish Examiner, 'One homeless person remains in Apollo House' (Dublin, 12 January 2017) <https://www.irishexaminer.com/news/arid-30772155.html accessed > 12 January 2021.

Irish Examiner, 'Apollo House Residents Ignore Court Order to Leave; Coveney Encourages 'Continued Engagement' (Dublin, 11 January 2017) <https://www.irishexaminer.com/news/arid-30771964.html> accessed 11 January 2021.

Irish Independent, 'Apollo House Occupiers Refuse to Vacate Building Despite Court Order' (Dublin, 11 January 2017) <https://www.independent.ie/breaking-news/irish-news/apollo-house-occupiers-refuse-to-vacate-building-despite-court-order-35360054.html> accessed 11 January 2021

Irish Independent, 'Redeveloped Apollo House Office Block Could Soon House 60 Homeless People' (Dublin, 19 December 2016) <https://www.independent.ie/breaking-news/irish-news/redeveloped-apollo-house-office-block-could-soon-house-60-homeless-people-35306092.html> accessed 1 January 2021.

Irish Independent, 'Home Sweet Home and Minister in Deal to End Apollo House' (Dublin, 9 January 2017) <https://www.independent.ie/breaking-news/irish-news/home-sweet-home-and-minister-in-deal-to-end-apollo-house-occupation-35354593.html> accessed 9 January 2021

Irish Independent, 'Massage and Physiotherapy Among Services Being Offered to Apollo House Residents' (Dublin, 30 December 2016) <https://www.independent.ie/irish-news/massage-and-physiotherapy-among-services-being-offered-to-apollo-house-residents-35330247.html> accessed 7 January 2021

Irish Independent, 'Office Block Receivers Take Court Action to Move Homeless Campaigners' (Dublin, 20 December 2016) <https://www.independent.ie/breaking-news/irish-news/office-block-receivers-take-court-action-to-move-homeless-campaigners-35308935.html> accessed 2 January 2021.

Irish Independent, 'Peter McVerry Trust Offers Accommodation to 40 Residents of Apollo House' (Dublin, 22 December 2016) <https://www.independent.ie/irish-news/news/peter-mcverry-trust-offers-accommodation-to-40-residents-of-apollo-house-35315839.html> accessed 4 January 2021

Irish Independent, 'Nama Defends Social Housing Efforts as Campaigners Demand Action' (Dublin, 5 January 2017) <https://www.independent.ie/breaking-news/irish-news/nama-defends-social-housing-efforts-as-campaigners-demand-action-35344734.html> accessed 8 January 2021

Irish Independent, 'Apollo House Occupiers Refuse to Vacate Building Despite Court Order' (Dublin, 11 January 2017) *Irish Independent* <https://www.independent.ie/breaking-news/irish-news/apollo-house-occupiers-refuse-to-vacate-building-despite-court-order-35360054.html> accessed 11 January 2021

Irish Independent, 'Campaigners for Homeless Agree to End Occupation of Empty Dublin Office Block' (Dublin, 12 January 2017) <https://www.independent.ie/breaking-news/irish-news/campaigners-for-homeless-agree-to-end-occupation-of-empty-dublin-office-block-35362444.html> accessed 12 January 2021

Lally C, and Leahy P, 'Apollo House Occupation 'Not the Solution' to Homelessness Crisis' *The Irish Times* (Dublin, 17 December 2016) 3

Larkin L, 'Ex-Apollo House Resident Claims People are 'Smoking and Injecting Heroin' in His New Accommodation' *Irish Independent* (Dublin, 10 January 2017) <https://www.independent.ie/irish-news/ex-apollo-house-resident-claims-people-are-smoking-and-injecting-heroin-in-his-new-accommodation-35357341.html> accessed 11 January 2021

Leogue J, 'Simon Coveney Asked to Clarify 'Beds' for Homeless' *Irish Examiner* (Dublin, 29 December 2016) <https://www.irishexaminer.com/news/arid-20436920.html> accessed 6 January 2021.

Leogue J, 'Simon Coveney Asked to Clarify 'Beds' for Homeless' *Irish Examiner* (Dublin, 29 December 2016) <https://www.irishexaminer.com/news/arid-20436920.html> accessed 6 January 2021.

Leogue J, 'Apollo House Residents Hesitant in Moving Out' *Irish Examiner* (Dublin, 24 December 2016) <https://www.irishexaminer.com/news/arid-20436602.html> accessed 5 January 2021

Lynott L, 'Twenty People were Turned Away from Apollo House Every Night' *Irish Independent* (Dublin, 3 January 2017) 14

McCarthy B, 'Speaking Out for The Homeless at Dublin's Apollo House' (*Aljazeera.com*, 3 Jan 2017) <https://www.aljazeera.com/features/2017/1/3/speaking-out-for-the-homeless-at-dublins-apollo-house> accessed 8 January 2021

McGee H, and O'Halloran B, 'Government Avoids Condemning Apollo House Occupation' *The Irish Times* (Dublin, 20 December 2016) <https://www.irishtimes.com/news/politics/government-avoids-condemning-apollo-house-occupation-1.2913524> accessed 1 January 2021

Mulvaney A, 'We are Involved in an Act of Civil Disobedience... It is an Illegal Act,' Glen Hansard Tells The Late Late Show' *Irish Independent* (Dublin, 16 December 2016) <https://www.independent.ie/entertainment/television/tv-news/we-are-involved-in-an-act-of-civil-disobedience-it-is-an-illegal-act-glen-hansard-tells-the-late-late-show-35299949.html> accessed 30 December 2020

Murray C, and O' Faolain A, 'One Person Remains in Apollo House as Home Sweet Home Occupation Ends' *Irish Independent* (Dublin, 12 January 2017) <https://www.independent.ie/irish-news/one-person-remains-in-apollo-house-as-home-sweet-home-occupation-ends-35362254.html> accessed 12 January 2021

Nugent R, and White G, 'We're Full Up' - Apollo House Takes in 30 People' *Irish Independent* (Dublin, 20 December 2016) <https://www.independent.ie/irish-news/news/were-full-up-apollo-house-takes-in-30-people-35307836.html> accessed 2 January 2021

Nugent R, 'Director Sheridan Making Apollo House Documentary' *Irish Independent* (Dublin, 24 December 2016) 22

O'Brien T, 'Protestors Take Over Vacant Nama Building for Use by Homeless' *The Irish Times* (Dublin, 16 December 2016) <https://www.irishtimes.com/news/social-affairs/protesters-take-over-vacant-nama-building-for-use-by-homeless-1.2908396> accessed 29 December 2020

O'Connor W, 'Hansard: Apollo House Money Will be Given to Other Charities' *Sunday Independent* (Dublin, 25 December 2016) 9

O'Doherty C, 'We are Involved in an Act of Civil Disobedience' - Musicians Lends Support to Homelessness Sit-In' *Irish Examiner* (Dublin, 17 December 2016) <https://www.irishexaminer.com/news/arid-20435679.html> accessed 31 December 2020

O'Faolain A, and Holland K, 'Apollo House: Judge Says Occupants Must Vacate in January' *The Irish Times* (Dublin, 21 December 2016) < https://www.irishtimes.com/news/ireland/irish-news/apollo-house-judge-says-occupants-must-vacate-in-january-1.2913959> accessed 3 January 2021

O'Faolain A, 'Efforts to Remove Donated Items from Apollo House Continue' *Irish Times* (Dublin, 17 January 2017) <https://www.irishtimes.com/news/crime-and-law/courts/high-court/efforts-to-remove-donated-items-from-apollo-house-continue-1.2940650> accessed 13 January 2021

O'Faolain A, 'Legal Action Over Apollo House Occupation Concludes' *Irish Times* (Dublin, 3 February 2017) <https://www.irishtimes.com/news/crime-and-law/courts/high-court/legal-action-over-apollo-house-occupation-concludes-1.2962390> accessed 13 January 2021

O'Faolain A, 'Some Occupiers of Apollo House - Including Musician Glen Hansard - Oppose Legal Action by Receivers to Gain Control' *Irish Independent* (Dublin, 21 December 2016) <https://www.independent.ie/irish-news/courts/some-occupiers-of-apollo-house-including-musician-glen-hansard-oppose-legal-action-by-receivers-to-regain-control-35311806.html> accessed 3 January 2021

O'Faolain A, 'Apollo House Occupiers Lose High Court Application' *The Irish Times* (Dublin, 11 January 2017) <https://www.irishtimes.com/news/crime-and-law/courts/high-court/apollo-house-occupiers-lose-high-court-application-1.2933240> accessed 11 January 2021

Ó Fátharta C, 'Apollo House Evacuees Return Amid Claims of 'Unsuitable' Alternative Facilities' *Irish Examiner* (Dublin, 11 January 2017) <https://www.irishexaminer.com/news/arid-20438573.html> accessed 11 January 2021

Ogle B, 'Why we are Taking Over the Apollo Building' *The Irish Times* (Dublin, 17 December 2016) 15

O'Halloran M, 'Coveney: Emergency Beds Available for Anyone who Wants One' *The Irish Times* (Dublin, 16 December 2016) <https://www.irishtimes.com/news/politics/oireachtas/coveney-emergency-beds-available-for-anyone-who-wants-one-1.2909252> accessed 30 December 2020

O'Halloran M, 'Coveney Asks Apollo House Occupants to Work with State' *The Irish Times* (Dublin, 21 December 2016) <https://www.irishtimes.com/news/politics/oireachtas/coveney-asks-apollo-house-occupants-to-work-with-state-1.2914259> accessed 3 January 2021

O'Halloran M, 'Apollo House Residents to Get New Rooms' *The Irish Times* (Dublin, 10 January 2017) 5

O'Keeffe A, 'Apollo House Homeless Campaign Set to Go National' *Irish Independent* (Dublin 28 December 2016) 13

O'Loughlin A, 'Receivers Seek to Take Back Apollo' *Irish Examiner* (Dublin, 21 December 2016) <https://www.irishexaminer.com/news/arid-20436113.html> accessed 4 January 2021

O'Sullivan D, 'Activists Take Over City Block to House Irish Homeless' (*CNN*, 19 December 2016) <https://edition.cnn.com/2016/12/19/world/ireland-dublin-building-homeless/index.html> accessed 8 January 2021

Pope C, 'Apollo House Group: Homeless 'Will Not Be Thrown to The Wolves' *Irish Times* (Dublin, 8 January 2017) <https://www.irishtimes.com/news/social-affairs/apollo-house-group-homeless-will-not-be-thrown-to-the-wolves-1.2929570> accessed 9 January 2021

Roche B, 'Deal Struck to End Homeless Occupation of Apollo House' *Irish Times* (Dublin, 9 January 2017) <https://www.irishtimes.com/news/ireland/irish-news/deal-struck-to-end-homeless-occupation-of-apollo-house-1.2930476> accessed 9 January 2021

Ryan P, 'Minister's Fury Over Tubridy's Coverage of Protest Group' *Sunday Independent* (Dublin, 15 January 2017)

The Irish Times, 'Campaigners Warn of Worsening Homelessness Crisis' (Dublin, 17 December 2017) <https://www.irishtimes.com/news/social-affairs/campaigners-warn-of-worsening-homelessness-crisis-1.3330355> accessed 15 January 2021

The Irish Times, 'Receivers Seek Court Order to Regain Possession of Apollo House' (Dublin, 20 December 2016) <https://www.irishtimes.com/news/crime-and-law/courts/high-court/receivers-seek-court-order-to-regain-possession-of-apollo-house-1.2912964> accessed 2 January 2021

White G, 'Apollo House Installs 'Well-Being Area' *Irish Independent* (Dublin, 29 December 2016) <https://www.independent.ie/irish-news/apollo-house-installs-well-being-area-35327880.html> accessed 6 January 2021

White G, 'Citizens Take Over NAMA-Controlled Property and Set Up Rooms for Homeless People' *Irish Independent* (Dublin, 16 December 2016) <https://www.independent.ie/irish-news/citizens-take-over-nama-controlled-property-and-set-up-rooms-for-homeless-people-35299848.html> accessed 30 December 2020

White G, 'Apollo House Campaigners 'Very Happy' with Visit from Receivers' *Irish Independent* (Dublin, 23 December 2016) <https://www.independent.ie/irish-news/courts/apollo-house-campaigners-very-happy-with-visit-from-receivers-35316278.html> accessed 5 January 2021

White G, 'We Won't Leave Apollo House Until Everyone is Sorted Out' *Irish Independent* (Dublin, 4 January 2017) 12

White G, 'It's Heaven' - Homeless in Illegally Occupied Building' *Irish Independent* (Dublin, 19 December 2016) 16

Oireachtas Debates

Oireachtas Debate, 'Mortgage Arrears Resolution (Family Home) Bill 2017' (Dáil Éireann Debate, Vol. 958 (1), 12 July 2017)

Oireachtas Debate, 'Urban Regeneration and Housing (Amendment) Bill 2018 (Dáil Éireann Debate, Vol., 971 (1), 3 July 2018

Oireachtas Debate, 'Residential Tenancies (Prevention of Family Homelessness) Bill 2018 (Dáil Éireann Debate, Vol. 981 (2), 28 March 2019