An Coimisiún Tithíochta
The Housing Commission

Conference on a Referendum on Housing in Ireland

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PANEL 5

Socio-Economic Rights, (Re) Distribution and Judicial Competence*

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Irish Housing Commission Submission

Rosalind Dixon

1. I am a scholar with expertise in constitutional social rights and the right to housing, but also economic policy and law and economics.[1] I draw on both these sources of expertise in framing my submissions.

2. The Commission has an extremely important role to play in examining the causes of and potential policy responses to the current housing crisis in Ireland. As I understand it, that crisis has three broad dimensions:
    a. A housing shortage in both the rental and sales markets, due to population shifts, past financial crises and the (un)availability of finance for and investment in housing development, planning restrictions, and delays in construction due to COVID-19;
    b. Associated price pressures in the housing rental and sales markets; and
    c. A lack of access to appropriate social housing, because of a lack of social housing units, and failure for the HAP to keep pace with the cost of housing in the private rental and sales markets.

    Any legislative and constitutional response to the crisis must take seriously all three of these dimensions to the current crisis.

3. As a matter of economic policy, some policy tools are especially useful responses to these problems:
    a. Housing shortages:
        i. Government incentives to lend, and guarantees of financing arrangements, for certain forms of affordable and/or medium-density residential construction;
        ii. Personal and/or corporate tax breaks for investments in rental property;
        iii. Corporate tax penalties for retaining undeveloped land; and
        iv. Land release and rezoning policies, with expedited planning approval processes, and accompanying investments in necessary public infrastructure (e.g., schools, playgrounds, roads and public transport).
    b. Price pressures:
        i. Targeted subsidies and tax deductions for low-income households in accessing the rental and sales markets;
        ii. Measures, as noted above, to increase the supply of residential property; and
        iii. New forms of indexing of the HAP to a bundle of housing prices in Ireland.
    c. A residual social housing option, which can provide a safety net in the event of:
        i. Increases in price that make private housing unaffordable, even in the face of new forms of indexing;
        ii. Forms of social vulnerability (and especially mental health challenges) that make access to the private housing market difficult; and
        iii. Unremedied discrimination by private landlords against low-income tenants.

[1] See e.g., Rosalind Dixon, 'Creating Dialogue About Socioeconomic Rights: Strong-form versus Weak-Form Judicial Review Revisited', 5 *International Journal of Constitutional Law* 391 (2007); Richard Holden & Rosalind Dixon, *From Free to Fair Markets: Liberalism After COVID-19* (OUP 2022).

In the Irish context, this would entail a reversal of previous policies of privatizing social housing, and exclusive reliance on the HAP, and a major increase in investment in (distributed) government-owned social housing.

4. Other tools are likely to be more problematic and have greater potential for unintended consequences.
    a. Housing shortages:
        i. Price-controls and ownership limits on certain forms of housing are likely to discourage investment in ways that worsen housing shortages; and
        ii. Price-controls may also lead to under-investment in the quality and upkeep of housing stock, and an under-investment in associated amenities.

    b. Price pressures
        i. Across-the-board subsidies for access to housing will tend simply to increase equilibrium prices in the housing market, rather than make access more affordable; and
        ii. Generalized tax incentives for renting or home-ownership, without an accompanying increase in supply, will tend simply to increase prices in the housing market.

5. Constitutionalizing the right to housing can have a range of salutary benefits in the context of reform efforts of this kind:
    a. It can have important symbolic or expressive benefits in affirming the importance of government action to address current housing needs;
    b. It could serve as a useful "shield" in the rare case where current property or zoning laws would prevent measures such as 3(a)(iv).[2] (Like Dr Rachael Walsh I do not see other measures of the kind set out in section 3 as encountering any serious constitutional difficulties); and
    c. It could serve as a "sword" for those seeking to pressure the government to do more to address the current housing crisis, and thereby help overcome both blind spots and burdens of inertia currently affecting reform in this area.[3]

6. The desirability of constitutionalizing a right to housing will depend for its:
    a. **Effectiveness** on:
        i. The text of the relevant provision;
        ii. Support for and from civil society for litigation in this area; and
        iii. The response of the Supreme Court to these changes.

    This requires care in the drafting of any constitutional language, realism about the likely Supreme Court response (especially in light of its right to education jurisprudence) and attention to a process of education and appointment reform within the judiciary.

[2] See Rosalind Dixon and David Landau, "Defensive Social Rights" (Work in Progress 2022).
[3] See Rosalind Dixon, 'The Core Case for Weak-Form Judicial Review', 38 *Cardozo Law Review* 2193 (2017); Rosalind Dixon, *Responsive Judicial Review: Democracy and Dysfunction in the Modern Age* (Forthcoming, OUP 2022).

b. **Legitimacy** on the degree to which a justiciable, affirmative housing rights guarantee encourages the Supreme Court to adopt a "weak-strong" as opposed to wholly "strong" approach to the enforcement of a right to housing.[4]

7. The dangers to focusing on constitutional responses to the current housing crisis is that they may:
    a. Be based on too optimistic a set of assumptions about the capacity and likely willingness of the Supreme Court to take an active, dialogic role in overseeing the process of housing reform;
    b. Be insufficiently targeted to the nature and scope of the housing crisis in Ireland, especially if modelled on comparative precedents, without appropriate modification to address the Irish context;
    c. Tend, without appropriate investment in public interest litigation, to do more to benefit the middle class over the poor, or to address problems 1(a) and (b) rather than (c);[5] and
    d. Encourage too much emphasis on constitutional as opposed to legislative policy solutions, in ways that deflect from pressure for immediate policy change and progress, and contribute to an unhelpful form of "utopian" as opposed to transformative form of constitutional politics.[6]

8. On balance, I would support constitutionalizing a right to housing, with a view to encouraging the kinds of policy responses set out in section 3, but with specific language designed to encourage this result. If one were to take the South African Constitution, a leading global precedent in this area as a starting point, constitutional language of this kind might read something like as follows:

26. Housing

1. Everyone in Ireland has the right to have access to adequate housing.

2. The state must take reasonable legislative and other measures, within its available resources, to achieve the progressive realisation of this right. This includes:

i. Measures designed to promote the adequate supply of and affordability of housing in both the rental and sales markets;
ii. Measures designed to ensure adequate security of tenure in all forms of housing;
iii. Measures designed to promote amenities and infrastructure to support new forms of housing development; and

[4] Dixon, 'Creating Dialogue About Socioeconomic Rights: Strong-form versus Weak-Form Judicial Review Revisited', *supra* note 1.
[5] See David Landau and Rosalind Dixon, 'Socioeconomic Rights and the Middle Class' in *The Future of Social and Economic Rights* (Katharine G. Young, ed., 2017).
[6] See Rosalind Dixon & David Landau, 'Utopian Constitutionalism' (Work in Progress 2022). On transformative constitutionalism, compare: Karl Klare, 'Legal Culture and Transformative Constitutionalism', 14 *South African Journal on Human Rights* 146 (1998); Gautam Bhatia, The Transformative Constitution: A Radical Biography in Nine Acts (OUP 2019); *Transformative Constitutionalism in Latin America: The Emergence of a New Ius Commune* (Armin von Bogdandy et al eds., 2017); Gaurav Mukherjee, 'The Legitimacy of Transformative Constitutional Adjudication' (Work in Progress, 2022), cited in Dixon, *Responsive Judicial Review*, *supra* note 3.

iv. The direct provision of appropriate social housing, for those in need and for whom market-based housing solutions are inaccessible or inadequate.

3. No one may be evicted from their home, or have their home demolished, without an order of court made after considering all the relevant circumstances. No legislation may permit arbitrary evictions.

Remedies for Economic, Social, and Cultural rights and the Irish constitutional order

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Introduction

Central to the question of whether and how to introduce justiciable Economic, Social and Cultural (ESC) rights into a legal or constitutional system is how judges will deal with these rights in practice. In essence, this is a question about *remedies* — what actions judges can and will we take to vindicate and protect rights if they are show in court to be violated. ESC rights present distinct remedial challenges—in respect of control of budgets, mandating government, conducting ongoing oversight of policy implementation—that have long been discussed in the literature in comparative constitutional law, and have been addressed in different ways in countries that have judicial protection of such rights. The Irish courts have an established set of remedies and practices for vindicating constitutional rights. However, since we have little tradition of protecting ESC rights, these have developed largely in respect of civil and political rights. Indeed, in the limited experience of the Irish courts in dealing with such questions, there has been a hostility to some of the remedial mechanisms that might be needed to vindicate such rights, in particular the mandatory order or order of mandamus. Irish judges also expressed some scepticism about the competence of the judiciary to utilise such tools and methods, suggesting there could be reluctance to utilise them in respect of any new ESC rights that might be inserted. Therefore, we may require new or augmented remedial practices in the Irish constitutional order to allow full and proper vindication of an ESC rights, such as a right to housing, should they be added to the Irish Constitution. It would also be important to consider and address in some way that concerns that Irish judges have expressed about some of these remedial methods in the past if we wish them to engage with these rights in an effective way.

In Part I, I will first briefly outline the challenges that are seen to beset judicial enforcement and remedies in respect of ESC rights, including a right to housing. In Part II, I will then canvass the traditional remedial practices of the Irish courts in respect of rights, and highlight the limitations that exist in terms of vindicating ESC rights using Ireland's traditional practice. The judicial reservations and concerns that underlie these limits will also be considered. Finally, in Part III, I will consider remedial innovations that might be possible, and text that could be inserted into a constitutional amendment to facilitate remedial action for a right to housing.

Part I: Remedial challenges with ESC rights

Much has been said on whether there are conceptual differences between ESC rights and civil and political rights; it is not necessary or practical to fully summarise that debate here.[1] It is perhaps more useful to focus on differences in the remedial measures these rights require, which are more concrete and practical than conceptual boundaries. ESC rights are said to require different things from the courts in terms of remedies and oversight than more traditional CPRs.

Stated briefly, there are several related contentions about what enforcement of ESC rights requires. CPRs are known as "negative rights", as they are said to require only state *inaction* to respect and vindicate, rather than requiring affirmative steps from the courts to vindicate and defend them. ESC rights are called positive rights because they require such positive action to vindicate. This will therefore require different remedial measures, compelling action, when compared to CPRs. Relatedly, it is said that ESC rights cost money to vindicate, where as CPRs do not. This involves the courts in ordering the expenditure of money and/or reviewing budgetary priorities and allocations. This, in turn, requires judges to assess in detail and potentially to change—in general or specific terms—state policy in respect of various core social and economic matters. It is not clear what expertise judges would have in either the budgetary or the policy sphere. Finally, given the nature of what it is to enjoy ESC rights, remedying breaches often requires oversight of policy and implementation in ongoing way

[1] See generally Katherine G Young, *Constituting Economic and Social Rights* (OUP, 2012); Paul O'Connell, *Vindicating Socio-economic Rights: International Standards and Comparative Experiences* (Routledge 2012); Jeff King, *Judging Social Rights* (CUP, 2012); Gerry Whyte, *Social Inclusion and the Legal System* (2nd ed, IPA, 2015).

over a period of time, rather than a single court resolution solving the matter immediately. It thus requires a form of supervision that courts do not usually engage in.

These remedial practices are not, in fact, unique to ESC rights. As has often been pointed out, vindication of civil and political rights can cost vast sums of money, involve major policy assessment, or ongoing supervision by the judiciary. It can involve ordering the state to take sweeping actions. Perhaps the most famous example is the racial integration of schools by the US Supreme Courts in the name of Equal Protection, which ultimate entailed court-supervised bussing for decades.[2] The right to legal aid, in Ireland and elsewhere, provides a more prosaic example of vast state expenditure and policy process being needed pursuant to judicial vindications of rights.[3] Vindicating many CPRs requires affirmative steps by the state.[4] However, it might be fairly said that the extent of the required involvement of the judiciary in expenditure, policy, supervision, etc. is greater in the ESC context than in others. They are, in Hogan's words, "definitionally resource-dependent", whereas CPRs are not.[5]

There are objections that are commonly raised to this involvement are along two axes: first, that the judiciary lack competence to undertake these tasks. Judges do not have experience in finance or policy. They do not understand the full scale of budgetary demands, or the balances of taxation and expenditure that policymakers have to consider when taking action. The case-by-case nature of adjudication limits the judicial view to particular instances rather than the full scope of the policy area, and does not let them see other competing policy areas. It is ill-suited to ongoing oversight, or the sort of swift adaptation that is commonly required in policy to keep up with new developments. Secondly, it is said that the judiciary lack the legitimacy to carry out these functions, given the proximity of these activities to the core of the democratic process, and the unelected status of the judiciary. Judges are appointed, and do not have direct accountability to the people or anything but the most general accountability for misconduct to politicians. Their dealing with taxes and policymaking is therefore contestable in terms of its legitimacy. The judiciary's task may be to defend the

[2] See Swann v. Charlotte-Mecklenburg Board of Education 402 U.S. 1 (1971).
[3] See Gerry Whyte, "A Tale of Two Cases – Divergent Approaches of the Irish Supreme Court to Distributive Justice" (2010) 32(1) *Dublin University Law Journal* 365.
[4] In addition to the complex regimes needed for legal aid, another example is provided by the complex state action need to vindicate voting rights. See *Doherty v Government of Ireland* [2010] IEHC 369.
[5] Gerard Hogan, "Directive Principles, Socio-Economic Rights and the Constitution" (2001) 36(1) *Irish Jurist* 174.

constitutional and constitutional rights, but this may have to be limited by reference to the other powers of government.

In a concrete way, these concerns raise the question of what judges can and should do to rectify breaches of ESC rights, within the limitations of their institutional role or institutional competence. Does ordering the expenditure of money, the making of policy, etc. go too far in this respect? And can ESC rights be vindicated without such measures?

Part II: Remedial Practices of the Irish Courts

Remedies known the Irish courts

There are several major remedies for breaches of constitutional rights in Ireland, which will be canvassed in turn.

i. Declaratory orders

The predominant remedy in constitutional rights cases is a declaratory order. This is a judicial declaration related to some challenged administrative or state action, law, policy etc, stating that it is unconstitutional. The declaration typically relates to a statute or a part of a statute, or it might relate to an action or decision. Declaratory orders often have real world effects: declaring laws or state/administrative actions to be unconstitutional means that those laws or actions are invalid, and things done under them may have to be—to at least some degree, not entirely—rolled back.[6] Such a remedy has been called a judicial death certificate for a law.[7] The declaration might not relate to a law or particular action, however, and might state that a *state of facts* results in an unconstitutional situation.[8] This will not remedy that state of facts, or compel any particular action, though it would suggest that the State must remedy that situation in order to comply with its constitutional obligations.

ii. Interpretive remedies

[6] Actions taken under the law that have reached finality before its invalidated will remain valid notwithstanding the invalidation; see Gerard Hogan, Gerry Whyte, David Kenny, and Rachael Walsh *JM Kelly: The Irish Constitution* (5th ed., Bloomsbury Professional, 2018) [6.2.357]-[6.2.396] (hereinafter *Kelly*).

[7] *Murphy v Attorney General* [1982] IR 241, 307, per Henchy J.

[8] See e.g. *Carmody v Minister for Justice* [2009] IESC 71, where the state of facts created by a gap in the legal aid regime—something the law failed to provide—was declared to be unconstitutional.

There are two interpretive remedies for rights violations under Irish law, one constitutional and one statutory, under the ECHR Act. The constitutional remedy is known as the double construction rule. It functions as a remedy for unconstitutional laws.[9] The rule means that if a possibly-invalid law is capable of an interpretation that renders the law *constitutional* rather than *unconstitutional*, that interpretation should be preferred. The law can then be upheld and continue to operate in a constitutional manner, rather than struck down as unconstitutional. This rule, however, is very severely circumscribed as to its use. The courts are only able to invoke this remedy when both interpretations—constitutional and unconstitutional—are "reasonably open" to the court, which in practice means equally plausible.[10] There must be doubt as to the meaning of the law;[11] if the meaning is clear, the rule cannot be applied, as this would "do violence to the plain meaning of words."[12] The rule is primarily used to imply procedural safeguards into statutes, and has limited uses beyond this.[13]

Section 2 of the ECHR Act 2003 provides for a similar remedy for laws that violate Convention rights. Courts are instructed "in so far as is possible, subject to the rules of law relating to such interpretation and application" to interpret laws "in a manner compatible with the State's obligations under the Convention". Though a very similar provision in the UK Human Rights Act has allowed for some radical reinterpretations of the law, the Irish provision has not been used in this way, having seen a small number of modest uses.[14]

iii. Severance of language

Another remedy that can correct violations of rights is linguistic severance. The Constitution says that laws are invalid "to the extent only of [their] repugnancy".[15] This has allowed the courts, in certain cases, to in essence "cross out" the language that violates constitutional

[9] Properly understood as a matter of constitutional law, this rule is not a remedy at all, but a consequence of the presumption of constitutionality—that rule that laws should be presumed to be constitutional unless the contrary is shown. However, it operates as a remedy in practice.
[10] *McDonald v Bord na gCon* [1965] IR 217, 239.
[11] "[I]t is not only a question of preferring a constitutional construction to one which would be unconstitutional where they both may appear to be open but it also means an interpretation favouring the validity of an Act should be given in cases of doubt." *East Donegal Co-operative Livestock Mart v Attorney General* [1970] 1 IR 319, 341.
[12] *Re Haughey* [1971] IR 217.
[13] See e.g. *Dellway v NAMA* [2011] IESC 14.
[14] Kelly [4.2.70].
[15] See Article 15.4 of the Constitution.

rights, curing the defect in the law and allowing the law to continue to apply without these words and their unconstitutional effect.[16] This remedy may or may not be available depending on the way in which the statute is drafted—the unconstitutionality has to be located in a particular, isolated clause of the statute. There are also additional conditions that must be met: the section must be operable and sensible after the language has been severed; and the removal of this language cannot alter the intention that the legislature had in enacting the measure; and the act of severance must not incur cost for the exchequer, by for example expanding an entitlement.[17] These requirements limit very significantly the number of cases where the remedy is useful and used.

iv. Damages

Another remedy for unconstitutional breaches of rights is an award of damages. It is possible—though not entirely usual—for the courts to award financial compensation to those who have suffered such a breach.[18] This can be in addition to other remedies, such as declaratory relief.

ESC remedies: Limitations on mandatory orders in Ireland

The limitations of several of these remedies—notably double construction and linguistic severance—are overtly a function of the separation of powers: it is not the job of the courts to make or change the law, and so they are unwilling to use these remedies to fundamentally alter the law's meaning.[19] Similar concerns limit the courts' willingness to offer a core remedy that might be necessary in the ESC rights context: mandatory orders.

Declaratory relief—the primary remedy offered in constitutional actions—is negative, in the sense that it does not *order* that anything in particular *be done*. On the other hand, a mandatory order (or order of mandamus, as it is also known) requires that action be taken. It requires those subject to it to carry out particular tasks or effect particular results. In ESC

[16] See *Deaton v Attorney General* [1963] IR 170.
[17] In *Maher v Attorney General* [1973] IR 140, 147;*Greene v Minister for Agriculture* [1990] 2 IR 17.
[18] See *PC v Minister for Social Protection* [2018] IESC 57; Sullivan v Boylan (No 1) and (No 2) [2012] IEHC 389, [2013] IEHC 104, [2013] 1 IR 510.
[19] See David Kenny, "The Separation of Powers and Remedies: The Legislative Power and Remedies for Unconstitutional Legislation in Comparative Perspective" in Carolan (ed.), *The Constitution of Ireland: Perspectives and Prospects* (Bloomsbury Professional, 2012) 191.

rights cases, this is likely to require expenditure of money or adoption of some policy measure. Failing to comply with such an order could result in a finding of contempt of court. This makes the issuing of such orders a subject of great controversy in the ESC rights debate.[20]

The question of mandatory orders—and the related concerns around the legitimacy and competence of the courts to engage in ESC rights adjudication— were addressed by the Irish courts in the landmark 2001 case of *TD v Minister for Education*, which concerned an unenumerated (or implied) right to secure residential care for minors.[21] In this case, the Supreme Court made very important statements in relation the courts' enforcement of ESC rights with mandatory orders. Kelly J in the High Court, hearing this and other cases, had, as an exceptional measure, given a mandatory order against the Minister, ordering that the State provide particular secure accommodation facilities for the vulnerable minors in question. The Judge described the repeated failure of the State to provide secure accommodation for these young people—who were at severe risk, in some cases at risk of death—as scandalous. The failure persisted notwithstanding numerous earlier declaratory orders given by the High Court the High Court. Kelly J did not make this policy himself, but rather used the State's own policy—which it had failure to actually implement—as his blueprint. It would have required significant expenditure to comply with this order, and the Minster would have had to act within a specified timeframe or answer to the Judge for any failure.[22]

On appeal against this order, the Supreme Court, by a 4-1 majority, held that this order should not have been granted, and generally set an extraordinarily high standard for the courts ever granting an order of the sort. This was, the majority argued, required by the separation of powers: "the granting of an order of this nature is inconsistent with the distribution of powers between the legislative, executive and judicial arms of government mandated by the Constitution."[23] There was, in the Constitution, no express judicial check on the executive making policy. The courts should be slow to oversee such actions, lest they unbalance the

[20] Kent Roach and Geoffrey Budlender, "Mandatory Relief and Supervisory Jurisdiction: When is it Appropriate, Just, and Equitable?" (2005) 122 SALJ 325.
[21] [2001] 4 IR 259. The right in this cases was not formally recognised by the Supreme Court, but rather conceded by the State for the sake of the broader arguments in the case.
[22] [2000] 3 IR 62, 69-75.
[23] [2001] 4 IR 259, 287.

separation of powers. Ordering in the Minister in this way, which would require the Minister to answer for any change in policy etc., "cannot be right", and such and order such would only ever be given in "exceptional circumstances". These would be cases of "clear disregard" of the Constitution, meaning a "conscious and deliberate decision by the … state to act in breach of its constitutional obligation to the other parties, accompanied by bad faith or recklessness". Declaratory orders would also have to be shown to be ineffective.[24] One judge, Denham J, dissented, adopting a more flexible view of the separation of powers, and suggested that the rights of the vulnerable young people in question were so important as to require this exceptional remedy.[25] This case exhibited a clear reluctance on the part of the courts to engage with ESC rights, and a fear that such engagement would lead them to engage in practices that were problematic from a legitimacy or capacity perspective. The courts made it clear that they did not, under the current constitutional order, have any role in reviewing and correcting State policy choices. It also ruled out mandatory orders in any but the most extreme cases.

The broad effect of the *TD* case is to establish a judicial unwillingness—grounded in vision of the constitutional separation of powers—to some remedial tools that might be important to vindicate justiciable ESC rights. There are reasons to believe, based on this case, that the courts might find aspects of a constitutional mandate to enforce such rights—such as a right to housing—challenging to do in light of the position in *TD*. It is important to note that this precedent, though important, is itself subject to change. A referendum to insert new ESC rights into the Irish Constitution, for example, could prompt the courts to reconsider this stance, or consider other remedial options. Similarly, new constitutional text could be inserted to suggest or direct the courts in this respect.

Part III: Remedial changes and innovations

Possible remedial innovations

If tasked with enforcing an ESC right such as a right to housing, what could the Irish courts do to remedy such wrongs? There are many options, ranging from reconsideration of past

[24] [2001] 4 IR 259, 288; 337; 372.
[25] [2001] 4 IR 259, 307-310.

practice, expanded use of recent remedial innovations, or novel remedies inspired by other jurisdictions, particularly South Africa. It should be noted that declaratory relief is very regularly relied upon in many countries with robust ESC rights protection, such as India and South Africa, and is often effective. The Irish State takes its legal and constitutional obligations—and the judgments of the Irish courts—very seriously. Therefore, there is every reason to believe that declaratory relief will be sufficient in many cases to resolve ESC rights issues.

However, stronger remedies would have to be considered for extreme cases. The other remedies that the Irish courts rely on are of limited help. The interpretive remedies used by the Irish courts are too narrow to be of much use in vindicating ESC rights, as is the remedy of linguistic severance. These could be expanded, but even then they are of at most peripheral use in solving ESC rights problems, which require complex policy action in many cases. Damages could be useful in some cases where monetary compensation is appropriate, but again, these are not likely to be a primary type of ESC rights remedy. Therefore, new directions would have to be considered.

i. Reconsidering TD and Mandatory Orders/Policy Oversight

First, it is not impossible that the TD consensus could be upturned, and courts would be willing to grant mandatory orders in at least some circumstances. The fact of a constitutional change to insert ESC rights, as noted above, might cause the courts to rethink their position in such orders. It might suggest that the people, in changing the constitution, have invited (or indeed mandated) a small recalibration in the separation of powers to allow for the courts to become involved in this way in policymaking. It might be seen as a popular endorsement of the courts' capacity for this sort of task. The legitimacy and institutional capacity concerns that underlay *TD* may be changed in the context of a housing rights.

It is also the case that the courts have shown willingness to narrow the scope and breadth of *TD* in recent years. In *Friends of the Irish Environment v Government of Ireland,* (*FIE*)[26] Clarke CJ, writing for a unanimous Supreme Court, made it clear that the courts can and will engage

[26] [2020] IESC 49.

in detailed review of policy where it is alleged that rights are breached: they "can and must act to vindicate such rights and uphold the Constitution. That will be so even if an assessment of whether the rights have been breached or constitutional obligations not met may involve complex matters which can also involve policy."[27] Though far from resiling from *TD*, this case suggests that the courts do not see a firm and clear line between legal and policy concerns, and assessment of policy not only can but *must* be undertaken when rights are at stake. TD can thus not be read as *per se* excluding the courts from policy considerations. In the *FIE* case, using a statutory requirement, the courts were willing to scrutinise the government's climate action plan to assess whether it was specific and clear enough that "a reasonable and interested person could make a judgement both as to whether the plan in question is realistic and as to whether they agree with the policy options".[28] In that case, they found that it was not. This is a form of policy review that might be adapted to the housing context, and that the courts would be comfortable with.

Even more recently, in *Burke v Minister for Education*,[29] O'Donnell CJ offered an important clarification about review of executive action. After *TD*, it had been assumed that the standard for reviewing executive action was "clear disregard" of the Constitution—a high bar—even when breaches of rights were at issue. In *Burke*, O'Donnell J clarified that the standard for executive action breaching rights could not be any different than the standard for legislative action, and the same, more searching standards of scrutiny would apply.[30] This again is suggestive of some small moves away from the orthodoxy that *TD* set out, and that has prevailed for 20 years.

Combining these developments with a major constitutional change—and a campaign for that change that might highlight a need for judicial involvement[31]—it is quite possible that the courts would reconsider how they engage with policy, and perhaps with an orders of mandamus. At the same time, I think there would a limit to how much the courts would change; it would be at most an evolution, not a revolution, in terms of the courts' behaviour.

[27] [2020] IESC 49 [8.16], [8.17].
[28] [2020] IESC 49 [9.2].
[29] [2022] IESC 1.
[30] [2022] IESC 1 [61].
[31] The courts have acknowledged that they will regard the context and campaigning for a constitutional change in considering its meaning. See *M v Minister for Justice & Equality* [2018] IESC 14.

TD, and the judicial outlook and culture it reflects, makes it nearly inconceivable that the Irish judiciary would engage in some of the most extreme remedial practices seen in the ESC rights context, such as "continuing mandamus" in India.[32] In this, the judicial caution in engaging with these remedies might be seen as a guard against judicial overreach or excess. Something more akin to an expansion of the sort of policy review undertaken in *FIE* seems to be a more likely option.

ii. Suspended or delayed invalidation

The Irish courts have recently introduced a limited remedy of delayed invalidity where, having found a measure to be unconstitutional in principle, they have declined to immediately invalidate the law, but instead given the Oireachtas some time to consider legislative reform and response.[33] This period will not be indefinite, and the courts will, after the passage of this time, invalidate the law. It is up to the legislature to respond if it wishes to, and the courts will not check on its progress, comment on its proposed solutions, or be involved in making policy choices.[34] The Supreme Court has made it clear that this is to be an exceptional remedy, and cannot be used in all cases.[35] However, it can be useful where invalidation might have very dramatic legal consequences, upending a legal regime or leaving some group without legal entitlements or protections until a new law can be passed. This could be a useful tool if the courts were to find a section of a housing law to be unconstitutional by virtue of violation of a right to housing. The invalidation of such a law might have all sorts of effects on perfectly constitutional housing measures which we would not wish to disturb. Delayed or suspended invalidation would allow the courts to highlight the constitutional issue and give the legislature time to redress the matter, solving the constitutional issue and avoiding the effects of invalidation on third parties and unproblematic policies.

This could also, to some degree, solve the problem in respect of mandatory orders in some instances: instead of ordering the government or the legislature to take certain actions, the

[32] Mihika Poddar and Bhavya Nahar, "Continuing Mandamus - A Judicial Innovation to Bridge the Right-Remedy Gap" (2017) 10 NUJS Law Review 555, 566.
[33] See *NHV v Minister for Justice and Equality (No 1)* [2017] IESC 35; *PC v Minister for Social Protection* [2017] IESC 63.
[34] *NHV v Minister for Justice (No 2)* [2017] IESC 82.
[35] *NHV v Minister for Justice (No 2)* [2017] IESC 82.

courts could highlight the deficiencies in the law governing certain policy areas, and ultimately invalidate it for those deficiencies, but allow the legislature time to make a new, rights-compliant law before this happen. Delayed invalidation would strongly suggest that the legislature should act, and act in a particular way to vindicate the relevant constitutional rights. However, it would not mandate or strictly require this action, and would leave the legislature space to formulate whatever new policy it wishes. If there are further concerns about the constitutionality of this new policy chosen by the legislature, another case can be taken to consider those issues. This avoids any problematic ongoing policy oversight that the courts might be uncomfortable with.

iii. Progressive realisation and Grootboom reasonableness

South Africa, as perhaps the leading jurisdiction for judicial vindication of ESC rights, would almost certainly serve as an inspiration for the Irish courts were a right to housing to be adopted. The protection of the right to housing in the South African Constitution includes the following language: "The state must take reasonable legislative and other measures, within its available resources to achieve the progressive realisation of this right."[36] The right is to protected by use of reasonable measure, and vindicated progressively, overtime, having regard to the resources that can be are available for this task. Proceeding from this language, the Constitutional Court, in the landmark case of *Grootboom*, held that rather than considering what every person would be entitled to by way of housing, the better question for the Court was "whether the measures taken by the state to realise the right… [were] reasonable."[37] The Constitution required "progressive realisation", gradual improvement over time, by way of reasonable policy decisions. This approach has become known as "*Grootboom* reasonableness".

In a case on the right to water, *Mazibuko v City of Johannesburg*,[38] the Constitutional Court elaborated on this approach and how it allows the courts to respect the institutional competence of other branches, while still vindicating rights:

[36] Section 26(2), Constitution of the Republic of South Africa 1996.
[37] *Grootboom v Oostenburg Municipality* (2000) (3) BCLR 277 (CC) [31], [33].
[38] [2007] BCLR 239 (CC).

> It is institutionally inappropriate for a court to determine precisely what the achievement of any particular socio and economic rights entails and what steps government should take to ensure the progressive realisation of the right. This is a matter, in the first place, for the legislature and the executive, the institutions of government best placed to investigate social conditions in the light of available budgets and to determine what targets are achievable in relation to socio-economic rights. Indeed, it is desirable as a matter of democratic accountability that they should do so for it is their programmes and promises that are subject to democratic and popular choice.

Such a reasonableness approach is designed to give substantial leeway to the State to determined how to vindicate rights and set policy, and thus respect the institutional competences of each branch, and their place within the separation of powers. [39] It is not too far from the kind of policy oversight undertaken by the Supreme Court in *FIE*.

In the *Grootboom* case, hundreds of people had been evicted from temporary shelters erected on privately owned land. With nowhere to go, the plaintiffs in this case issued proceedings claiming the State had failed to provide for their housing rights. The Constitutional Court acknowledged that housing policy is complex, and "may differ from province to province, from city to city, from rural to urban areas and from person to person". However, to be reasonable, the State plans had include provision for those who were homelessness, and had to pay due regard to those most in need. The state needed a reasonable plan of action which would progressively realise its housing obligations, and it had to, when available, devote resources to it. In this case, the Court found the government's policy to be *unreasonable*. It failed to take basic account of the immediate and dire needs of those most vulnerable in South African society.

In the *Grootboom* case itself, the Constitutional Court did not make any particular remedial orders. Instead, it issued a declaration that there had been a breach of housing rights, and

[39] The courts "respect the institutional competencies and roles of the other branches of government while playing a meaningful role in enforcing constitutionally guaranteed socioeconomic rights." Sandra Liebenberg, "Adjudicating Social Rights under a Transformative Constitution" in Langford (ed) *Social Rights Jurisprudence: Emerging Trends in International and Comparative Law* (CUP 2008) 75, 100.

left it to the State to remedy this breach of rights in the manner that it thought most appropriate.[40] In other cases, such as the famous case of *Treatment Action Campaign v Minister for Health* involving the right to healthcare, the Court has made much more specific and directive orders, which included requiring the distribution of antiretroviral drugs to combat HIV which were being unreasonably withheld.[41] Limited mandatory orders are therefore available in certain cases.

On occasion courts have been willing to oversee their implementation in a limited way, while attempting to still leave policy discretion for the elected branches.[42] Relatively recently, the Court took the unprecedented step of ordering appointment of a "special master" to oversee, as an agent of the court, land reform that was unduly delayed.[43]

In short, the South Africa progressive realisation jurisprudence gives courts a framework to assess breaches of ESC rights, and to conceive of their remedies as gradual and reasonable rather than perfect or immediate. At core, these are not dissimilar from some recent actions of the Irish courts, though they do exceed this in cases where this is required. It might be a good fit with Irish constitutional culture.

iv. Meaningful Engagement

The South African courts are also willing to establish new or novel remedies if needed to vindicate rights.[44] They have, for example, set down stringent requirements for evictions as something that threaten the right to housing.[45] Related to this, the courts in South Africa have on occasion required the State to have "meaningful engagement" with those seeking to vindicate their right to housing, including in one case with those squatting on private land, in order to reach some reasonable resolution.[46] This judicial exhortation to engage

[40] Some suggest that, as a result, the case did not have that much of an effect on housing in practice. See David Landau, "The Reality of Social Rights Enforcement" (2012) 53(1) *Harvard International Law Journal* 198.
[41] (1) 2002(10) BCLR 1033 (CC).
[42] See Christopher Mbazira, "From Ambivalence to Certainty: Norms and Principles for the Structural Interdict in Socioeconomic Rights Litigation in South Africa" (2008) 24 SAJHR 1
[43] *Mwelase v Director General for the Department of Rural Development* [2019] ZACC 30.
[44] "If it is necessary to do so, the courts may even have to fashion new remedies to secure the protection and enforcement of these all-important rights" *Fose v Minister of Safety* [1997] ZACC 6 [19].
[45] *Jaftha v Schoeman* [2004] ZACC 25; *President of the Republic of South Africa v Modderklip Boerdery* [2005] ZACC 5.
[46] *Occupiers of 51 Olivia Road, Berea Township and 197 Main Street Johannesburg v City of Johannesburg* [2008] ZACC 1. See Lilian Chenwi, "A New Approach to Remedies in Socioeconomic Rights Adjudication" (2009) 2 *Constitutional Court*

constructively—with the knowledge that other, more invasive remedies may follow if the matter is unresolved—might encourage the State innovate and compromise without requiring or directing any particular policy or outcome.

Constitutional amendment language on remedies

It is important to note that this question of remedies does not have to be left entirely to the courts to work out: the language of any constitutional change could contrain some instructions to the courts as to what to do, or not do, in addressing breaches of a right to housing.

For example, the language of a housing right could include some terminology similar to the South African Constitution, in particular "progressive realisation", but also "within available resources" and "reasonable legislative and other means". This would be a fairly clear indication to the courts that the South African Constitution would be instructive in understanding the text and the scope of the rights, and that the remedial techniques developed in the South African courts around progressive realisation and reasonablness would be a fitting source of inspiration for the Irish courts in developing their own approach. Similarly, in the vein of *FIE*, the constitutional text protecting the right could require the state to have a reasonable policy for vindicating the rights that a "reasonable and interested" person would be able to understand and agree with. This would again suggest particular directions for enforcement that courts should follow.

It is not uncommon for constitutions to contain general remedies clauses. The Irish constitution only speaks of invalidity, not any other remedy. Article 172(1) the South African Constitution reads:

> When deciding a constitutional matter within its power, a court—
> (a) must declare that any law or conduct that is inconsistent with the Constitution is invalid to the extent of its inconsistency; and

Review 371 Shanelle van der Berg, "Meaningful Engagement: Proceduralising Socioeconomic Rights Further or Infusing Administrative Law with Substance" (2013) 29 SAJHR 376.

(b) may make any order that is just and equitable, including—

(i) an order limiting the retrospective effect of the declaration of invalidity; and

(ii) an order suspending the declaration of invalidity for any period and on any conditions, to allow the competent authority to correct the defect.

Article 32 of the Indian Constitution empowers the Supreme Court to redress breaches of fundamental rights: it may issue "directions or orders or writs, including writs in the nature of habeas corpus, mandamus, prohibition, quo warranto and certiorari" as it sees fit.

Some remedies clause could be included within a constitutional right to housing, giving some direction as to how it might be enforced. It might also give an indication of what the courts should not do, or concerns they should bear in mind when fashioning appropriate remedies. For example, such a clause could read:

> In enforcing the right to housing, the courts shall give any order that is deemed just, equitable, and necessary for vindication of these rights, with due regard for the roles and capacities of the other branches of government.

This could be in addition to "progressive realisation" and "available resources" language in the language outlining the right itself.

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RIGHTS AND QUEUES: ON DISTRIBUTIVE CONTESTS IN THE MODERN STATE

Two legal concepts have become fundamental to questions of resource allocation in the modern state: rights and queues. As rights are increasingly recognized in areas such as housing, health care, or immigration law, so too are queues used to administer access to the goods, services, or opportunities that realize such rights, especially in conditions of scarcity. This Article is the first to analyze the concept of queues (or temporal waiting lines or lists) and their ambivalent, interdependent relation with rights. After showing the conceptual tension between rights and queues, the Article argues that queues and "queue talk" present a unique challenge to rights and "rights talk." In exploring the currency of rights and queues in both political and legal terms, the Article illustrates how participants discuss and contest the right to housing in South Africa, the right to health care in Canada, and the right to asylum in Australia. It argues that, despite its appearance in very different ideological and institutional settings, the political discourse of ***66** *"queues" and especially "queue jumping" commonly invokes misleading distinctions between corruption and order, markets and bureaucracies, and governments and courts. Moreover, queue talk obscures the first-order questions on which resource allocations in housing, health care, or immigration contexts must rely. By bringing much-needed complexity to the concept of "queues," the Article explores ways in which general principles of allocative fairness may be both open to contestation and yet supportive of basic claims of rights.*

*67 INTRODUCTION

In South Africa, persons living in intolerable conditions who seek housing have been derided as "queue jumpers," despite their claims of basic constitutional and human rights.[1] In Canada, those who seek to access medical care outside of the State's provided services have been labeled "queue jumpers," again in the face of claims of basic constitutional and human rights.[2] In Australia, persons attempting to enter the continent by sea who seek asylum are dismissed as "queue jumpers," notwithstanding their claims of basic human rights.[3] Deeply divisive, these distributive contests pit queues against rights, propelling the importance of the queue and objections to its evasion into the same moral, political, and legal universe as rights. As a political and legal concept, rights represent the fundamental importance of the dignity of the human person, or of their liberty, or their equality with others. But so too, as a political and legal concept, do queues represent the fundamental importance of fairness and order. The interrelation between the two has not been theorized.

This Article explores how these two legal concepts--so fundamental to questions of dignity, equality, ordering, and distribution--interact. I argue that only the first legal concept (the concept of rights) has attracted the normative and conceptual attention that is due, and that the second legal concept (the concept of the queue) has been strikingly under-theorized, despite its prevalence in legal systems, especially in deciding questions of resource allocation under conditions of scarcity. The two concepts together forge an ambivalent, interdependent relation: to be realized, rights appear sometimes to prohibit, sometimes to permit, and sometimes to require queues; queues, in their turn, appear to create, institute, or displace rights. I aim to show that the lack of attention paid to the legal concept of the queue is a result not only of its uncertain relation to other distributional norms in law, but of the contradictions and the obfuscations that the concept produces in political discourse. I emphasize throughout, however, that the role of the queue has become so basic to our understanding of law that no effort to disaggregate and therefore to understand the legal concept can shift, on its own, the ideological role that it plays. Examining the interrelation of rights and queues is therefore a first step in attending to perceived tensions in the norms of liberty, equality, and justice in modern settings of constitutional ***68** government and liberal market-based democracies.

This Article is organized in three parts. Part I draws from comparative constitutional and international human rights law to define rights, and from queueing theory and law to define queues. This part also sets out an initial map of the relations between the two concepts. Part II moves to an analysis of discourse, examining three encounters between "rights talk" and "queue talk" in highly charged distributive disputes in South Africa, Canada, and Australia. I examine the "queue" as a wait list for access to housing, health care, or asylum processing. This queue configures the space in which housing rights, patient rights, and refugee rights are contested. In each context, rights claimants, perceived as "queue jumpers," are the focus of heated objection by government officials, politicians, and members of the public. This part shows the highly distinct ideological and distributional roles in which the concept of the queue is asserted and defended, and in which perceived "evaders" of the queue--in each instance, asserting claims of right--are treated. Part III seeks to disaggregate the legal concept of the queue by noting the unresolved questions that accompany the political use of the concept and the obfuscations that "queue talk" produces. It argues that the political discourse of queues and "queue jumping" invokes misleading distinctions between corruption and order, markets and government, and governments and courts. And even more significantly, "queue talk" obscures the first-order questions on which the resource decisions impacting housing, health care, or asylum rights must rest. After describing the high stakes of the contests between rights and queues, the Article concludes.

I. RIGHTS AND QUEUES

A number of different allocation methods are available to distribute scarce goods: markets, merit, voting, need, lotteries, arbitrary power, queues, and rights.[4] In many cases, different methods of allocation work together. For example, a market-based system of health care can be designed according to certain principles of justice, in order ***69** to allow for exemptions for those in need of urgent medical assistance, but who are unable to pay. Indeed, that is a basic template for ordering in modern liberal capitalist democracies. In the definition provided in this Article, queues implement a principle of "first come, first served," and allocate first to those who have waited longest,[5] while at the same time often controlling for other modes of ordering preferences by allowing for exemptions (on grounds of need or other criteria) or by setting categories of recipients in line with each other, using "first come, first served" within each category. In turn, rights operate as political "trumps" when certain important values, such as liberty or dignity, are infringed,[6] or at least require an appropriate reason, over majoritarian or utilitarian objections, before such infringement is justified.[7] The mechanisms of rights and queues sometimes compete and sometimes work together in settling distributive questions. Because so much of this relation rests on definitions, this Part first describes the contemporary role and function of rights in comparative constitutional and human rights law and the operation of queues in varied legal and extra-legal settings before moving to address the relation between the two.

A. Rights in Law

One might describe ours as the age of rights. In contemporary political discourse, few concepts now rival the discursive moral power of the idea that every person has inherent dignity and basic ***70** rights, which others ought to respect.[8] Since at least the end of the Second World War, the development of a comprehensive international law of human rights[9] and the corresponding growth in constitutional bills of rights around the world[10] have buttressed this idea and expanded it. Laid within its Westphalian architecture, the age of rights corresponds with the duty of modern states to respect them as matters of law.[11] And laid within a more expansive conception of human freedom than the eighteenth century declarations of the "rights of man," such rights now commonly include economic and social rights and require the modern state to respect, protect, and fulfill them.[12] Claims of "rights" have now entered into contested areas of social policy, such as housing, health care, education, and immigration.[13] These claims include new articulations of the material dimensions ***71** of liberty and the government's positive role in responding to shortcomings in the enjoyment of that liberty.[14] Such "positive," "second-generation," or "welfare" rights immediately call forth the question of priority, although such questions arise with civil and political rights as well, as will be shown below. It is at the point of positive provision, however, that the relation between rights and queues is most in need of analysis. For this reason, this Article selects, in illustrating the tensions between rights and queues, examples of prominent contestations around rights to housing, health care, and asylum.

The language of rights expresses "individualistic considerations,"[15] which may be characterized in terms of their special importance to securing fundamental values such as freedom, dignity, or equality,[16] and in terms of their systematization within broader conceptions of justice or political morality.[17] Rights, conceptualized as human rights or constitutional rights, have been legally instituted in the texts of international declarations on how states must treat individuals, constitutional texts, and statutes,

and in the interpretive stances that judges apply to common or civil law.[18] But rights also ***72** exist in the "slogans and polemics of political debate."[19] In answer to a number of unsettled questions about constitutional and human rights, this Article assumes that they should be understood as both moral and legal entitlements; that they are validated by processes of deliberation as well as reason; that an alleged infringement demands, at the very least, a heightened level of justification; and that they include material interests, such as food, health care, housing, and education that are necessary for the protection of particular values.[20]

Already, the inclusivity of such assumptions suggests the permissibility of some sort of co-existence between rights and queues. But this choice reflects modern trends in comparative and international law, if not in U.S. constitutional law itself.[21] Many national constitutions now recognize economic and social rights within their bills of rights. The latest textual survey recorded the inclusion of such guarantees as the rule, rather than the exception, with the greatest number of such rights entrenched in Latin America and the post-communist states.[22] In ever more countries, the infringement of economic and social rights now gives rise to justiciable complaints, either expressly or via the interpretive practice of courts.[23] In international ***73** human rights law, the International Covenant on Economic, Social and Cultural Rights, ratified by 164 states, now has its own quasi-adjudicatory mechanism.[24] The treaty's committee has issued its first response to an individual complaint.[25] A widely accessible and growing jurisprudence on economic and social rights[26] informs the arguments and decisions of NGOs, lawyers, governments, and judges in networks that are often indistinguishable from the civil and political concerns of more traditional constitutional and human rights advocacy.[27] Such jurisprudence centers on the questions of legitimate priority setting in the "progressive realization"[28] of economic and social rights through three main routes: setting the content of a ***74** non-derogable, or otherwise prioritized, "minimum core";[29] setting out standards of "reasonableness" or "proportionality" in state responses;[30] or prioritizing "negative" over "positive" obligations.[31] Each of these debates assumes, without analysis, that certain rights-holders are to be given priority and that others must wait before their rights claims are addressed.

Despite this growing practice around economic and social rights, on which the assumptions of this Article rest, fundamental questions remain about the legitimacy of rights claims in the distributional sphere, foremost of all being the pervasive perception that such rights are "positive rights" that require state action, rather than "negative rights" that require state restraint. This central positive/negative binary is noteworthy, not only for its longevity, in the face of extensive and convincing analysis of its shortcomings,[32] but also for the ease with which it accommodates the concept of queues. The more accurate demarcation of positive and negative duties, associated with all rights, rather than the so-called positive and negative rights, is described in more detail below.[33] In short, queues appear to be an appropriate method for fulfilling "positive" duties; yet at the same time, many who seek to evade the queue are seeking to assert claims of "negative" duties (to be allowed to buy health care, for instance, or to be protected from eviction). These interests are pitted against those ***75** who remain in their "correct" place in the queue, who can be characterized as enjoying rights with "negative" duties (to be left alone), or "positive" duties (to having the interest in the queue fulfilled). Thus, as will be seen below, this binary is misleading in relation to queues, as it is for rights.

B. Queues in Law

The concept of queues has a less developed analytical pedigree in law.[34] Nonetheless, the concept is a familiar one in both formal and informal systems of ordering and harbors its own normative commitments--to equality, for example, or transparency--that appear to compete with the value claims of rights. This Article defines the queue as a resource allocation method that ranks those who seek access to goods, services, or opportunities, and gives priority in order of entry. This definition is closely tied to current law. Queues can operate as a legal rule, procedure, or practice. In property law, for example, competing claims to property in wild animals are decided according to first occupancy.[35] In compensation mechanisms for mass torts, claims are processed according to "first in, first out," with only claimants confronting financial need allowed to skip to the front of the line.[36] In commercial dealings, conflicts between security interests on debtor's property are resolved in accordance with the time of filing or perfection.[37] As commentators contend, a general rule of ***76** "first in time, first in right ... runs like a golden thread through all priority schemes."[38]

Such a thread appears to run through many informal settings of ordering as well. In this respect, queues appear an almost universal, if culturally variable, system of ordering in conditions of scarcity, or in conditions where simultaneous provision is not possible. In examining a system of informal norms of queueing, Neil MacCormick emphasized not only the informal prompt of groups to self-organize in rank, but also the expectation that others observe the priority-norm and "respond critically or even obstructively towards people who flout" it.[39] MacCormick's insight here highlights not only the informal self-organization toward queueing, but the way in which people feel justified in giving social sanctions to those who jump the queue, or cut in

line, in the absence of any law. Often, this is a question of the trust and cooperation that is available to self- and extra-legally-enforce this system.[40] Law also steps in to endorse and enforce these informal ordering systems, particularly in times when trust and cooperation are low.[41]

That the queue is readily understood and socially enforced[42] is more pronounced in some cultures than others. Queues represent "an overlapping, largely shared, common understanding of the right way to behave,"[43] but this is culturally, just as it is historically and jurisdictionally, contingent.[44] For example, queues are sometimes ***77** thought of as a quintessentially Western consumer practice.[45] The British have been described as having mastered the art of the queue;[46] Americans, too, avidly follow the practice, although it is usually described as "waiting in lines," not "queues."[47] Slightly different norms of queueing exist in Nordic countries: for example, time-outs are often socially acceptable.[48] Yet culture is a malleable concept, and cultural practices respond to institutional conditions. In Eastern Europe during communism, queueing was an unavoidable part of everyday life.[49] In contemporary China, the rise of urbanization has brought with it lengthy queues.[50] The end of apartheid in South Africa ***78** allowed for new, desegregated queues.[51] In journalist accounts, queueing prowess has been described as the "cornerstone of civilisation";[52] a failure to respect queues has been linked to political instability in government,[53] and entrepreneurial instability in business.[54]

Notwithstanding these different cultural affinities with queues, there is universality in the normative values they purport to uphold. They appear to promote the values of both fairness and order. In terms of the former, queues lay claim to rival notions of fairness that are purportedly settled by rights. In this sense, the queue represents two important distributive values: equality and desert. First, queues are blind to the interpersonal differences that should be irrelevant to questions of distribution, such as eye color in a queue for food.[55] Queues ensure that services or opportunities are distributed on a "ground that is universalistic rather than personally discriminatory,"[56] and thus not on the basis of gender, sexual orientation, ***79** race, ethnicity, religion, age, disability, socioeconomic status, or other grounds. Such discrimination is also impermissible, of course, in theories of rights, unless required affirmatively on grounds of substantive equality. Moreover, the relevant criteria of distribution or provision--the time of entry--appears to vindicate equality by treating equally every person's time.[57] As well as equality, queues espouse the value of desert, since they allocate on the basis of a person's own conduct (arriving/filing/registering early, and waiting in line). This justification is evident in the "first in time, first in right" principle, espoused above.[58] This value is a greater rival to the fundamental values upheld in modern theories of rights, which may depart from desert-based justifications entirely.[59] Yet, while these system features purport to uphold equality and desert, this may be more apparent than real, because more affluent participants often have the resources necessary to strategically adapt to early entry or waiting substitutes.[60] Certainly, gender, sexual orientation, race, ethnicity, religion, age, disability, and socioeconomic status are grounds that may determine not only time and ability to wait in line, but also entry into the queue at all.[61] And more significantly, the lack of proportionality between effort (time invested) and result in different queueing systems means that they may flout a desert-based justification anyway.[62]

***80** As well as certain values of fairness, queues are said to reflect and promote the values of order and civility, but this too is unreliable.[63] In conditions of scarcity, queues prevent chaos and disorder. Compared with other allocation methods, administrative costs are low because of the ease of explaining the method of allocation, monitoring compliance, and resolving disputes.[64] This brings obvious gains in efficiency. Nonetheless, because queues are insensitive to the question of who will use the resources most efficiently, such gains are, beyond the superficial level, uncertain.[65] Queues are a recognizable medium for social integration,[66] and an incubator for developing important virtues such as patience, rule-compliance, and trust.[67] And if civility means regarding others, "including one's adversaries, as members of the same inclusive collectivity,"[68] queues ***81** can, in principle, provide a useful forum for learning and practicing it, and building norms of courtesy, cooperation, and institutional effectiveness.[69]

Much of these justifications for queues are dependent on the type of queue. These include tangible physical queues (for instance, in supermarkets, airports, passport controls, and sports and entertainment ticket booths) and legally enforced but virtual queues (mass tort compensation funds, public housing applications, or surgery wait lists). The first type usually involves the suspension of other activities for minutes or hours; while the second involves days, weeks, or years in waiting and the continuation of other activities despite significant queueing costs.[70] The queue, therefore, stands in as a system of physical or virtual ordering which gives priority to the timing of the claim, despite critical differences in the experiences of time in each case. Moreover, while developments in information technology increasingly limit the need for physical queues, such that grocery shopping and parking permit applications can now take place online, new versions of priority setting in virtual environments themselves rely on design principles with certain controlled, if more fleeting, queues.[71] At the same time, other countervailing modern trends,

such as urbanization or mobility, have made physical queues ever more ubiquitous.[72]

***82** If time is the most vital criteria for allocations in queues, it has an uncertain value. Time is a scarce good, and the reward for the investment of time and the recognition of the cost of time would appear to be the key feature of queues as opposed to other ordering mechanisms. However, in the virtual and physical instantiations of queues described above,[73] the expenditure of time operates differently. Moreover, the recognition of the importance of time does not, in itself, consider that the benefits of time expenditure can be radically different. In simple distribution queues, people may be queueing to receive the same good before others.[74] But queues may also determine the quality of the good, service, or opportunity, its price at point of provision, or indeed whether it is received at all. In the latter sense, scholars Ronen Perry and Tal Zarsky have described certain queues as "entitlement determining,"[75] where those first in line will acquire a scarce resource and others will not receive any share. The expenditure of time is therefore unequally rewarded in such queueing systems, with very different implications for rights.

In their relative simplicity, queues thus embody complex systems of norms and values, and their violation usually gives rise to intense objection. Especially when combined with other distributive criteria, such as desert or need, the queue may represent a fair system of allocation whose breach suggests not only a discrete unit of unfairness in allocation, but the jeopardy of the more collective values described above. What participants and outsiders consider an impermissible breach of the queue is often labeled "queue jumping." Before analyzing the political use of the metaphor of "queue jumping," the next section introduces the relation between the two concepts.

C. The Relation Between Rights and Queues

Once we have posited the existence of the queue as a legal category, we can map the relations between rights and queues. The ***83** two concepts forge an ambivalent, interdependent relation. In order to be realized, rights may in some cases prohibit queues, but in other cases permit, or even require, them. Queues, in turn, create, institute, and even displace rights. It is in the distributive context that the relationship between queues and rights is at its most complex. The image of the queue seems an intuitive response to the "line-item" mode of rights argument that is created by the discrete claims of economic and social rights, rather than broader justice-based claims.[76] But the relation can be both rivalrous and symbiotic: rights are invoked as a means to challenge queues, but rights also rely on queues to be realized. This contradictory relationship--which raises the inevitable tensions between substance and process, informality and formality, and negative and positive duties--conceals important questions of justice and reason in modern rights claims.

From the perspective of rights, the use of queues points immediately to the distinction between so-called positive and negative rights described above: negative rights are subject to a duty of immediate respect; positive rights, in their turn, are subject to a duty to realize rights progressively, over time.[77] Thus, so-called positive rights seem not only to permit, but also to require, a waiting priority system. Yet commentators have long noted the "positive" obligations underlying the so-called "negative" civil and political (and property) rights, in the sense that they all require an extensive state apparatus to enforce.[78] This insight is an important one, although it is clear that the act/omission distinction, usually conjured by the positive/negative distinction, is nevertheless worth retaining in understanding the duty of the state to respect fundamental rights.[79] The analytical sorting of state duties--to respect, protect, and fulfill--has helped to clarify this dichotomy.[80] Yet again, as we will see, the ***84** concept of the queue confounds the clarity of this typology as well.

Taking first the duty to respect rights, this obligation is perceived as negative, since it requires the state to refrain from a particular action that will deprive persons of their rights, and is usually termed an immediate one,[81] such that any queueing system would be prohibited. A framework of queues for determining freedom from torture, or the exercise of free speech, would seem absurd. To allow any reason (administrative or otherwise) to justify delay in respecting rights goes against the fundamental structure of the rights argument: to "trump" arguments that rely on the common good, or, at the very least, heighten the justification required for rights infringements.[82] One can imagine, however, secondary queues in such contexts, such as a requirement of reasonable waiting time to secure a prosecution for torture, behind other claims; or a reasonable waiting procedure for accessing particular city permissions for staging a political demonstration.[83] As soon as scarce resources are implicated, some kind of subordinate priority-setting is required. Queues may therefore be present in our understanding of the duty to respect rights, for civil and political rights, no less for economic and social rights. Take one example in support of a duty to respect economic and social rights: a State must refrain from "denying or limiting equal access for all persons, including prisoners or detainees, minorities, asylum seekers and illegal immigrants, to preventive, curative and palliative ***85** health

services" if it is to respect the right to health.[84] This prohibition relies on the fundamental norm of non-discrimination, as well as the fundamental importance of the particular right.[85] Yet the institution of some sort of queue for such systems would appear unremarkable, as long as it did not operate in conjunction with impermissible classifications.[86]

Secondly, the duty to protect rights is often understood as an obligation concerning third parties.[87] In this sense, it requires the state to ensure that third parties do not deprive people of the guaranteed right, through enforcing rights-protective private laws, for example,[88] or agency decision-making.[89] The duty is critical for rights in market-based societies.[90] Again, a relatively uncontroversial example would be a duty on the state to regulate hazardous chemicals that are a risk to public health: the duty would require the government to pass and enforce laws that prohibit private companies from releasing such chemicals.[91] Yet again, queues may be permissible to ***86** establish agency priorities within certain timelines,[92] or to sort out compensation claims, in the event that third parties infringe such laws in the face of illegality.[93] They are therefore present in the duty to protect rights.

Finally, the duty to fulfill is understood as a positive obligation. It requires the state to establish political, economic, and social systems that provide access to the good, service, or opportunity at issue in the guaranteed right for all members of society.[94] For example, a government must provide essential health services such as accessible primary care and clean water.[95] Again, queues may be permitted and also required in such arrangements, especially if the government is to establish such systems without using market mechanisms.[96] Queues provide such rights a tangible presence in the world: the right to food, for example, may require a delivery system of queueing in order to be realized, particularly in conditions of extreme scarcity (of course, the more usual mechanism of the market is far more relevant to the long-term realization of the right to food, as will be seen below).[97] While an inordinately long queue for essential services would suggest an infringement of the duty to fulfill such rights,[98] there is nothing in the structure of the queue itself that is objectionable. ***87**

Thus it would appear, in the face of an incongruity between rights and queues, that the two do share an interdependent relation, and that even the duty to immediately respect rights carries with it an understanding that enforcement might have to depend on particular priority setting. Much here depends on baselines. It is therefore necessary to examine whether there is anything in the design of queues that invokes a particular relation with rights. For as well as instituting the realization of rights, queues themselves may also be observed to both create and displace rights. To understand how this is so, one must observe the ancillary rights that queues appear to create.

While a full analysis of such ancillary rights is beyond the scope of the present Article, I present a basic sketch here in order to lay the framework for understanding the rhetorical use of queues in arguing for and against the rights claimed in the illustrations in Part II. The ancillary rights are property-like, although the analogy is a loose one. In broad terms, we can point to the earlier analysis by Charles Reich, who pointed to a form of "new property,"[99] at work in the modern administrative state. With this analytical tool, Reich showed how government largess could be understood to create new forms of wealth, upon which, he argued, beneficiaries should be able to form some sort of reliance. In this vein, we might say that the modern human rights-respecting State creates queues, setting out expectations of benefit even before distribution. Reich's analysis was directed to the rights or statuses that the government had already provided, which, he argued, should be subject to procedural safeguards before removal.[100] We might say that queues--or a person's place in ***88** them--are rights-realization-in-waiting, where the allocative priority that a person is given within a waiting system gives rise to a legitimate expectation that she or he can rely on this method of allocation.

Yet this creation of an ancillary right--to promote the realization of the primary right (such as in housing, health care, or the security of the person from persecution, each detailed in Part II below)--cuts both ways. Indeed, it may create a conflict between rights and queues. Queuers and others police the distributive channel and deride "queue jumpers" if they access such goods or services before them. Due, in no small part, to such well-observed phenomena as the "endowment effect,"--whereby "the sheer fact of possession" confers a sense of entitlement--and related theories of loss aversion,[101] those waiting in line react strongly against those who apparently evade it. Of course, queues can be designed to operate with certain other distributive criteria, which exempt certain interests from the temporal discipline, or even absorb evaders to preserve the order of the line.[102] Yet it is the pernicious relation between ancillary rights-realization-in-waiting and rights that sets out the condition in which the former displaces the latter, or, at least, in which such displacement is claimed to be justified. This is the basic structure of what I identify as "queue talk."

II. RIGHTS TALK VERSUS QUEUE TALK? THREE EXAMPLES

A conceptual and functional analysis of rights and queues is properly informed by evidence of each concept's rhetorical use. Ordinary language use of such concepts, and accompanying prevalent behavior, are relevant to their conceptual classifications and legal functions: people's beliefs about justice, and people's behavior when asked to allocate some valuable resource, inform politics and law. In this way, "rights talk" and "queue talk" are constitutive of principles ***89** and practices of justice.[103] "Rights talk" has long been analyzed as a discursive trope in which the appeal to rights (and often, the appeal to litigation)[104] sets the domain of political argument, in both limiting and expansive ways.[105] In this Part, I suggest "queue talk" operates as a countervailing and complementary discursive trope, which invokes the concept of the queue and objection to its evasion.[106]

In the three examples of "queue talk" described in this Part, participants invoke the spatial ordering scheme of persons-in-waiting as the appropriate method of allocating scarce resources in housing, health care, and asylum claims, and use the pejorative term of "queue jumping" to describe those who proceed outside this order, including by claims of right. This is done, by and large, with the queue acting as a metaphor for distribution.

A metaphor stands in the place of words and engenders many narratives, some of them conflicting. But for a metaphor to "stick," as a trope of socio-political discourse, it must enjoy immediate intuitive ***90** appeal and represent a cognitive reference point for many.[107] The prevalence of these metaphors suggests that queue talk has begun to rival rights talk's importance in justice claims. Of course, in each case, rights and queues have an institutional ontology, and do not just exist solely as "talk." As Part I has shown, their institutional dimension is not reducible to the way they are talked about, and indeed the two are distinct. In each of the following examples, queue talk appears to refer to an actual queue and yet the wait list or line may be largely inoperative.[108] In this respect, the discourse of queues and "queue jumping" may tell us more about the popular understanding of allocative systems, rather than the process of allocation itself.

The above description of the two concepts in the abstract leaves many questions open, as the case studies--of South Africa and housing rights contestations, Canada and patient rights contestations, and Australia and refugee rights contestations--will show. In each case, I describe the queue, the act of "queue jumping," the "queue jumpers," and those perceived as harmed by the practice, followed by a short overview of the housing, health care, or asylum processing system in place. This exercise shows how queues are understood as operating to institute, but also, importantly, to displace, rights.

The three case studies demonstrate very different uses of the same metaphor, with different understandings of the "queue," how it is evaded, and who is harmed by the evasion. The comparative analysis helps to shed light on the different values at stake in thinking about rights in terms of queueing distributional systems and challenges to that system. South Africa, as my primary case study, will be the most detailed of the three. Insofar as this analysis is comparative, it helps to shed light on the different values at stake in thinking about rights in terms of queueing distributional systems and challenges to that system. The three illustrations are therefore provided as examples of a discourse that has formed against the backdrop of ***91** different legal systems, as well as different socio-economic policy domains. This analysis suggests that, alongside the increasing use of the rights vocabulary in legal systems across the world, a new moral idiom of queue talk has developed that demands our attention.

Such an inquiry departs from the methodology of comparative public law that seeks causal inferences from observed convergences and divergences in law.[109] Instead, it posits the question as to whether the observed expanding international currency of rights talk is also met, in the same places, with the expansion (or adoption) of queue talk, particularly in divisive domestic controversies. For this reason, it is necessary to describe the use of rights, as well as the basic features of the legal systems, in which this discourse has appeared.

South Africa, Canada, and Australia have all inherited the English common law system, making them perhaps more conducive to queueing ideas in law.[110] Yet their legal systems can be distinguished on many relevant grounds--the legal recognition accorded to human rights being the most pertinent. South Africa's post-apartheid Constitution recognizes the most expansive list of constitutional rights, including justiciable economic and social rights;[111] Canada's Charter of Rights and Freedoms recognizes primarily civil and political rights at the constitutional level;[112] Australia's human rights regime is a patchwork of statutory protections,[113] with the emphasis on ***92** parliamentary scrutiny and administrative procedures rather than judicial review.

Together, these systems have been described as "dialogic," or "weak-form," insofar as the courts and legislatures are understood

to share a role in enforcing rights.[114] While this shared enterprise is highly relevant to the influence of the popular discourses studied in this Article, the emphasis taken here is on the elements of that discourse rather than on institutional differences that may, in part, be a cause.

Similarly, this Article does not foreground the comparative differences between the three administrative (welfare or developmental) states of South Africa, Canada, and Australia. These involve different levels of public resources (taxable revenue and GDP) as well as different income distribution,[115] different attitudes towards redistribution, different legal and political cultures, and different social and racial cleavages.[116] The illustrations of queue talk in such highly distinct settings are provided here to demonstrate the frequent association of rights talk with queue talk, rather than any causal claims.

Moreover, in addition to the three countries, the three socioeconomic policy domains offered for comparison--housing, health care, and immigration--are highly disparate, insofar as they involve, anywhere, differently placed beneficiaries (by class, race, and nationality), differently placed decision-makers (municipalities and bureaucracies ***93** at the housing level; medical associations, professionals, and bureaucracies at the health care level; and international organizations and bureaucracies at the immigration level); stakeholders (industries, beneficiaries, coordinated interest or consumer groups, national or transnational advocacy groups, and social movements), and different statutory and administrative frameworks.[117] What they have in common is how contentious each policy domain is in each jurisdiction. Nonetheless, it is precisely these differences within policy domains that reveal the contingencies of the relationship between rights and queues, in ideological and institutional terms.

A. South Africa and Housing Rights

"Queue jumping" in South Africa is a discourse centered on the allocation system for state-subsidized housing. In this context, of course, the South African Constitution famously guarantees the right to have access to housing, which has been deftly upheld by the Constitutional Court.[118] The queue is the register of low-income households in need of housing assistance established in 1994, at the same time as the post-apartheid Constitution endorsed a guarantee of the right of everyone to "have access to ... housing."[119] State-subsidized housing is delivered based on various criteria such as location, special needs, age, along with, importantly, time spent on the "waiting list."[120] Jumping the queue implies any perversion of the waiting list system, such as through "occupying" vacant lots earmarked for development or empty houses, and then using anti-eviction rules and courts to defend that occupation.[121] At the same ***94** time, there is also a perception that "people can pay and jump to the front of the queue,"[122] so the practice is two-fold; both practices are criticized, yet it is only the former that describes the practice of those claiming rights.

"Queue jumpers" themselves are understood to be those resident in informal settlements who are often new to the area in which they are "squatting" and who frequently arrive from rural areas in which much dislocation has occurred, or from outside South Africa.[123] The protagonists are therefore poor, desperate, and often displaced, who claim their rights to housing, but are perceived as subverting the waiting list at the expense of other poor, desperate, but patient, applicants, who themselves face very limited options for shelter.[124] Under the "queue jumping" narrative, the resulting harm falls on those waiting for housing allocation or support (recorded as some 1.8 million households),[125] as well as the general public, from the social unrest that comes as a result, and from perceptions of corruption and patronage. The discourse of "queue jumping" is deployed in the South African media, and by officials and politicians in relation to housing policy.[126] It is worth noting that, while the condemnation ***95** of the practice is widespread, the connotations of land invasion and squatting may be different among and across South Africa's racial and social groupings.[127] The government itself, while often deviating from housing wait lists on the basis of need (and in accordance with constitutional rights), as well as other criteria, has been slow to announce such changes, perhaps, as suggested by one commentator, in "fear that people will torch their shacks and backyard shanties to jump the queue."[128]

The discourse has moved explicitly from politics to law. In several constitutional complaints, the government has defended its eviction practices by alleging "queue jumping" on the part of the evictees.[129] The Constitutional Court of South Africa itself has adopted the metaphor, noting that "[o]pportunists should not be enabled to gain preference over those who have been waiting for housing, patiently, according to legally prescribed procedures ... [t]hey have to wait in the queue or join it."[130] Nonetheless, the Constitutional ***96** Court has been reluctant to characterize rights claimants as "queue jumpers," arguing that those seeking temporary or emergency housing can be distinguished from those seeking "permanent housing, ahead of anyone else in a queue."[131] Similarly, a homeless community, "who ha[s] been evicted once, and who found land to occupy with what

they considered to be the permission of the owner where they have been residing for ... a considerable period of time" are not "queue jumpers," according to the Court.[132] Not surprisingly, the same factors that are relevant to the grant or refusal of an eviction order are relevant to whether occupiers are described as "queue jumpers" or not. These factors include the circumstances under which the unlawful occupiers started occupying and erecting their illegal structures on the property, the period the unlawful occupiers have resided on the land in question, the availability of alternative accommodation of land, and the rights and needs of the elderly, children, persons with disabilities, and female-headed households.[133] The Court will also examine whether occupation has occurred on public or private land (as a relevant, although not decisive factor),[134] the degree of the housing emergency faced by the unlawful occupiers, and whether they have a plausible belief in the permissibility of their occupation or have instead "deliberately invade[d] land with a view to disrupting the organised housing programme and placing themselves at the front of the queue."[135]

These uses of queue talk must be understood against the background of South Africa's housing policies. The allocation of housing has been integral to post-apartheid South Africa and its goal of providing redress for the historical, socio-economic, and racial injustices ***97** of apartheid.[136] Registering one's name for a house is perceived as a "rite of passage."[137] One commentator describes the "eradication of the housing backlog" as both a political target and a broader developmental goal.[138] The 1994 White Paper on Housing committed the government to provide housing for all its citizens,[139] mainly through the construction of new houses on greenfield, previously undeveloped land.[140] This scheme has, according to government reports, resulted in the construction of "an additional 5,6 million formal homes since the country's first democratic elections."[141] Who gets a house, where, and when, is thus a central terrain of South African politics.

The queue--understood as the housing register--has been pivotal in these contestations. While the goal of housing provision became a central purpose of the African National Congress in post-apartheid South Africa, many of the housing lists on which the new government relied had already been drawn up during apartheid.[142] In merging these lists and creating new databases,[143] housing claimants ***98** were asked to fill in a form with details such as ID number, gender, age, and number of dependents, and were given a receipt with the date on which they had registered.[144] The expectation was that this list would work on a "first come, first served" basis, and applicants would receive a house when their name made its way to the top.[145] Later, other factors were deemed relevant, such as location and "catchment" for an intended housing project, or an applicant's income.[146] Some municipalities also created random selection or "lottery" systems, and discrete application processes for advertised, project-based opportunities.[147] Since 2008, public guidelines have been drawn up "to facilitate fair, equitable, transparent and inclusive selection and housing subsidy application approval processes" for certain housing applications, although their practical effect has been unclear.[148] Nonetheless, the waiting list has continued to be a key mechanism in housing allocations and a key focus in political contestations.

Into the mix of this legislative and administrative regime has come litigation and, as a result, judicial oversight, of the housing programs. Indeed, housing rights claims have vastly outnumbered any of the other economic and social rights as a source of constitutional complaint.[149] In an early and very well-known case, the Constitutional Court in *Grootboom* held that the government had infringed the right to housing by failing to cater to vulnerable people in desperate need of housing, including the claimant, Irene Grootboom, and her community.[150] The government had pointed to the problem ***99** of queue jumping, in policy (and later doctrinal) terms.[151] The Constitutional Court held that the national housing program had fallen short of the constitutional right to housing by failing to:

> provide for relief for those in desperate need. They are not to be ignored in the interests of an overall programme focussed on medium and long-term objectives. It is essential that a reasonable part of the national housing budget be devoted to this, but the precise allocation is for national government to decide in the first instance.[152]

Despite this finding of a rights infringement, the Constitutional Court declined to issue an individual remedy, making only a declaration of unconstitutionality that was resolved incrementally by the government over time.[153] The refusal to issue a more substantive remedy to the individual plaintiffs, whose rights were infringed, has been criticized,[154] and yet many within South Africa and abroad have expressed support for the ability of this approach to support long-term, government-led (rather than court-led), reform.[155]

The Constitutional Court has continued to refuse to issue remedies that would reorder the priorities set by government in individual allocative terms. In the intervening decade and a half since *Grootboom*, the Constitutional Court has heard a large number of anti-eviction and other housing rights cases (and lower courts have heard an even greater number).[156] In making a stronger argument for ***100** the ability to evict occupiers, with the suggestion that the obligation to progressively realize the

right to housing requires enforcement of the existing queue, certain municipalities have sought to elevate the housing waiting list to constitutional doctrine.[157] This has not, however, been accepted by courts, although they have been careful not to impose their own ordering in its place. In many cases, courts have ordered negotiated resolutions between the parties (the remedy of "meaningful engagement") or other procedural methods of redress, rather than issue strong, individual remedies.[158] In others, courts have indicated an even stronger fidelity to the existing prioritization of access to housing, emphasizing the difficulties faced by the government in addressing housing needs and development more broadly. In *Residents of Joe Slovo*, for example, Justice Yacoob, who had penned the unanimous judgment supporting the right to housing in *Grootboom*, emphasized that the evictions and relocations at the basis of the claimants' appeal were occurring in order to facilitate housing development, and that others had stakes in this development.[159] Under such conditions, the evictions met the test of reasonableness.[160] This consideration has been criticized as "inverting the rights entitlements in question in the case, such that the constitutional rights of those not before the Court appear, through the reasonableness test, to 'trump' the right to housing of the plaintiffs."[161]

Other members of the Constitutional Court have indicated a great willingness to scrutinize current housing priorities in addressing ***101** claims of rights infringements. In *Joe Slovo*, several justices noted their dissatisfaction with the "either/or" nature of legal title versus the status of "unlawful occupier" in the context of South Africa's history;[162] and argued for a less "mechanistic" application of property entitlements under a public law, rather than private law, paradigm.[163] On this latter view, the constitutional right to housing is said to usher in (and even compel) a "move away from a static, typically private-law conceptualist view of the Constitution as a guarantee of the *status quo* to a dynamic, typically public-law view of the Constitution as an instrument for social change and transformation."[164] Yet it is clear that the criticism of "queue jumping" casts a long shadow over such cases. Before unpacking this criticism, let us introduce Canada's, and then Australia's, practice of queue talk.

[…]

III. DISAGGREGATING THE QUEUE AS METAPHOR AND CONCEPT

We have seen that the connotations of "queue jumping" are distinct in South Africa, Canada, and Australia. While those seeking to access public housing, private health care, or asylum are all deemed as evading norms of fairness and order, these norms are expressed in very different ideological settings. In this section, I return to the frame of rights versus queues and examine the discursive role played by the metaphor against the conceptual classifications presented in Part I. I suggest that the underlying narrative structure of these three examples of the queue is one that underlines the distinction between three broad instruments of distribution in modern states: rights, markets, and government. In adopting certain assumptions ***113** about each, queue talk is a discourse that suggests that order is preferable to corruption, bureaucracies are preferable to markets, and governments are preferable to courts. And yet the inconsistencies that I described as inherent in the legal concept of the queue, set out in Part I of this Article, show that the assumptions are contestable, or, as I suggest in Section A below, that they raise but do not resolve the critical distributional questions that attend housing, health care, and claims of asylum. Moreover, as I argue in Section B, queue talk obscures the complexities within each.

A. Unresolved Questions

Queue talk poses a number of questions about the preferable methods of ordering in society, but the answers it suggests are unreliable. Each of the case studies shows us how queue talk operates to imply the strengths and failures of certain ordering systems, based on certain assumptions about rights, markets, and government. In each context, the queue metaphor is used to raise complaints about order and corruption, governments and markets, and governments and courts. In housing, health care, and asylum seeking, queue talk sets up the method of appropriate ordering as a choice between two and responds by favoring the first alternative and dismissing the second. And yet, such answers are misleading due to the deep contingency of the queue in question.

1. Order Versus Corruption

The first connotation associates queues with order and their evasion with corruption. In this sense, queues are related to the integrity of the rule of law itself. Their breach consists of the deployment of arbitrariness, whether by power, influence, money, or deception. Corruption is, of course, a major problem for the rule of law in the modern state and involves bending or upending

formal systems of allocation.[220] It is susceptible to several definitions. The evasion of a publicly administered queue is most closely associated with a conventional focus on public officials seeking private gain through bribery, nepotism, and misappropriation.[221] But such evasion is complicated ***114** by the more extended meanings of "corruption," such as signifying moral disapproval of a situation when ruling elites and the wealthy fail to look after the poor and indigent.[222] At the most basic level, public administration of any queue must occur in the presence of monopoly and discretion--two elements that public officials can exploit in engaging in corruption. Outside of queues, other methods of public allocation may be less open to this form of corruption, however, it is worth noting that attempts to replace queueing systems with lotteries or randomized placements are also besieged by administrative difficulties.[223]

In each of our case studies, defense of the queue is an argument for order, while "queue jumping" is associated with corruption. In South Africa, the association is most stark: allegations and perceptions of corruption have beleaguered the housing delivery system, which has been administered by provinces in ways open to abuse.[224] The complaint of corruption is targeted at government administrators, who, in their turn, are quick to allege improper land squatting on the part of community members, drawing on the same rhetoric of queueing. ***115** [225] During the auditing of one list, for example, "it was discovered that 50 percent of beneficiaries' ID numbers were invalid, while 65 percent did not match the applicants' records."[226] The complaint that the housing system is mired in corruption takes place against the backdrop of a recognized problem with official corruption in South Africa, which is widespread and widely reported.[227]

Allegations of "queue jumping" as corruption would seem to be far afield in the higher income democracies of Canada and Australia;[228] nonetheless the sense of an inappropriate subversion of public office for private gain is apparent in each system. In Canada, such subversion occurred during the H1N1 vaccine scandal, where hockey players were given preference for access to a vaccine, before people deemed especially vulnerable and thus placed in priority in the medical wait list.[229] In Australia, the perception of boat arrivals as "illegals," who pay smugglers to arrive by boat is tied to both ideas of system corruption, as well as market, discussed below. In this respect, "queue jumpers" are often perceived as "bogus" refugees or economic migrants, who are assumed to fall outside of the protection of international law.[230] And more perniciously, associations between ***116** the illicit operations of people smugglers, human traffickers, and transnational organized crime are increasingly drawn,[231] implying a system-level corruption in this mode of entry to Australia.

Despite the power of this narrative, the association of "queue jumping" with corruption is often just that--a mere association created by the broader defense of the queue as a legal, administrative procedure to be upheld. The "queue jumping" as corruption complaint does not invariably pit queues against rights, as do the other distinctions drawn out below, since there are much broader instances of corruption in the housing, health care, and immigration contexts than linked with those claiming rights in South Africa, Canada, and Australia respectively. There are thus parallel cases of those who attempt to gain access to goods and services by an illegal payment to, or other forms of undue influence on, government officials or third parties. Yet, if only by association, the perception of "queue jumping" as corruption is a particularly corrosive one for rights-claimants. Whether they are used to allocate interests in housing, health care, or asylum, queues distribute scarce goods and, in doing so, enact the kind of "tragic choices" that Philip Bobbitt and Guido Calabresi analyzed in their seminal account of the conflicts that arise in the allocation of scarce resources. In such choices, the values of honesty and equal treatment must be especially safeguarded, since honesty and fairness represent the "structural premises designed to moot, or at least set the terms of, any particular ordering of preferences."[232] When they are undermined (by corruption, actual or perceived), the present ordering of goods and opportunities is undermined, but so, too, are future attempts to do so.[233] The association of "queue jumping" with corruption produces a stigma on rights claimants in each of the settings of markets, courts, and rights claims described below.

*117 2. Bureaucracy Versus Market

The second connotation of "queue jumping" relates to the availability of market access to the good or opportunity in question. The assumptions that set up bureaucracies against markets rely on the fact that queues support bureaucratic, or at least ex ante, decision-making, while the evasion of these processes through payments relies on markets.[234] Queues represent a general allocative scheme, usually administered by the government (although sometimes by private actors). At the same time, opportunities for evasion are created by a market for acquiring a higher place in the queue or for skipping it altogether. Indeed, for political theorist Michael Sandel, the subversion of queues is a quintessential example of the growing role of markets in society. He emphasizes the associations between "queue jumping" and privilege: "It's long been known that, in fancy restaurants, a handsome tip ... can shorten the wait on a busy night."[235] "Queue jumping" by purchase adds to "the advantages

of affluence and consigns the poor to the back of the line."[236]

Economists have favored both queues and the permissibility of "queue jumping," for the reason that combining the two forms of allocation can be efficient. In principle, the queue allocates goods according to willingness to wait, whereas markets allocate goods according to willingness to pay. It follows that the queue discriminates against those with less time, while the market discriminates against those with less money.[237] In economic theory, then, a queueing system, which operates with a secondary market (for instance, scalping), can be defended on efficiency grounds, since each unit of time is given a price. At the very least, a system that allows for queue-jumping-by-purchase is preferable, on efficiency grounds, to one that prevents this occurring.[238]

The use of dollars to provide access outside of the queue is the main trope in our Canadian example.[239] […]

In South Africa, the market for an earlier place in the public housing queue is often inseparable from the corruption criticism, just as, in Australia, the payment of people smugglers is seen as a sign of corruption, or, at the very least, a clandestine "black market."[247] ***119** Nonetheless, there is an additional role for the market, which takes place when those who have been allocated subsidized houses and are prohibited from selling their home for eight years pass on the houses to those who can pay a higher amount. These sales, which often go unregistered, fuel community perceptions of corruption in allocation, but also press upon fears of "downward-raiding" of public housing by richer individuals who have the means to pay.[248] According to utilitarian principles of welfare and choice (that is, a sale based on the utility of individual buyers and sellers), these sales may appear perfectly legitimate.

As Sandel notes, markets may have their appropriate place in social allocations; however, he suggests corruption may be endemic in markets in certain goods or opportunities. He gives the example of the line-standing industry on Capitol Hill, which is an extension of the lobbying industry.[249] The public has the opportunity to stand in line to participate. But professional line-standers (often, as it turns out, homeless people) are hired by lobby groups, who capitalize on the arrangement. This practice, suggests Sandel, is not illegal, nor is it non-transparent, but "degrades Congress by treating it as a source of private gain rather than an instrument of public good."[250] A similar criticism was made about subversion of the queueing practices that determine admission to popular hearings of the U.S. Supreme Court, which recently revised admission rules to prohibit professional ***120** linestanding.[251] Each case indicates how "market values are corrosive of certain goods but appropriate to others."[252] Better, for Sandel, is to defend the social condemnation of market-based queue jumping in certain cultural domains, such as "[t]he court hearing, the doctor's surgery, and the supply of aid in an emergency."[253] The appropriate question in this respect is whether substantive claims of "rights" help to draw this distinction. Certainly, a fuller conception of the role of rights in responding to claims of basic needs is required in order to work out when market competition is permissible and when it is not.[254]

3. Government Versus Courts

The third target of the "queue jumping" criticism is the use of courts. When rights claimants--"queue jumpers"--bring their claims to courts, they are seen as jumping a queue devised elsewhere (by provincial bureaucracies, in South Africa's case; or by medical experts in deliberation with government, in Canada; or by politics and diplomacy, in Australia). Thus, this complaint accords with common understandings of the way in which the adjudication of rights is understood to "judicialize" the complex political decisions that go into the basic question of distribution and redistribution. While judicialization is a criticism that is also made about all constitutional rights that are subject to judicial review,[255] it is in the area of economic and social rights that it receives its strongest force.[256] This criticism has been a main source of the long-standard argument against the "justiciability" of economic and social rights, and its ***121** strands relate to the distortion of public debate, the usurpation by the judiciary of the role of the elected branches, the inevitable vagueness and indeterminacy of such rights,[257] and the uneven access to the courts as between the poor and middle class.[258] In these terms, "queue jumping" becomes a shorthand complaint about accessing courts to deliver rights that have not been decided during legitimate and accountable political debate.[259]

This is a criticism that has been fully internalized by courts in South Africa. While the introduction of liberal constitutionalism and judicial review was central to the post-apartheid compromise and settlement,[260] and the centrality of courts was accepted for the realization of economic and social rights,[261] courts have repeatedly felt the need to address the "queue jumping" critique. One of the central architects of the new bill of rights, Albie Sachs, has suggested that ways must be found to ensure that those who are successful in their claims for economic and social rights are not those "with the sharpest elbows (and the best

lawyers)."[262] In the lower courts, they have done so by defending their choice of review and remedy (usually structural interdicts) in general terms.[263] In the Constitutional Court, ***122** where these orders have often been repealed,[264] the Court has sought to avoid pitting constitutional rights against each other (the most pertinent example being a refusal to balance the right to property against the right to housing),[265] and to avoid individual remedies.[266]

In Canada, the original debates against the Supreme Court judicial review of rights under the Canadian Charter have been resuscitated in the "queue jumping" guise. The dissent written in the *Chaoulli* judgment is illustrative. Despite the fact that the decision explicitly referenced "queue jumpers" as those who access the scarce medical resources outside of the public wait list, it was a dissent focused on the proper role of judges and the principle of deference.[267] Although the dissenting judges made a series of comments about the need for support for the principles of universal health care in Canada (which no party had contested), their opinion was taken up mainly with the urgency of keeping courts out of social questions and thus ***123** exclusively focused on legal questions.[268] Such debates have continued to surface and are unresolved in Canada.[269] The early *Charter* cases involving support for positive obligations under the right to life in Canada have not been developed,[270] and there is a preference for "dialogic" remedies,[271] which avoid the perception of individual remedy. While this remedial form has its costs,[272] advocates of the "weak-form" approach point to the fact that even unsuccessful cases in court have sometimes changed public opinion in the long run, particularly in the health care scenario.[273] […]

The answering trope to the connotations of "queue jumping" through courts lies in the characterization of judicial review in constitutional democracy. If courts are charged with adjudicating rights, it should follow that a successful claim results in the correct application of extant queueing principles, rather than the subversion of them. While it is clear that such justification is less likely to be required in civil and political rights cases (where successful rights claims are more easily understood as protecting the rights of everyone),[281] there are queues established by such claims as well--think of *Brown II*, for example.[282] In that case, the order to desegregate "with all deliberate speed" permitted a wide variety of re-ordering systems with an unspecified ***125** time.[283] Even in a desegregation case involving higher education, in which *Brown* rather than *Brown II* was held to apply, evasion continued.[284] A fuller analysis is beyond the scope of this Article, but it can be observed that the issue of queue jumping via courts is clearly more complex than a discussion of the appropriate role of the judicial branch. Answers to this complaint will vary in their emphasis on the substance of rights or the procedures for protection, such as the protection of discrete and insular minorities;[285] other forms of liberty- or dignity-protecting measures;[286] or the astute design of remedies that can circumvent the challenges of "queue jumping" through courts.[287] On the more procedural end of these theories lie conceptions of "destabilization rights,"[288] perhaps the most explicit challenge to extant queueing systems.

B. Obfuscations

There is thus, as we have seen, a number of differently perceived wrongs--by administrators, markets, and courts--that give ***126** rise to the "queue jumping" complaint. Yet a discourse of rights focused on duties on the state to respect, protect, and fulfill them would signal certain avenues for redress. The queue is maintained as a respectable and transparent default mechanism for distribution, but is discarded in respect of exceptional needs, much like an ambulance is allowed to bypass other vehicles and traffic signals. Even informal queueing systems internalize some criteria for permitting "queue jumping," and, depending upon the stakes involved, the criteria may be notably lax.[289] Nonetheless, if too many exceptions are made, support for the queue is eventually undermined. In this way, rights and queues have a parasitic, but contradictory, relation.

Yet, it will be seen that the focus on queues conceals many of the more important questions about the socio-economic distributions at stake. In this sense, instead of providing a straightforward mechanism for distribution in conditions of scarcity, and providing order to such distribution, the queue serves to distract from highly relevant and political questions of rights, access to material goods and services, and distributive justice. This section notes how, in cases of housing, health care, and refugee claims, the queue obfuscates rights at the same time as it draws attention to them.

There are, for example, initial questions about the production of scarce resources (how many houses how much health care how many humanitarian visas) that involve population-wide resource decisions that are rendered invisible to those focused on "the queue." These we might call the first-order decisions, which are left uncontested.[290] There are also other issues, and competing beneficiaries, that are avoided by a focus on queues, such as, for example, mortgage subsidies in housing, social determinants and health, or entrants who overstay their visas. In such cases, the queue offers a category ***127** of thought supported, if not imposed, by the state[291] that obscures the stakes of distributions and the effect on rights. This Part first describes

how such obfuscations play out in each policy domain, before addressing the stakes of rights and queues in general.

1. Housing Allocations

Discourses on the right to housing can become dominated by perceptions of a housing queue, and of opportunistic breaches of this queue. And yet the queue is the veritable tip of the iceberg in the distributive and redistributive decisions that are made about the allocation of publicly-subsidized housing. The housing waiting list represents a small number of the decisions made about housing and can only represent such a fraction, in South Africa just as elsewhere.

As a right, housing represents a safe and secure space that shields one from the elements and provides refuge from external physical threats.[292] Housing provides a material base from which to build a livelihood and take part in the life of the community.[293] And it provides a space where psychological needs can be met.[294] But the right to housing can be realized by different forms of fixed dwelling--the affordability of one's own house, for example, but also access to a service or accommodation (with some security of tenure).[295] There is an irrepressible social aspect of the right to housing--that is, the spatial relationship of the home to other houses, workplaces, schools, ***128** shops, and a web of social relations is important.[296] The notion of a queue limits the complexities of rights realization, just as it limits claims. The discourse of housing rights can extend to the issue of women's exclusion from holding property rights,[297] or to the restitution interests of internally displaced persons.[298] Forced and arbitrary evictions do, of course, point to clear infringements of the right to housing,[299] but advocates of the right are also concerned about the other myriad forms of insecurity of tenure, and of the demands on human dignity and freedom presented by population shifts, mobility, financialization, and displacements.[300] None of this complexity is addressed by the focus on the queue.

For example, in South Africa, since at least 2001, there has been a decline in state-subsidized housing delivery and a shift towards informal settlement upgrading and the provision of subsidized rental housing.[301] This change has meant that location has become a more important criterion than waiting time in determining a person's access to subsidized housing because in situ housing projects and area-based projects rely on local residents. In temporal terms, waiting lists are turned to after a housing project is identified for development, and has been developed, thus diminishing the importance of the list in first-order decisions. Added to this are the other unavoidable political realities: there are area-specific upgrading agendas;[302] housing implementation is supply driven;[303] and the strategy of creating "mixed" neighborhoods that desegregate communities may create ***129** other social problems.[304]

Moreover, the waiting list itself creates its own problems of administration: it does not cater to the growth and split of families over time; it accommodates other special needs or other criteria in often uncertain ways; there are practices of "multiple" waiting lists;[305] and "gaps" in the purportedly transparent program have been reported in terms of identifying beneficiaries, screening beneficiaries, deploying the appropriate criteria, and educating beneficiaries.[306] In the large province of the Western Cape in South Africa, for example, more than half of the households on the waiting list who are living in informal settlements have been on the list for five or more years.[307] Housing allocations are thus the mirror side of evictions policies. These latter decisions are made on the basis of a "special cluster of legal relationships" between a municipality and the residents of its jurisdiction, which "possess an ongoing, organic and dynamic character that evolves over time."[308] In such cases, a "one-fits-all solution in eviction cases is, therefore, not only unworkable but also unacceptable."[309]

In a representative example, the Alexandra Renewal Project in Johannesburg departed from the waiting list approach to a "block-by-block" allocation strategy, with a result that:

> ***130** [R]eprioritised limited resources from one poor group to another. The housing waiting list approach meant that it would be primarily old residents who were on the waiting list who would benefit, but the block by block approach changed this completely by benefiting primarily shack dwellers and excluding and frustrating those who had been on the waiting list.[310]

Moreover, of course, the decisions to switch to informal upgrading or alternative tenure arrangements are also made in the context of deciding how many houses are being built: a first-order decision that is recognized, but is a less constant source of complaint.[311]

[…]

C. The Stakes of Rights and Queues

The unresolved questions, and obfuscations, that are produced by the queue's role as metaphor and concept, distort the democratic political space in which we expect our normative commitments to rights to play out. As discussed above, distributive allocations made in conditions of scarcity are popularly, and often intuitively, understood in terms of queues. It is my final contention that this may be highly distortive of rights talk, particularly for claimants in the most desperate positions. In addition to the unresolved questions and obfuscations discussed above, the discourse of "queue jumping" places a burden on rights-claimants to justify their claim and may set up conditions of anti-solidarity, and indeed enmity, on behalf of differently situated rights-holders whose claims may be less urgent.[331]

This is because "queue jumpers" are perceived as having misappropriated otherwise legitimate criteria--the criteria of need--and are therefore moving up the system of allocation illegitimately. Again, there are links to perceptions of "corruption," but the argument is separate and has a particularly disempowering effect on rights claimants.

First, in South Africa's example, the "queue jumper" is the homeless person, or squatter, whose very need and vulnerability are grounds for their claim for housing, or to the anti-eviction protections ***135** accorded by the state.[332] In a sense, the "queue jumper" is perceived as racing to the bottom of the needs-based hierarchy in order to be first served. There is an assumption of active agency by the "queue jumper," and a selfish disregard for others who are waiting patiently in the system. Second, in the Australian case study, the boat arrivals are perceived as risking life and limb inappropriately, rather than waiting their turn.[333] While, in pursuing legal recognition, asylum seekers' passivity is well-documented, it is at the moment that they assert agency that their claims become so unpopular.[334]

This criticism is directed to individuals, but it also applies to communities seeking to organize with particular results. For example, in South Africa:

> If an organised community takes initiative, or wins a court case, then the public system is not very adept at being responsive to a departure from the "waiting patiently" (for your name to come up on a waiting list) mentality. It could be said that this mind set has actually disempowered people over the last fifteen years or so, as it has undermined some community's ability or will power to get on with it themselves. In contrast, some of the social movements stand in contrast to this ("nothing for us without us").[335]

In this way, the waiting list stands in as a "tool of political and social control in housing delivery,"[336] no less than in asylum claims. "Queue jumping" may thus be seen as a "blame frame" that is used by those who must be passive in the face of inequities of others,[337] ***136** but one that is peculiarly hostile to the political agency exercised by unpopular groups--in comparison with common tropes of "welfare queens" or "dependents,"[338] which invoke passivity, rather than agency, as the source of blame. The consequence is to undermine the very norm of individual agency that the recognition of rights purports to mobilize. Unlike the legal stakes of the classifications of rights and queues, described in Part I above, in which we observe constitutional or human rights co-existing with an administrative structure of queues in varied relations, the political stakes of such classifications work on a metaphorical level and, as such, may represent a greater challenge to the implementation of human rights.

The discourse of queues and "queue jumping" is one that operates perniciously to treat queues as creating ancillary rights, which, in apparent support of order and collective fairness, must trump the claims of others. This contradictory result may be seen as distinct from the perceptions of the liberty-affirming politics that arise by claiming and litigating other human rights: one person's guarantee of free speech is thought to assist the free speech of others, not unsettle or rival it. It was T.H. Marshall's thesis that a grant of social rights would lead to an ever-widening protection, such that one person's successful claim of social security would lead to the social security of others.[339] But in the "queue jumping" discourse, one person's recognition of rights can do precisely the opposite. These are the less obvious stakes of queue talk.

***137 CONCLUSION**

In the age of rights, the queue is seen to represent a system in which legitimate claims are ordered and rendered orderly by a recognizable system of allocation. And yet, when people seek to access their constitutional or human rights through making claims upon the state, they are often perceived as "queue jumpers" who are contravening the norms of the queue, conflicting with extant allocative schemes, and dislodging the claims of others waiting for the same resources and opportunities. Rights in modern States give rise to queues, and yet are invoked discursively both to unsettle present queues and to admonish those who

attempt to do so. This Article has sought to unsettle the metaphors of the queue and "queue jumping" in the three examples of housing rights in South Africa, health care claims in Canada, and asylum claims in Australia. This has revealed very different complaints harbored within "queue talk": against courts, administrators, markets, and claimants themselves. A sophisticated discourse of rights, which acknowledges the breadth of the correlative duties to respect, protect, and fulfill, is a potential rejoinder. Rights can co-exist with queues, and be supported by principles of administrative fairness, where the queue operates as a default norm of allocation, which may be abrogated when important claims of human dignity, liberty, justice, or fairness require it. Yet to treat the queue at face value is to overlook its deceptive appeal. The first-order distributional decisions that force some into queues and allow some to exist outside of them, are also appropriately part of our understanding of rights. Of course, one may question the pursuit of rational answers to metaphoric conceptions arguably immovable by logic. Yet I suggest that analytical attention can explain the different sources of the power of the metaphor, and therefore different sources of redress.

Select Footnotes	
[4]	For classic treatment, see, for example, GUIDO CALABRESI & PHILIP BOBBITT, TRAGIC CHOICES: THE CONFLICTS SOCIETY CONFRONTS IN THE ALLOCATION OF TRAGICALLY SCARCE RESOURCES (1978) (noting methods of allotment based on markets, political allocations, lotteries, and mixed forms); DAVID MILLER, PRINCIPLES OF SOCIAL JUSTICE (1999). For direct comparisons with rights, see Daryl J. Levinson, *Rights and Votes*, 121 YALE L.J. 1286 (2012); Jeremy Waldron, *Rights and Needs: The Myth of Disjunction, in* LEGAL RIGHTS: HISTORICAL AND PHILOSOPHICAL PERSPECTIVES 87 (Austin Sarat & Thomas R. Kearns eds., 1996).
[5]	"First come, first served" reflects the most common discipline of queues in everyday life and is the one under study in this Article; other queue disciplines may follow a principle of "last come, first served" (inventory systems), "last in, first out" (employment law), or random order selection, where queues operate much like lotteries. *See, e.g.*, DONALD GROSS ET AL., FUNDAMENTALS OF QUEUEING THEORY 3 (4th ed. 2008).
[6]	For seminal analysis of this conception, see RONALD DWORKIN, TAKING RIGHTS SERIOUSLY (1977). For alternative philosophical conceptions that are distanced from the "trumps" formulation, see, for example, ROBERT ALEXY, A THEORY OF CONSTITUTIONAL RIGHTS (Julian Rivers trans., 2002) (presenting constitutional rights as principles that demand optimization); THE HUMAN RIGHTS READER: MAJOR POLITICAL ESSAYS, SPEECHES, AND DOCUMENTS FROM ANCIENT TIMES TO THE PRESENT (Micheline R. Ishay ed., 2d ed. 2007) (presenting codified human rights in different historical phases).
[7]	ALEXY, *supra* note 6; STEPHEN GARDBAUM, THE NEW COMMONWEALTH MODEL OF CONSTITUTIONALISM: THEORY AND PRACTICE (2013); MARK TUSHNET, WEAK COURTS, STRONG RIGHTS: JUDICIAL REVIEW AND SOCIAL WELFARE RIGHTS IN COMPARATIVE CONSTITUTIONAL LAW (2008); Mattias Kumm, *Constitutional Rights as Principles: On the Structure and Domain of Constitutional Justice*, 2 INT'L J. CONST. L. 574 (2004) (reviewing ALEXY, *supra* note 6).
[8]	*E.g.*, Amartya Sen, *Elements of a Theory of Human Rights*, 32 PHIL. & PUB. AFF. 315 (2004); *see also* John Tasioulas, *The Moral Reality of Human Rights, in* FREEDOM FROM POVERTY AS A HUMAN RIGHT: WHO OWES WHAT TO THE VERY POOR? 75, 75 (Thomas Pogge ed., 2007) (noting the "discourse of human rights [has acquired] in recent times ... the status of an ethical lingua franca").
[9]	International Covenant on Civil and Political Rights, Dec. 16, 1966, 999 U.N.T.S. 171 [hereinafter ICCPR] (entered into force in 1976); International Covenant on Economic, Social and Cultural Rights, Dec. 16, 1966, 993 U.N.T.S. 3 [hereinafter ICESCR] (entered into force in 1976); G.A. Res. 217 (III) A, Universal Declaration of Human Rights (Dec. 10, 1948) [hereinafter UDHR].

[10]	For recourse to the primary text of all of the world's constitutions, see, for example, CONSTITUTE, http://www.constituteproject.org (last visited Dec. 2, 2016) (collecting texts and highlighting their parallels with each other and with international law). For analysis, see, for example, Zachary Elkins et al., *Getting to Rights: Treaty Ratification, Constitutional Convergence, and Human Rights Practice*, 54 HARV. INT'L L.J. 61 (2013). Convergence between constitutional rights and human rights follows many paths. *See, e.g.*, CONSTITUTIONALISM AND RIGHTS: THE INFLUENCE OF THE UNITED STATES CONSTITUTION ABROAD (Louis Henkin & Albert J. Rosenthal eds., 1990); Vlad Perju, *Constitutional Transplants, Borrowing, and Migrations*, *in* THE OXFORD HANDBOOK OF COMPARATIVE CONSTITUTIONAL LAW 1304 (Michel Rosenfeld & András Sajó eds., 2012).
[11]	*E.g.*, ICCPR, *supra* note 9; ICESCR, *supra* note 9; UDHR, *supra* note 9; Louis Henkin, *The Universality of the Concept of Human Rights*, 506 ANNALS AM. ACAD. POL. & SOC. SCI. 10 (1989) (presenting this early architecture); *cf.* HUMAN RIGHTS: THE HARD QUESTIONS (Cindy Holder & David Reidy eds., 2013) (collecting viewpoints on the problems with this general architecture).
[12]	*E.g.*, ICESCR, *supra* note 9; Francesca Bignami & Carla Spivack, *Social and Economic Rights as Fundamental Rights*, 62 AM. J. COMP. L. 561 (2014); David S. Law & Mila Versteeg, *The Declining Influence of the United States Constitution*, 87 N.Y.U. L. REV. 762 (2012).
[13]	This Article does not discuss the right to education, arguably the most universally recognized (in law) of the (as-categorized) economic and social rights. Much of the discussion could certainly be tested in this policy domain. See, for example, the rigorous examination of justice principles behind the distribution of educational opportunities in MARK KELMAN & GILLIAN LESTER, JUMPING THE QUEUE: AN INQUIRY INTO THE LEGAL TREATMENT OF STUDENTS WITH LEARNING DISABILITIES (1997).
[14]	*See, e.g.*, CÉCILE FABRE, SOCIAL RIGHTS UNDER THE CONSTITUTION: GOVERNMENT AND THE DECENT LIFE 47-49 (2000); HENRY SHUE, BASIC RIGHTS: SUBSISTENCE, AFFLUENCE, AND U.S. FOREIGN POLICY (2d ed. 1996); KATHARINE G. YOUNG, CONSTITUTING ECONOMIC AND SOCIAL RIGHTS (2012); Sen, *supra* note 8.
[15]	For a useful presentation of the diversity of conceptions of rights, see Jeremy Waldron, *Introduction*, *in* THEORIES OF RIGHTS 1 (Jeremy Waldron ed., 1984).
[16]	DWORKIN, *supra* note 6; Sen, *supra* note 8.
[17]	JOHN RAWLS, A THEORY OF JUSTICE (REV. ED. 1999); *see also* Waldron, *supra* note 4.
[18]	ICCPR *supra* note 9; ICESCR *supra* note 9; UDHR *supra* note 9; *see also* YOUNG, *supra* note 14; *infra* text accompanying notes 110-113 (describing basic legal design of rights-implementation and enforcement in South Africa, Canada, and Australia).
[19]	PHILIP ALSTON & RYAN GOODMAN, INTERNATIONAL HUMAN RIGHTS: THE SUCCESSOR TO INTERNATIONAL HUMAN RIGHTS IN CONTEXT: LAW, POLITICS AND MORALS 489 (2013).
[20]	These assumptions, while supported in constitutional theory, *see, e.g.*, YOUNG, *supra* note 14; Waldron, *supra* note 15, are also applicable to the positive law undergirding the three rights in the three jurisdictions dealt with in Part II below. Any departures from these assumptions are noted in more detail in that Part.

[21]	*Compare*, DWORKIN, *supra* note 6, *with* Vicki C. Jackson, *Constitutional Law in an Age of Proportionality*, 124 YALE L.J. 3094 (2015) (noting the posture of balancing can apply to rights); *see also* Goodwin Liu, *Rethinking Constitutional Welfare Rights*, 61 STAN. L. REV. 203 (2008) (proposing an approach that would resituate welfare rights in U.S. constitutional law); Frank I. Michelman, *Socioeconomic Rights in Constitutional Law: Explaining America Away*, 6 INT'L J. CONST. L. 663 (2008).
[22]	Courtney Jung et al., *Economic and Social Rights in National Constitutions*, 62 AM. J. COMP. L. 1043, 1047 (2014).
[23]	*Id.* at 1046 (suggesting that one-third of all constitutions identify all of their economic and social rights as justiciable, with another third reserving justiciability for some rights only, and others containing only aspirational rights, or containing less than two). This categorization is useful, with the obvious caveat that constitutional text does not always reflect constitutional practice. *See, e.g.*, Atudiwe P. Atupare, *Reconciling Socioeconomic Rights and Directive Principles with a Fundamental Law of Reason in Ghana and Nigeria*, 27 HARV. HUM. RTS. J. 71 (2014); Katharine G. Young, *On What Matters in Comparative Constitutional Law: A Comment on Hirschl*, 96 B.U. L. REV. 1375 (2016); Madhav Khosla, *Making Social Rights Conditional: Lessons from India*, 8 INT'L J. CONST. L. 739 (2010).
[24]	G.A. Res. 63/117, Optional Protocol to the International Covenant on Economic, Social and Cultural Rights (Dec. 10, 2008) (twenty-one Parties, forty-five Signatories as of December 1, 2016).
[25]	U.N. Comm. on Econ., Soc. and Cultural Rights, Communication No. 2/2014: Views Adopted by the Committee at Its Fifty-Fifth Session, U.N. Doc. E/C.12/55/D/2/2014 (Oct. 13, 2015) [hereinafter *I.D.G. v. Spain*].
[26]	*E.g.*, ECONOMIC AND SOCIAL RIGHTS AFTER THE GLOBAL FINANCIAL CRISIS (Aoife Nolan ed., 2014); EXPLORING SOCIAL RIGHTS: BETWEEN THEORY AND PRACTICE (Daphne Barak-Erez & Aeyal M. Gross eds., 2007); SOCIAL RIGHTS JURISPRUDENCE: EMERGING TRENDS IN INTERNATIONAL AND COMPARATIVE LAW (Malcolm Langford ed., 2008).
[27]	The metaphor of migrations has been popular for comparative constitutional ideas. Sujit Choudhry, *Migration as a New Metaphor in Comparative Constitutional Law*, *in* THE MIGRATION OF CONSTITUTIONAL IDEAS 1 (Sujit Choudhry ed., 2006). For an analysis of human rights ideas outside of courts, see BETH A. SIMMONS, MOBILIZING FOR HUMAN RIGHTS: INTERNATIONAL LAW IN DOMESTIC POLITICS (2009). For analysis of earlier trends in human rights advocacy, especially in the United States, omitting economic and social rights, see SAMUEL MOYN, THE LAST UTOPIA: HUMAN RIGHTS IN HISTORY (2010). For documentation of such networks, particularly in relation to economic and social rights, see generally SOCIAL AND ECONOMIC RIGHTS IN THEORY AND PRACTICE: CRITICAL INQUIRIES (Helena Alviar García et al. eds., 2015); STONES OF HOPE: HOW AFRICAN ACTIVISTS RECLAIM HUMAN RIGHTS TO CHALLENGE GLOBAL POVERTY (Lucie E. White & Jeremy Perelman, eds., 2011).
[28]	*See* ICESCR, *supra* note 9, art. 2(1) (requiring States Parties to "progressively" realize economic, social, and cultural rights). This is in contrast with obligations to "respect" (immediately) civil and political rights under the ICCPR. *See* ICCPR, *supra* note 9, art. 2(1). Progressive realization requires the state to "take steps" according to "available resources." BEN SAUL ET AL., THE INTERNATIONAL COVENANT ON ECONOMIC, SOCIAL AND CULTURAL RIGHTS: COMMENTARY, CASES, AND MATERIALS 137-57 (2014). While later human rights treaties, which combine civil, political, economic, social, and cultural rights together, eschewed the progressive

	realization formulation, the Convention on the Rights of Persons with Disabilities, Dec. 13, 2006, 2515 U.N.T.S. 3, reverted to this formula for economic and social rights. *Id.* art. 4(2). But for the suggestion that the "minimum essential level of enjoyment" requires immediate respect under that Convention, see U.N. Office of the High Comm'r for Human Rights, Monitoring the Convention on the Rights of Persons with Disabilities: Guidance for Human Rights Monitors 28 (2010), http://www.ohchr.org/Documents/Publications/Disabilities_training_17EN.pdf.
[29]	*Cf., e.g.*, U.N. Comm. on Econ., Soc. and Cultural Rights, General Comment No. 3: The Nature of States Parties' Obligations (art. 2, para. 1 of the Covenant), U.N. Doc. E/1991/23 (1990); David Landau, *The Promise of a Minimum Core Approach: The Colombian Model for Judicial Review of Austerity Measures, in* ECONOMIC AND SOCIAL RIGHTS AFTER THE GLOBAL FINANCIAL CRISIS, *supra* note 26, at 267; Katharine G. Young, *The Minimum Core of Economic and Social Rights: A Concept in Search of Content*, 33 YALE J. INT'L L. 113 (2008).
[30]	SANDRA LIEBENBERG, SOCIO-ECONOMIC RIGHTS: ADJUDICATION UNDER A TRANSFORMATIVE CONSTITUTION (2010); Katharine G. Young, *Proportionality, Reasonableness, and Economic and Social Rights, in* PROPORTIONALITY: NEW FRONTIERS, NEW CHALLENGES (Vicki C. Jackson & Mark Tushnet eds., forthcoming).
[31]	On the more idiosyncratic approaches between constitutional systems with respect to economic and social rights, as opposed to the apparently converging approaches to civil and political rights, see Daniel M. Brinks et al., *Social Rights Constitutionalism: Negotiating the Tension Between the Universal and the Particular*, 11 ANN. REV. L. & SOC. SCI. 289, 297-300 (2015); Colm O'Cinneide, *The Problematic of Social Rights--Uniformity and Diversity in the Development of Social Rights Review, in* REASONING RIGHTS: COMPARATIVE JUDICIAL ENGAGEMENT 299 (Liora Lazarus et al. eds., 2014).

[…]

Socio-Economic Rights, the Separation of Powers, and the Judicial Role

I. Introduction

One of the fundamental questions raised by the proposed amendment to enshrine a right to housing in the Irish constitution is whether the courts can, or should, play a meaningful role in adjudicating on such a right. The orthodox position in Irish constitutional law is, in essence, that the courts cannot and should not play a positive role in enforcing socio-economic rights. The reasons that underscore this position traverse a range of legitimacy and competency concerns about the appropriate judicial role under the Constitution. In essence the objection boils down to a nebulous separation of powers argument against either the recognition or judicial enforcement of socio-economic rights. In the first part of this paper, I will restate the core aspects of this orthodox position and draw out from it the assumptions that underlie the objection to the judicial enforcement of socio-economic rights.

While the arguments against socio-economic rights encompass several grounds, the objection to socio-economic rights is fundamentally premised on a number of assumptions about the necessary remedial responses that would flow from a judicial finding that a socio-economic right has been violated. This, then, is read back into notions of justiciability, and overarching separation of powers concerns, but the ultimate concern turns on the issue of remedies, and the assumed judicial capture of budgetary allocation processes, which are deemed to more appropriately be the remit of the elected branches of government.

In part two of the paper, I consider the experience of the South African courts in adjudicating on entrenched socio-economic rights. South Africa is important as it provides the most advanced jurisprudence on socio-economic rights in the common law world. The South African experience

is important for present purposes because it demonstrates, in concrete terms, that the spectre of judicial overreach and paramountcy that has exercised opponents of socio-economic rights in Ireland is overstated and premised on questionable assumptions about the nature of the judicial role in the context of socio-economic rights claims. The South African experience is considered not as a model to be followed, but more modestly as an illustration that it is entirely possible for courts to adjudicate on socio-economic rights claims without undermining the separation of powers.

In the third part of the paper a framework for judicial enforcement of socio-economic rights is sketched. Again, the objective here is not to suggest a rigid model, but rather to point to some of the key principles and ideas, drawing on experiences in South Africa and on the Irish constitutional context, that should inform judicial approaches to claims under the proposed new right to housing. If the constitution is amended to entrench a right to housing this will not be the death knell for the separation of powers under the constitution, but it will require a rethinking and recalibration of the separation of powers doctrine and the appropriate judicial role. From all of this it will be clear that the courts are more than competent to adjudicate on any future right to housing claims, but in doing so they will need to revisit and revise the orthodox position on socio-economic rights and the separation of powers in Ireland.

II. Ireland, Socio-Economic Rights, and the Separation of Powers

Apart from the right to education in Article 42, the Irish Constitution does not contain explicit protection for socio-economic rights. Nonetheless the courts have, over the years, been confronted with a range of socio-economic rights claims, relating to education, the rights of vulnerable children under Article 42.5, and a variety of claims under Article 40.3 and the doctrine of unenumerated rights. From this case law a clear opposition to the recognition and judicial enforcement of socio-economic rights has emerged. A key case establishing this orientation is

O'Reilly v Limerick Corporation,[1] in this case members of the Traveller community had been living in conditions of squalor and neglect on an unofficial halting site. They sought (i) a mandatory order for a serviced halting site under the Housing Act 1966 and (ii) damages for suffering and breach of constitutional rights.

In the High Court Costello J found against the claimants on both grounds, but on the second limb of their claim he noted that it raised a crucial question:

> [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?[2]

Drawing on the Aristotelian distinction between distributive and commutative justice and holding that only the latter is the appropriate domain of the courts, Costello J held that what the applicants were asking the court for would require "the imposition by the court of its view that there had been an unfair distribution of national resources". To reach such a determination the court "would have to make an assessment of the validity of the many competing claims on those resources, the correct priority to be given to them and the financial implications of the plaintiffs' claim". For Costello J, if the court were to undertake such an assessment it would not be administrating justice but would be involved in "an adjudication on the fairness or otherwise of the manner in which other organs of State had administered public resources", a role for which judges lacked competence and for which the courts were "a wholly inappropriate institution". Costello J therefore concluded that for the applicants' claim to succeed it should, to comply with the Constitution, "be advanced in Leinster House rather than in the Four Courts".[3]

[1] [1989] ILRM 181.
[2] [1989] ILRM 181, 193.
[3] [1989] ILRM 181, 195.

For present purposes, two key points emerge from Costello J's judgment in *O'Reilly*: (i) the assumption that determining an alleged breach of a socio-economic right would require a comprehensive audit and evaluation of public finances by the courts; (ii) the related assumption that it would then be for the courts to suggest the correct ordering of public finances. Taken together these two assumptions provide the bedrock for the broader separation of powers argument against judicial recognition or enforcement of socio-economic rights in Ireland. It is an argument that has been rehearsed in many other jurisdictions, as Kim Lane Scheppele notes:

> Behind most critiques of justiciable social rights are two presumptions: (1) that court decisions necessarily come in the form of all-or-nothing mandates to government, and (2) that court decisions giving meaning to social rights must do so by putting effective liens of a particular size on the state budget.[4]

The concern, then, is that if socio-economic rights are recognised, the courts, when called upon to adjudicate on such rights, will have to engage in second-guessing public policy and public finances, and will then have to make extensive orders requiring the re-ordering of both. This, in turn, will see an expansion of judicial power which "saps at the sinews" of democracy by undermining the separation of powers.[5]

A similar view was reflected in the *Report of the Constitution Review Group* (CRG) in 1996. The majority of the Group rejected the idea of amending the Constitution to protect socio-economic rights on the basis that the issues such rights were concerned with were "essentially political matters which, in a democracy, it should be the responsibility of the elected representatives of the people to address and determine". It would, the majority argued, be "a distortion of democracy to transfer decisions on major issues of policy and practicality from the Government and the Oireachtas,

[4] Kim Lane Scheppele, 'A Realpolitik Defense of Social Rights' (2004) 82 *Texas Law Review* 1921, 1931.
[5] Gerard Hogan, 'Judicial Review and Socio-Economic Rights' in Sarkin and Binchy (eds.), *Human Rights, the Citizen and the State: South African and Irish Perspectives* (Round Hall Sweet and Maxwell 2001) 1, 12.

elected to represent the people and do their will, to an unelected judiciary".[6] The majority further cautioned, giving the example of a hypothetical right to be free from poverty, that:

> It would then become a matter for judges in particular cases to determine what constitutes poverty (absolute or relative) and what minimum income would be needed, according to circumstances, to overcome it. Government and Oireachtas would have no discretion as to what amount of revenue could, or should, be raised from the public to fund the remedial requirement.[7]

Finally, the Report warned that it would not "accord with democratic principles to confer absolute personal rights in the Constitution in relation to economic or social objectives, however desirable in themselves, *and leave the Oireachtas with no option but to discharge the cost, whatever it might be, as determined by the judiciary*".[8] As with Costello J's judgment in *O'Reilly*, the objections to socio-economic rights in the report of the CRG are couched in a general separation of powers concern, but one which more fundamentally turns on the assumption that entrenching socio-economic rights will entail the courts in determining social policy and imposing limitless costs on the hapless elected branches of government.

The position articulated in *O'Reilly* subsequently found support in the Supreme Court. Of particular note is the judgment of the majority in *TD v Minister for Education*.[9] The case was the culmination of a long line of dispiriting cases in which the state was found to have failed in its duties towards vulnerable children. In the High Court Kelly J, relying on Article 40.3 and 42.5 of the Constitution, granted a mandatory order requiring the Ministers for Education, Health and Children to take all steps necessary to build and maintain ten high-support units to meet the needs of the applicant and other similarly situated minors. On appeal the Supreme Court overturned the High Court order, and a majority also took the opportunity to set down a marker on the question

[6] Report of the Constitution Review Group (Stationary Office 1996) 236.
[7] ibid.
[8] ibid [emphasis added]
[9] [2001] 4 IR 259.

of the constitutional protection of socio-economic rights.

Murphy J noted that it was significant that the Constitution as enacted did not, except for Article 42, protect socio-economic rights, and that no such right had been added in the many referenda since enactment. In his view, while there was no doubt many reasons for this dispensation, one crucial reason must be the apprehension that entrenching such rights would "involve … a radical departure from the principle requiring the separation of the powers of the courts from those of the legislature and the executive".[10]

In the leading judgment, Hardiman J noted that while an order such as that granted in the High Court might "gratify those who agree with the judge that there has been a failure" on the part of the state, such a development, if left unchecked, would:

> [represent] an enormous increase in the power of an unelected judiciary at the expense of the politically accountable branches of government. It would attribute to the judiciary a paramountcy over the other branches in the form of a residual supervisory governmental power which, once asserted and exercised, would certainly be appealed to again and again. This paramountcy … would represent a very significant change in our constitutional order, not easily reversed.[11]

We see here the key element in the objection to judicial enforcement of socio-economic rights in Ireland. The assumption underlying Hardiman J, and the rest of the majority's, separation of powers concerns is that the order granted in the High Court in *TD* is the *necessary form* that remedial relief must take in cases concerning socio-economic rights. As such, socio-economic rights should be eschewed by the courts, to avoid such remedial overreach and thereby uphold the separation of powers.

[10] [2001] 4 IR 259, 316-317.
[11] [2001] 4 IR 259, 339.

Interestingly, given that we are now discussing the possibility of amending the Constitution to enshrine a right to housing, Hardiman J anticipates the possibility of entrenching socio-economic rights through amendment, and his reservations about judicial enforcement of socio-economic rights extend to such a scenario. As the judge puts it, any such amendment would:

> [vest] responsibility in these areas in a body without special qualifications to discharge it which, if its views fell into disfavour, would not easily be replaced by another more congenial. It would also render technical and legalistic discussions, which should, properly be conducted in quite a different manner.[12]

This reflects the other core assumption underlying the objection to socio-economic rights, that entrenching such rights will entail courts in evaluating and setting policy, at the expense of the elected branches of government.

The position adopted by the majority of the Supreme Court in *TD*, and in *Sinnott v Minister for Education*,[13] represents the established orthodoxy on socio-economic rights and the judicial role in Ireland. While there have been some glimmers of openness in subsequent cases, broadly speaking the *Sinnott-TD* orthodoxy holds sway. The fundamental concern about judicial competency to enforce socio-economic rights turns on two central assumptions: that courts must necessarily evaluate and determine social policy, and that remedies for a breach of socio-economic rights are necessarily resource intensive. Next, we look at the South African experience of entrenching and vindicating socio-economic rights, to demonstrate that these assumptions are, at best, overstated.

III. The South African Experience

One of the defining features of South Africa's "transformative", post-apartheid Constitution is the entrenchment of judicially enforceable socio-economic rights. As such, South Africa has the most

[12] [2001] 4 IR 259, 358.
[13] [2001] 2 IR 545.

well-developed jurisprudence in the common law world on judicial enforcement of socio-economic rights. Prior to the adoption of the new constitution, in the *First Certification Judgment*,[14] the concern was raised that entrenching socio-economic rights would undermine the separation of powers, by having the courts scrutinise and reorder public policy and finance. The Constitutional Court rejected the argument, noting that many cases involving civil and political rights had budgetary implications, which in no way placed them beyond the pale of judicial scrutiny. The Court concluded that "it cannot be said that by including socio-economic rights within a bill of rights, a task is conferred upon the courts so different from that ordinarily conferred upon them by a bill of rights that it results in a breach of the separation of powers".[15]

Since the adoption of the new constitution, the Constitutional Court's jurisprudence has developed in two broad waves: in the first the court laid the foundations of its distinctive approach to adjudicating on socio-economic rights claims, and in the second the court has fleshed out innovative remedies, and broached the substantive content of certain rights, in particular the right to education. The courts first major socio-economic rights judgment was, for supporters of socio-economic rights, underwhelming. In *Soobramoney* the court sounded a highly deferential tone to decisions of budgetary allocation in the health care context and refused to find in favour of the applicant.[16] However, in the subsequent case of *Grootboom* the court began to articulate a more robust, and distinctive socio-economic rights jurisprudence.

In *Grootboom* a community of more than 800 people who were living in conditions of squalor on an abandoned sports ground argued that they should be provided with emergency accommodation based on the right to housing in section 26 of the Constitution. In the High Court Davis J granted

[14] *Ex parte Chairperson of the Constitutional Assembly: In re Certification of the Constitution of the Republic of South Africa 1996* 1996 (10) BCLR 1253 (CC)
[15] 1996 (10) BCLR 1253 (CC) [77].
[16] *Soobramoney v Minister for Health, KwaZulu-Natal* 1997 (12) BCLR 1696 (CC)

a mandatory order directing the state to provide the applicants with certain essentials for minimum shelter, he did so by drawing out the minimum core requirements of the right to housing under section 26. On appeal, however, the majority of the Constitutional Court rejected this approach, and held that rather than articulating the minimum core requirements of the right to housing, the role of the courts was to assess "whether the measures taken by the state to realise the right afforded by section 26 are reasonable".[17]

This shift to a reasonableness standard of review was a markedly more deferential approach than that adopted by Davis J in the High Court. Nonetheless, based on the evidence before them the Constitutional Court found the states policy to be unreasonable, because it made no provision for the short-term housing needs of the most desperate. But even while finding the state in breach of its obligations with respect to the applicants right to housing, the Court sounded a deferential tone:

> In any challenge based on section 26 in which it is argued that the state has failed to meet the positive obligations imposed upon it by section 26(2), the question will be whether the legislative and other measures taken by the state are reasonable. A court considering reasonableness will not enquire whether other more desirable or favourable measures could have been adopted, or whether public money could have been better spent.[18]

The court made clear that when adjudicating on a claimed breach of socio-economic rights, it was not for the courts to scrutinise public expenditure or determine if it could or should be done better, but more modestly to ask whether the overall policy pursed was reasonable. There is a high level of defence involved here, and the court extended this by confining itself to a declaratory order.

In the next major socio-economic rights case, the Constitutional Court found that the states failure to make an anti-retroviral drug available to all who needed it constituted a breach of the right to

[17] *Government of the Republic of South Africa v Grootboom* 2000 (11) BCLR 257 (CC) [33].
[18] 2000 (11) BCLR 257 (CC) [41].

health under section 27 of the Constitution. However, while the Court found a breach of the right to health, and made a limited mandatory order in this case, it nonetheless continued to sound a deferential tone with respect to the judicial role in enforcing socio-economic rights. The Court stated that:

> It should be borne in mind that … the courts are not institutionally equipped to make the wide-ranging factual and political enquiries necessary for determining what the minimum-core standards call for … nor for deciding how public revenues should most effectively be spent … Courts are ill-suited to adjudicate upon issues where court orders could have multiple social and economic consequences for the community. *The Constitution contemplates rather a restrained and focused role* for the courts, namely to require the state to take measures to meet its constitutional obligations and to subject the reasonableness of these measures to evaluation. Such determinations of reasonableness may in fact have budgetary implications but are not in themselves directed at rearranging budgets. In this way the judicial, legislative and executive functions achieve appropriate constitutional balance.[19]

The court here sets out a consciously self-limiting role for the courts in adjudicating on socio-economic rights claims. A "restrained and focused" role which does not set about re-writing social policy or placing indefinite liens on public finances. Instead, the court attempts to reconcile a robust defence of constitutional socio-economic rights with due regard to the separation of powers.

Both *Grootboom* and *TAC* set the framework for the South African court's subsequent socio-economic rights jurisprudence, and while it is not possible to give a detailed account of all subsequent developments, the South African experience demonstrates, at the very least, that it is entirely possible for courts to adjudicate on socio-economic rights claims. As Sandra Liebenberg puts it:

> The courts have proved themselves quite capable of developing a sophisticated and nuanced model of review for adjudicating social rights claims. This has enabled the courts to respect the institutional competencies and roles of the other branches of government while playing

[19] *Minister of Health v. Treatment Action Campaign (TAC)* 2002 (10) BCLR 1075 (CC) [37-38] (emphasis added).

> a meaningful role in enforcing constitutionally guaranteed socio-economic rights.[20]

In contrast to the spectre of judicial paramountcy, and the concern about inappropriate interference in budget setting and allocation, the South African experience demonstrates that courts can accommodate their role to the assessment of socio-economic rights claims in a manner which respects and upholds the separation of powers.

Indeed, critics of the South African approach argue that the courts have not gone far enough in vindicating socio-economic rights and have erred too much on the deferential side. Critics claim that the reasonableness approach adopted by the court's strips socio-economic rights of any meaningful content and defangs the courts in socio-economic rights cases.[21] The court has also been criticised for over-reliance on deferential remedies, with non-compliance by state agencies proving a persistent and damaging problem. This is illustrated by the fact that Irene Grootboom, who gave her name to the canonical Constitutional Court case establishing reasonableness review, died in the same conditions of squalor she lived in when bringing her case to court.

In some of its more recent housing cases the Constitutional Court has adopted more innovative remedies, requiring greater engagement between the claimants and government agencies,[22] but even this has been of limited value from the perspective of rights claimants. In the end, Marius Pieterse argues that the Constitutional Court has thus far failed to develop "an appropriately deferent but also appropriately transformative judicial role within a reconceptualised, uniquely South African, separation of powers" doctrine.[23] There is merit in Pieterse' assessment, a concern shared by others, but whatever its limitations, the South African experience demonstrates that

[20] Sandra Liebenberg, 'South Africa: Adjudicating Social Rights Under a Transformative Constitution' in Langford (ed.), *Social Rights Jurisprudence: Emerging Trends in International and Comparative Law* (CUP 2008) 75, 100.
[21] David Bilchitz, *Poverty and Fundamental Rights: The Justification and Enforcement of Socio-Economic Rights* (OUP 2007) 176.
[22] For example: *Occupiers of 51 Olivia Road v City of Johannesburg* (2008) 5 BCLR 475 (CC).
[23] Marius Pieterse, 'Coming to Terms with Judicial Enforcement of Socio-Economic Rights' (2004) 20 *South African Journal on Human Rights* 383, 385.

courts are eminently capable of adjudicating on socio-economic rights claims, and of doing so in a way which does not "sap at the sinews" of the separation of powers, or result in an overweening and unfettered judicial paramountcy on matters of social policy and resource distribution.

IV. Socio-Economic Rights, Dialogue, and the Judicial Role

The orthodox position in Ireland is that judicial enforcement of socio-economic will tend, necessarily, to undermine the separation of powers. This position rests, fundamentally, on assumptions about the nature of the enquiry involved in adjudicating socio-economic rights claims (courts assessing and reordering social policy and budgetary allocations) and on the presumed form that remedial orders must take (extensive mandatory orders determining the distribution of national resources). Experience elsewhere, particularly in South Africa, shows that these assumptions are overstated. So, while the constitutional protection and judicial enforcement of socio-economic rights does not undermine the separation of powers, it will, of necessity, require a recalibration of the doctrine. As Scott and Macklem note, the "inclusion of social rights in a … constitution would require rethinking the relationships that would otherwise exist between the executive, legislature, and judiciary".[24]

This necessary recalibration of the separation of powers doctrine is one that is already taking place in many jurisdictions around the world and has given rise to an extensive literature on the concept of constitutional dialogue. This broad framework seeks to break with the absolutist, zero-sum concepts of the separation of powers that derive from outmoded Montesquian orthodoxy,[25] and instead seek to understand the relationship between the different branches of government as an ongoing, iterative process to achieve specific constitutional or policy aims.

[24] Craig Scott and Patrick Macklem, 'Constitutional Ropes of Sand or Justiciable Guarantees? Social Rights in a New South African Constitution' (1992) 141 *University of Pennsylvania Law Review* 1, 42.
[25] Eoin Carolan, 'The Relationship Between Judicial Remedies and the Separation of Powers: Collaborative Constitutionalism and the Suspended Declaration of Invalidity" (2011) 46 *Irish Juris (n.s.)* 180.

Speaking directly to the implications of this framework for socio-economic rights, Scott and Macklem argue that:

> Ideally, the relationship between the judiciary and the other two branches of government would be cooperative as opposed to antagonistic, interactive as opposed to separate. This is not to deny that, in practice, the relationship will often be shaped by spirited, even bitter, resistance to what one branch perceives as overly intrusive incursions by another. Limits on the spheres of authority of each would emerge from the relationships that they jointly construct through the dialogic encounter, whether cooperative or conflictual.[26]

In this context, Hershkoff notes, courts are called upon to "ensure that the government is doing its job and moving policy closer to the constitutionally prescribed end".[27] The entrenching of, for example, a right to housing in the constitution "requires [courts] to share explicitly in public governance, engaging in [a] principled dialogue [to resolve social and economic issues]".[28]

This is a world away from presumptuous judicial capture and reordering of policy and budgetary decision-making processes. Instead, it requires courts to play their part in ensuring that constitutionally entrenched rights are being protected by all organs of state. Again, Hershkoff usefully illuminates the point, noting that:

> [when] a … constitution commits the state to particular public policies, the role of the … court is to ensure that government uses its assigned power to achieve, or at least move closer to achieving, the specified goals. Although the legislature retains discretion over how to implement the state constitutional requirements, its discretion over the various 'manners' and 'means' is constrained by the constitutional mandate. In exercising review, the court would not itself construct welfare policy, but rather would impose a burden on the legislature to show that the chosen 'manner' and 'means' are likely to carry forward the specified constitutional aim.[29]

[26] Scott and Macklem (n 24) 42.
[27] Helen Hershkoff, 'Positive Rights and State Constitutions: The Limits of Federal Rationality Review' (1999) 112 *Harvard Law Review* 1131, 1138.
[28] ibid.
[29] ibid 1145.

The South African experience provides, albeit imperfectly, one example of a jurisdiction attempting to develop this modest, dialogic (or cooperative) approach to vindicating socio-economic rights.

This idea of dialogue provides a useful, conceptual solvent to loosen and resolve rigid framings of the separation of powers in a zero-sum manner. It also provides a way of thinking through the vexed question of remedies. As Sanele Sibanda notes, even in South Africa, with its explicit recognition of socio-economic rights and an empowered judiciary, the "issue of remedial powers and the type of remedies the courts hand down … represents the sharpest line of tension" in demarcating the appropriate roles of the respective branches of government.[30] The South African courts have been criticised for their remedial approach to breaches of socio-economic rights, on the one hand for being too deferential in issuing declarations in the first wave of cases, and on the other for either being too interventionist or for defanging socio-economic rights though its more dialogic remedies involving engagement between the parties in the context of evictions. Whatever the shortcomings, the South African experience again shows that it is entirely possible to craft remedies for socio-economic rights that do not necessarily take the form of onerous demands on public finance or entail the judicial reordering of national resources.

The Canadian scholar Kent Roach has devoted much time to developing a cogent account of dialogic remedies. He argues that the aim of different dialogic approaches to constitutional review and remedies is to articulate "a role for courts in interpreting rights while allowing government to engage in robust policymaking".[31] There is a danger, as arguably exemplified by the South African experience, of courts articulating remedies that focus too much on procedure and policy in the abstract, providing cold comfort for successful litigants whose socio-economic rights are being

[30] Sanele Sibanda, "Introduction to Special Issue: Separation of Powers, the Judiciary and the Politics of Constitutional Adjudication" (2020) 36 *South African Journal on Human Rights* 287, 291.
[31] Kent Roach, 'Dialogic Remedies' (2019) 17 *International Journal of Constitutional Law* 860, 861.

violated. Conscious of this, Roach advocates what he calls a "two-track" approach, in which:

> courts recognize their obligations to give successful litigants meaningful remedies and not to abandon principle while also engaging in a "colloquy" or dialogue with political institutions and ultimately society about the ultimate systemic response.[32]

Such an approach recognises the importance of both the protection of constitutional rights and the respective roles and competences of the different branches of government. It approaches the separation of powers not as a rigid, absolute bar to judicial enforcement of certain rights, but rather a process through which the precise contours of the roles and relationships of the different branches of government are determined through ongoing practice and dialogue.

Interestingly, in the Irish context the courts have recently shown themselves to be both capable and willing to innovate on the remedial front. In *Kinsella v Governor of Mountjoy Prison*,[33] Hogan J in the High Court found the conditions a prisoner was being detained in came close to constituting a breach of his constitutional rights and would cross that threshold if the matter was not addressed by the prison authorities. However, rather than making an immediate order, he remitted the matter to the prison authorities to give them time to resolve the issue. As the judge put it:

> The present case may yet prove to be an example of a constructive engagement of this kind between the executive and judicial branches which achieves a just solution in line with appropriate separation of powers concerns without the immediate necessity for a coercive or even a declaratory court order.[34]

Subsequently, in *NHV v Minister for Justice*,[35] the Supreme Court also demonstrated that it was open to remedial innovation, adopting something akin to the suspended declarations of invalidity

[32] ibid 866.
[33] [2012] 1 IR 467.
[34] [2012] 1 IR 467, 474.
[35] [2018] 1 IR 246. On this Eoin Carolan, 'A Dialogue-Orientated Departure in Constitutional Remedies? The Implications of NHV v Minister for Justice for Intra-Branch Roles and Relationships' (2017) 40 *Dublin University Law Journal* 191.

pioneered in Canada. While the precise contours and implications of this remedial innovation are not yet fully worked out, it demonstrates that the Irish courts are more than capable of articulating remedial responses attuned to a "collaborative inter-institutional response" to violations of constitutional rights - an approach that recognises both the obligation on the courts to interpret and uphold constitutional rights, and the policy prerogatives of the elected branches of government.[36]

Both in terms of how the separation of powers is understood generally, and specifically in relation to the question of remedies, it is therefore entirely possible for the courts to adjudicate on socio-economic rights claims. Notably, in her dissenting judgment in *TD*, Denham J intimated such a dialogic/non-absolute conception of the separation of powers, and a legitimate role for the courts in determining socio-economic rights claims in that context. The judge wrote that:

> The separation of powers in the Constitution of Ireland is not absolute. It is a fundamental principle underlying the exercise of the powers of the basic institutions of the State and applied in a functional manner. It is a principle relevant to the three great organs of State – the legislature, the executive and the courts – which are independent institutions – and their dynamic relationship one with the other. *However, the powers and duties of each organ of State extend across theoretical lines of separation and checks and balances established in the Constitution breach a rigid concept of the separation of powers. The doctrine of the separation of powers has to be balanced with the role given to the courts to guard constitutional rights.*[37]

If a dissenting judgment is indeed "an appeal … to the intelligence of a future day",[38] then following any proposed amendment to the Constitution that enshrines a right to housing, Denham J's dissent in *TD* will provide an important reference point for the necessary recalibration of the separation of powers doctrine in Ireland.

[36] Carolan (n 25) 185.
[37] [2001] 4 IR 259, 306 (emphasis added).
[38] Charles Hughes, *The Supreme Court of the United States* (Columbia University Press 1928) 68.

V. Conclusion

The central question we are asked to consider here is: "Are the judiciary equipped to tackle questions of redistribution that might materialise from affording constitutional status to socio-economic rights". The short answer is that in terms of professional training, experience and institutional positioning, the courts are more than capable of adjudicating on socio-economic rights claims. We perhaps need to be more cautious in terms of framing, as adjudicating on such cases does not necessarily entail the courts in taking final and preeminent decisions about the distribution of resources. This is certainly the spectre that haunts *O'Reilly*, *TD* and the other canonical cases in Ireland, but it is not the experience of, for example, South Africa, and it is not a necessary consequence of judicial determination of socio-economic rights claims.

Limitations of space mean it is not possible to cover all the other implications and issues that might arise from entrenching a right to housing in the Irish Constitution. But, in brief, it can be said that the first step would be to break with the absolutist conception of the separation of powers represented by the *Sinnott-TD* orthodoxy, and instead recalibrate the separation of powers along dialogic or cooperative lines. Irish courts will still have to develop a distinctly Irish approach to adjudicating socio-economic rights claims, and questions about the appropriate standard of review (reasonableness arguably lacks teeth, so perhaps a form of proportionality would be more appropriate), in developing the normative content of the right (the South African courts have, mostly, been reticent on this front, but there is a wealth of international and comparative material to draw on), and crafting suitable, dialogic remedies, which may require some degree of innovation and thinking outside the box.

None of this, however, is beyond the competence of the courts. If the Constitution is amended to entrench a right to housing, it will provide both a textual warrant for the courts to adjudicate on claims pertaining to that right, but more broadly it will carry an implicit invitation for the courts,

and the other branches of government, to rethink their respective roles, so that all the institutions of the state can contribute towards the realisation of the newly entrenched right.

Socio-Economic Rights and the Judicial Role

Paul O'Connell

11 May 2022

- Objections to Socio-Economic Rights: The Orthodox Stance
- The South African Experience
- Socio-Economic Rights, Dialogue and the Judicial Role

Objections to Socio-Economic Rights

- The established position in Ireland is that courts cannot and should not play a positive role in enforcing socio-economic rights

- *O'Reilly v Limerick Corporation* (1989) - Costello J's judgment turns ultimately on two assumptions:
  1) Adjudicating on SERs claims would entail courts in auditing/second guessing public policy and budgetary decisions
  2) Finding a breach would entail the courts in reordering budgetary priorities

- Such claims should be "advanced in Leinster House rather than in the Four Courts"

- The common sense of *O'Reilly* also reflected in report of the Constitution Review Group (1996)

- It would not

> "accord with democratic principles to confer absolute personal rights in the Constitution in relation to economic or social objectives, however desirable in themselves, and leave the Oireachtas with no option but to discharge the cost, whatever it might be, as determined by the judiciary"

- In *Sinnott* and *TD* (2001) the Supreme Court confirmed this as the orthodox position

- Hardiman J – orders such as those granted in the High Court in *TD*

> "[represent] an enormous increase in the power of an unelected judiciary at the expense of the politically accountable branches of government. It would attribute to the judiciary a paramountcy over the other branches in the form of a residual supervisory governmental power".

The South African Experience

- South African Constitution (1996) enshrines a number of enforceable socio-economic rights, including a right to housing (section 26)

- In the *First Certification Judgment* (1996) the Constitutional Court rejected the argument that entrenching such rights would undermine the separation of powers:

> "it cannot be said that by including socio-economic rights within a bill of rights, a task is conferred upon the courts so different from that ordinarily conferred upon them by a bill of rights that it results in a breach of the separation of powers".

- In *Grootboom* (2000) the CC introduced its ”reasonableness” standard for assessing SER cases:

> “In any challenge based on section 26 … the question will be whether the legislative and other measures taken by the state are reasonable. A court considering reasonableness will not enquire whether other more desirable or favourable measures could have been adopted, or whether public money could have been better spent”.

- Similarly in the *Treatment Action Campaign (TAC)* case (2002)

> "Courts are ill-suited to adjudicate upon issues where court orders could have multiple social and economic consequences for the community. The Constitution contemplates rather a restrained and focused role for the courts, namely, to require the state to take measures to meet its constitutional obligations and to subject the reasonableness of these measures to evaluation … In this way the judicial, legislative and executive functions achieve appropriate constitutional balance".

- On the positive side, the South African experience demonstrates that courts can, and do, adjudicate on socio-economic rights claims, without either second guessing social policy or dictating the allocation of public resources

- However, the South African experience has many critics, arguing the courts have been too deferential, the reasonableness standard is insufficient to protect SERs, and the remedial approach of the courts is inadequate(or, alternatively, overly intrusive)

Socio-Economic Rights, Dialogue and the Judicial Role

- The *Sinnott-TD* orthodoxy rests on a rigid, absolutist and outmoded notion of the separation of powers, and on misplaced assumptions about the necessary character of the judicial role in adjudicating SER claims

- The entrenchment of a right to housing in the Irish Constitution will require a re-thinking and re-calibration of how the separation of powers is understood

- Experiences from around the world demonstrate the value of a “dialogic” understanding of the separation of powers

- In this context, rather than the exercise of power by a branch of government being a one-off, zero-sum event – the exercise of state power, and the interaction of the different branches of government, is seen, where appropriate, as an iterative, dialogic process

- On such an understanding, the question is not the “paramountcy” of one branch or the other, but the shared responsibilities and roles of each branch in upholding constitutional rights and principle

- This has particular relevance in the context of SERs cases, as Scott and Macklem (1992) put it:

> "Ideally, the relationship between the judiciary and the other two branches of government would be cooperative as opposed to antagonistic, interactive as opposed to separate. This is not to deny that, in practice, the relationship will often be shaped by spirited, even bitter, resistance to what one branch perceives as overly intrusive incursions by another. Limits on the spheres of authority of each would emerge from the relationships that they jointly construct through the dialogic encounter, whether cooperative or conflictual".

- Within this framework, the courts do not second-guess or substitute their view of appropriate social policy or distribution of resources, instead they determine whether existing policy serves to vindicate constitutional rights, if not, the other branches of government must act

- This will still pose challenges, and courts will need to develop appropriate remedies for an evolving area of law, but this is something that the courts have shown themselves to be more than capable of doing

- Irish courts will also have to learn, both positively and negatively, from other experiences, and develop a distinctive Irish approach (standard of review, content of rights, appropriate remedies etc.)

- In her dissent in *TD*, Denham J hinted at such a dialogic approach

> "The separation of powers in the Constitution of Ireland is not absolute … the powers and duties of each organ of State extend across theoretical lines of separation and checks and balances established in the Constitution breach a rigid concept of the separation of powers. The doctrine of the separation of powers has to be balanced with the role given to the courts to guard constitutional rights".

- The courts are more than capable of adjudicating on any new right to housing, but to do so they will need to depart from prevailing orthodoxies – Denham J's judgment provides a useful starting point