

Directive Principles, Political Constitutionalism, and Constitutional Culture: the Case of Ireland's failed Directive Principles of Social Policy

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Directive principles of social or state policy – use of constitutional provisions in parliamentary debates – economic, social and cultural rights – political constitutionalism – Article 45 of the Constitution of Ireland – constitutional culture – constitutional narrative – failure of constitutional culture to take hold – limits of constitutional text

INTRODUCTION

Two holy grails of contemporary constitutional discourse are protection of economic, social, and cultural rights,¹ and successful political constitutionalism, where political actors, rather than courts, are primarily charged with defence of rights and other constitutional imperatives.² Each of these ideals is hard to achieve independently, let alone the two together. It is unsurprising, then, that attention has recently been given to directive principles of social or state policy, an unusual constitutional mechanism that promises to realise both of these goals:

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¹K.G. Young, *Constituting Economic and Social Rights* (Oxford University Press 2012).

²S. Gardbaum, *New Commonwealth Model of Constitutionalism: Theory and Practice* (Cambridge University Press 2013); R. Bellamy, *Political Constitutionalism: A Republican Defence of The Constitutionality of Democracy* (Cambridge University Press 2009).

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to defend economic, social and cultural entitlements on a constitutional level, but to do so through constitutional creation of a political culture that values such entitlements. It attempts to do this by constitutionally protecting economic, social and cultural principles in an expressly non-justiciable way in order to inspire and guide political action from a constitutional level.

This constitutional approach was first attempted in Ireland where, to defuse political controversy about seemingly justiciable economic, social and cultural rights in the draft constitution, but still seeking to promote socio-economic equality, the framers of the Irish constitution included non-justiciable 'directive principles of social policy' in Article 45. These principles, *inter alia*, commit the state 'to strive to promote the welfare of the whole people', provide an 'adequate means of livelihood, divide land fairly, and prevent exploitation of people in the promotion of private enterprise'. These principles should inform and guide state policy. In doing so, they created a possible third way between relying on justiciable rights or non-constitutional politics, by trying to inspire a *constitutional* politics. This constitutional innovation was embraced by several other former British colonies, which 'sought to tackle . . . hidden, but no less dangerous legacies, including the denial of basic social and material needs'.³ The most notable example is India, where the directive principles of state policy have formed the basis of a substantial body of economic, social and cultural rights jurisprudence, despite their supposed non-justiciability.⁴

Recent scholarship by Weiss and others has refocused the debate on directive principles, suggesting they can be a powerful mode of constitutional expression and perhaps create a culture of respect for social equality and economic, social and cultural entitlements.⁵ Khaitan argues that directive principles have been effective in the Indian context, and are 'obligatory telic norms, addressed primarily to the political state, which constitutionalise thick moral objectives'.⁶ Weiss argues that directive principles 'appear to give legislation a prominent role in defining and giving effect to fundamental social values'.⁷ This suggests that directive principles, rather than an obscure feature of post-colonial constitutions, should be a major part of our toolset for contemporary constitutional design, as a way to inspire and guide constitutional discourse and constitutional culture. These calls, we think, will only increase as we grapple with how to protect environmental rights, which

³T. Khaitan, 'Constitutional Directives: Morally-Committed Political Constitutionalism', 82(4) *Modern Law Review* (2019) p. 603 at p. 606.

⁴See M. Galanter and J. Krishnan, 'Bread for the Poor: Access to Justice and the Rights of the Needy in India', 55 *Hastings Law Journal* (2004) p. 789 at p. 795.

⁵L.K. Weiss, 'Constitutional Directive Principles', 37(4) *Oxford Journal of Legal Studies* (2017) p. 916.

⁶Khaitan, *supra* n. 3, p. 603.

⁷Weiss, *supra* n. 5, p. 917.

raise many similar concerns about justiciability and how to empower state action through constitutional commitments.

While we think that directive principles can and will be a useful feature of constitutional design and constitutional discourse, we would sound a note of caution about these principles and the limits of what they can do. We think that the Irish case offers an illuminating example of how and why such principles fail. We examined the invocation of the directive principles in Ireland's lower house of parliament, Dáil Éireann, to see how frequently the principles are invoked for their intended purpose: to inspire politics and guide political debate. The answer is not encouraging – they have had seemingly no substantial effect. Mentions of Article 45 in Dáil Éireann are largely incidental; examples of significant invocation of the principles are very few; and there is no evidence that governments are ever guided by these principles as the Constitution intended.

It is obviously not the case that one failed example – even if it was the *first* example – suggests that directive principles are not worthwhile or important, or that they cannot work. Instead, we think this shows why it is a mistake to have too much faith in these principles, and shows what these principles really are: an attempt to embed a constitutional culture. This is a difficult and complex task, with no guarantee of success, and hard to do with constitutional text alone.

This article proceeds in three parts. In the first part, we: outline how directive principles can, in theory, advance political constitutionalism and economic, social, and cultural rights; discuss the history of directive principles and how they first came about in the Irish Constitution and spread elsewhere; and consider the recent attention paid to these principles by scholars such as L.K. Weiss and Tarunabh Khaitan in comparative constitutional law: their promise is a way to inspire politics, and fill the gaps that many constitutions have in respect of strong economic, social, and cultural rights protection. In the second part, we look in detail at the Irish case, showing the failure of directive principles of social policy to make any noticeable impact on Irish politics. We detail the results of our research into use of the directive principles in Irish parliamentary debate, and the methodology used to assemble this data, and suggest it evidences a near-complete failure of the principles to accomplish their core purpose. In the third part, we assess the implications of this finding. We suggest this example shows the contingency of constitutional culture; the difficulty of creating such a culture, especially with constitutional text alone; and the reality that directive principles may at best reflect an already-present culture of commitment rather than advance that culture further. Most of all, it shows that constitutional text alone, without the culture to animate it, is a hollow protection and a cold comfort.

DIRECTIVE PRINCIPLES AND DEBATES IN CONTEMPORARY
CONSTITUTIONALISM*Political constitutionalism, economic, social and cultural rights, and directive principles*

Political constitutionalism is often seen and described in opposition to legal constitutionalism. It suggests that interpretation of the constitution should be entrusted to the legislature and executive branches, rather than to the judiciary.⁸ Political constitutionalism furthers the idea that those elected as governmental representatives – given the task of promoting and ensuring democracy – should be the driving force behind constitutional interpretation and protection. Bellamy, one of the leading proponents of political constitutionalism, suggests that it can halt the encroachment of judicial power in this space in favour of a legislative system that is more responsive to public opinion. The Constitution, as interpreted, has wide-ranging effects on the society which it governs. It is thus understandable that some would not want the shape and direction of the constitution left to judges, argued by some to be an elite, unelected group who are not largely representative of society.⁹

Though an old idea, its resurgence in recent decades can be seen as a response to its opposite pole, legal constitutionalism. This viewpoint would suggest that the most important actors for interpretation and enforcement of the constitution are the courts, and while the political branches are constitutionally central, their authority stops at the water's edge of constitutional concepts, particularly constitutional rights.¹⁰ Under critique from various quarters (particularly in the mid-late 20th century in the United States) about the standing of judges – in terms of electoral accountability, legitimacy, expertise – to take on this role, various theories were put forward to defend the institution of constitutional judicial review.¹¹ In the comparative constitutional law sphere, these were later answered by new and more nuanced statements of critique, particularly by those from systems without histories of strong judicial review or judicial 'supremacy'.¹²

Political constitutionalism offered an alternative model that was in many respects free from these difficulties. It offered several supposed benefits over judicial review. First, it is obviously more representative, and potentially allows greater

⁸See Gardbaum, *supra* n. 2.

⁹See J. Waldron, 'The Core of the Case against Judicial Review', 115 *Yale Law Journal* (2006) p. 1346.

¹⁰See R.H. Fallon, 'The Core of an Uneasy Case for Judicial Review', 121 *Harvard Law Review* (2008) p. 1693.

¹¹See e.g. A. Bickel, *The Least Dangerous Branch* (Yale 1962).

¹²See generally Bellamy, *supra* n. 2; Waldron, *supra* n. 9; A. Tomkins, *Our Republican Constitution* (Hart Publishing 2005).

popular engagement with constitutional issues than the courts could possibly entertain.¹³ Secondly, judges do not consider and explain their decisions in the same way as politicians, and so political constitutionalism may bring a broader and deeper view of rights and constitutional norms to bear.¹⁴ Courts are limited in the moral and even legal arguments they consider;¹⁵ considering constitutional issues at the earlier and more fulsome debate in the political arena is far superior. Courts are bound by precedent, bogged down in 'esoteric legalisms';¹⁶ the admittedly messier sphere of politics has no such bindings. Thirdly, political constitutionalism offers the opportunity for 'collaboration' with courts, which can have some role in adjudicating constitutional concepts. Legislatures and courts can work together to advance constitutional norms, with each adding their own strengths and expertise to synthesise a more optimal approach than either could achieve on its own.¹⁷ In short, it purports to offer, in Gardbaum's words, a better 'form of constitutionalism within a democratic polity than provided by either traditional model alone, one that provides a better working coexistence of democratic self-governance and the constraints of constitutionalism, the twin concepts underlying constitutional democracy'.¹⁸

Political constitutionalism can be seen as one of the underlying philosophies of New Commonwealth constitutionalism, as it is sometimes known.¹⁹ This is embodied by countries with 'weak form' judicial review, such as New Zealand and the UK (and to a lesser extent Canada), where the courts can assess breaches of rights by reference to a parliamentary bill of rights, but cannot *invalidate* or *strike down* laws that violate those rights. Though results of this have varied,²⁰ and there are questions as to the extent to which the supposed benefits of this

¹³Gardbaum, *supra* n. 2, p. 69.

¹⁴G. Silverstein, *Law's Allure: How Law Shapes, Constrains, Saves and Kills Politics* (Cambridge University Press 2009) p. 63.

¹⁵R. Post, 'Theorizing Disagreement: Reconceiving the Relationship between Law and Politics', 98 *California Law Review* (2010) p. 1319 at p. 1341.

¹⁶J. Waldron, 'Representative Law Making', 89 *Boston University Law Review* (2009) p. 335 at p. 340.

¹⁷See generally A. Kavanagh, 'The Lure and Limits of Dialogue', 66(1) *University of Toronto Law Journal* (2016) p. 83.

¹⁸Gardbaum, *supra* n. 2, p. 52.

¹⁹See J.L. Hiebert, 'Parliamentary Bills of Rights: An Alternative Model', 69(7) *Modern Law Review* (2006) p. 19; T. Hickey, 'The Republican Virtues of the "New Commonwealth Model of Constitutionalism"', 14(4) *International Journal of Constitutional Law (ICON)* (2016) p. 794; J.L. Hiebert, 'New Constitutional Ideas: Can New Parliamentary Models Resist Judicial Dominance When Interpreting Rights?', 82 *Texas Law Review* (2004) p. 1963 at p. 1971.

²⁰J.L. Hiebert, 'Rights-Vetting in New Zealand and Canada: Similar Idea, Different Outcomes', 3 *New Zealand Journal of Public and International Law* (2005) p. 75.

approach are realised in practice,²¹ it is a central plank of contemporary constitutional discourse.

Directive principles are obviously relevant to debates on political constitutionalism. Such debates are, at core, about who must enforce constitutional rights and other constitutional imperatives or play the key role in their implementation. At the broadest level, political constitutionalism ‘stands for the proposition that the limits on governmental power inherent in the concept of constitutionalism . . . and especially those that are expressed in terms of individual rights and liberties, are or should be predominantly political in nature and enforced through the ordinary mechanisms of Madisonian-style structural constraints and, especially, through electoral accountability.’²² It is clear that – like weak form review – directive principles have the potential to be a useful tool in promoting this form of constitutional politics. Weiss argues that ‘directive principles are designed to create an aspect of political constitutionalism within a particular domain of constitutionally entrenched social values by allocating institutional responsibility to the political branches’.²³

In other words, ‘directive principles thus appear to insert an element of political constitutionalism within the domain of legal constitutionalism’.²⁴ As we shall see, in the Irish Constitution, Article 45’s directive principles expressly place the onus upon politicians to enforce these principles and affirm that they are not within the ambit of the courts. In removing the meaning, content, and effect of these principles from the courts (while otherwise providing for strong form judicial review), the Constitution sought to foment political-constitutional elements in the constitutional order. The principles try to give a firm *constitutional* direction to politicians to debate, consider and enforce them.

The Irish Constitution is just one example of how to attempt a balance between legal and political constitutionalism using directive principles. There are clearly others. Kavanagh has argued that the clash between political and legal constitutionalism is, in many respects, a false dichotomy, as every constitutional system will contain some element of both.²⁵ The real question, then, is the nature of the balance between them and the tools we use to strike this. Arguably directive principles provide a more flexible tool than a simple choice between weak/strong form review; or cutting the courts out entirely; or trusting the political branches

²¹See D. Kenny and C. Casey, ‘Shadow Constitutional Review: The Dark Side of Pre-Enactment Political Review in Ireland and Japan’, 18(1) *International Journal of Constitutional Law (ICON)* (2020) p. 51.

²²Gardbaum, *supra* n. 2.

²³Weiss, *supra* n. 5, p. 940.

²⁴Weiss, *supra* n. 5, p. 917.

²⁵A. Kavanagh, ‘Recasting the Political Constitution: From Rivals to Relationships’, 30(1) *King’s Law Journal* (2019) p. 43.

exclusively. They potentially allow for a nuanced approach that could have strong legal constitutionalism for certain condign matters, weak form review for others, and constitutionally-directed politics for others still.²⁶ Their potential is thus significant, in theory.

Rights in contemporary legal systems are, in practice, divided into two major categories: civil and political rights and economic, social and cultural rights. The conceptual soundness of this division has long been questioned; though these rights differ in practical ways, firm conceptual boundaries are hard to draw.²⁷ There is fairly broad consensus on constitutional enforcement of 'first generation rights' or 'negative' rights, but there is still significant dispute about constitutional protection of economic, social, and cultural rights, also known as 'positive' rights, or 'second generation rights'.²⁸ These relate to fundamental aspects of human life, and the ability for people to live and thrive in a society. The most commonly discussed social and economic rights are rights to health; housing; education; food; shelter; water; a right to work in fair and reasonable conditions; and a right to social security. The most common cultural rights include language rights/minority language protections; rights to cultural protection/recognition; the recognition/protection of ethnicity; and rights to cultural participation.

Since these rights tend to require state action – rather than state inaction – and often money to vindicate, there remains a huge debate about the appropriateness of their justiciability. It is often argued that it is inappropriate to judicially enforce such rights since judges lack the democratic legitimacy and policy expertise to balance the interests at stake in socio-economic questions, and that the legal process is unsuitable for such a task.²⁹ Judges undertaking this task are often said to encounter a particularly acute form of the 'countermajoritarian difficulty' that besets strong form judicial review. Typically systems with very strong form judicial review have not made these rights justiciable, though they have been included in the text of many constitutions.

Where such rights are enforced, there has been a tendency to favour 'progressive realisation' of the rights and a modest 'minimum core' protection. The 'minimum core' – sometimes called 'vital minimum', or 'duties/obligations of immediate effect' – is the bare minimum realisation of a right needed to vindicate basic needs and avoid severe deprivation. It does not fully and completely

²⁶See R. Dixon, 'The Core Case for Weak-Form Judicial Review', 38 *Cardozo Law Review* (2017) p. 2193.

²⁷See detailed argument in Young, *supra* n. 1; P. O'Connell, *Vindicating Socio-economic Rights: International Standards and Comparative Experiences* (Routledge 2012); J. King, *Judging Social Rights* (Cambridge University Press 2012).

²⁸A third generation of cultural and environment rights have been postulated. See D.R Boyd, *The Environmental Rights Revolution* (UBC Press 2012).

²⁹See a full canvassing of these arguments in Young, *supra* n. 1, and O'Connell, *supra* n. 27.

vindicate the right; it is the minimum essential content of the right. A minimum core is to be realised immediately and universally; it cannot be denied or derogated from. Progressive realisation is the gradual achievement of a fuller standard of economic, social and cultural rights protection over time, within the limits of available state resources, by pursuing legislative and policy measures. Judging adequate progressive realisation requires not only assessment of the current state of enjoyment of the rights, but also the likelihood of improvement over time having regard to current policy versus some policy alternatives. One means to do this is a standard known as ‘Grootboom Reasonableness’, used by South African Constitutional Court.³⁰

Yet even where these modes of enforcement are used, such judicial protection is often criticised as inadequate in its vindication of rights.³¹ But the more extensive the enforcement, the more that opponents will query the legitimacy of judicial action in this sphere. This has led to a lengthy academic conflict on this topic resulting in something of a stalemate.

Again, the relevance and potential usefulness of directive principles to this issue is obvious: it offers a way to constitutionally protect these rights and entitlements, and to provide for their vindication in the constitution, without providing for judicial enforcement and inviting the attendant problems and controversies. Political constitutionalism, if it is effective in this context, could provide a way to provide the constitutional protection these interests require, and directive principles could be a core way of constitutionally providing for this.

The history of directive principles

Directive principles as a constitutional innovation originated in the Irish Constitution of 1937.³² There was no equivalent in its precursor, the Irish Free State Constitution in 1922, though that constitution, itself, was unusual in European terms in not providing for any economic rights.³³ Pope Pius XI’s

³⁰*Grootboom v Oostenburg Municipality* 2000 (11) BCLR 1169 (CC). See S. Liebenberg, ‘Adjudicating Social Rights under a Transformative Constitution’, in M. Langford (ed.), *Social Rights Jurisprudence: Emerging Trends in International and Comparative Law* (Cambridge University Press 2008) p. 75 at p. 100.

³¹See S. Liebenberg, ‘The Value of Human Dignity in Interpreting Socio-economic Rights’, 21 *South African Journal of Human Rights* (2005) p. 1 at p. 22; D. Davis, ‘Transformation: The Constitutional Promise and Reality’, 26 *South African Journal on Human Rights* (2010) p. 85 at p. 97; P. O’Connell, ‘The Death of Socio-Economic Rights’, 74(4) *Modern Law Review* (2011) p. 532.

³²Some similar constitutional text can be found in the Constitution of Weimar Germany of 1919, a core inspiration for the Irish drafters (see e.g. Section 5, on Economic Life), though without the mechanism of directive principles.

³³D. Coffey, *Drafting the Irish Constitution, 1935–1937* (Palgrave 2018) p. 241.

encyclical *Quadragesimo Anno* (1931) was a key touchstone for Irish political thought of this era. It sought to espouse a third way politics to avoid the ‘twin rocks of shipwreck’ of excessive individualism and excessive collectivism. Its influence – and the influence of other core tenets of Catholic social teachings of that era – can be seen in many aspects of the Irish Constitution, not least its protection of property, which sought to balance communitarian interests of the common good with protecting the institution of property as a natural right.³⁴

Despite this, the Irish Constitution does not protect many enforceable economic, social and cultural rights in its text. It features only two core rights: language rights of Irish speakers, protected by virtue of Article 8’s provision of Irish as the national and first official language; and the right to free primary education in Article 42. There is also one judicially-recognised unenumerated/derived economic, social, and cultural right, of limited scope, in the right to earn a livelihood/seek employment.³⁵ The courts specifically disclaimed, in a landmark 2001 case, the ability to recognise new economic, social, and cultural rights in the Irish Constitution.³⁶

This absence can be explained by the generative history of Article 45 of the Constitution, entitled ‘Directive principles of social policy’. Article 45 begins:

The principles of social policy set forth in this Article are intended for the general guidance of the Oireachtas. The application of those principles in the making of laws shall be the care of the Oireachtas exclusively and shall not be cognisable by any Court under any of provisions of this Constitution.

The drafters of the Constitution excluded, in the clearest terms, the application of these principles by courts, separating them from the enforceable rights that preceded them in Articles 38–44. Article 45.1 then states: ‘the State shall strive to promote the welfare of the whole people by securing and protecting as effectively as it may a social order in which justice and charity shall inform all the institutions of the national life’. The article goes on to say that the State shall ‘direct its policy towards securing’:

- an ‘adequate means of livelihood’ for all citizens;
- that ‘ownership and control of the material resources of the community may be so distributed’ as to best achieve the common good;

³⁴R. Walsh, ‘Private Property Rights in the Drafting of the Irish Constitution: A Communitarian Compromise’, 33 *Dublin University Law Journal* (2011) p. 86.

³⁵See *Murtagh Properties v Cleary* [1972] 1 IR 330; *NHV v Minister for Justice* [2017] IESC 35.

³⁶*TD v Minister for Education* [2001] 4 IR 259 at 287–288, per Keane CJ.

- that ‘operation of free competition shall not be allowed so to develop as to result in the concentration of the ownership or control of essential commodities in a few individuals to the common detriment’;
- that credit and banking should be controlled to aid the common good;
- that ‘as many families as in the circumstances shall be practicable’ should be ‘established on the land in economic security’;
- that while private enterprise should be supported, the State must ‘protect the public against unjust exploitation’.

It concludes by committing the State ‘to safeguard with especial care the economic interests of the weaker sections of the community, and, where necessary, to contribute to the support of the infirm, the widow, the orphan, and the aged’. It seeks to ensure that workers shall not be abused and not obliged by economic necessity, to take up unsuitable employment. These principles have, as the article mandates, not been judicially enforced.³⁷

As originally written, in an earlier draft of the Constitution, provisions of this sort were included in the enforceable rights provisions, as part of the protection of private property.³⁸ They were subject to what Coffey characterises as ‘sustained criticism’ from civil service departments commenting on the draft for being too vague and subject to uncertain judicial interpretation. They were characterised as ‘merely moral principles [that] should not be created positive rights’. This concern was most clearly echoed by the Irish Department of Finance, which noted that these provisions could make it ‘compulsory for the state to do a number of vague and undefined things’ that would ‘recoil like a boomerang on the Government of some future day’. As a consequence of these criticisms, a decision was taken to ‘isolate those rights with social implications’ in an article of their own, with its own preamble that would indicate that they stood apart.³⁹

To put it another way, the enforcement of core socio-economic interests would be entrusted to institutions of political constitutionalism rather than to the judiciary. Article 45 pledges the state not just to defend the mostly civil and political rights in the Constitution, but also to advance and pursue certain social policies, creating a state with a thick vision of social justice and strong sense of social equality. But it does not enlist the power of the judiciary or constitutional judicial

³⁷There are very limited exceptions; see G. Hogan et al., *Kelly: The Irish Constitution*, 5th edn. (Bloomsbury Professional 2018) para. [7.10.01] ff.; J. Rooney, ‘International Human Rights as a Source of Unenumerated Rights: Lessons from the Natural Law’, 42 *Dublin University Law Journal* (2018) p. 141.

³⁸See Walsh, *supra* n. 34; Coffey, *supra* n. 33, p. 241-250; G. Hogan, *The Origins of the Irish Constitution, 1928-1941* (RIA 2012) p. 327-331, 371-372.

³⁹Coffey, *supra* n. 33, p. 243-244.

review to aid in this task, and seems to exclude it to a significant degree. It trusts that the political branches will carry out this constitutional directive. Article 45 is thus an attempt to guide policy through political rather than legal routes. Despite these good intentions, parliaments since 1937 have rarely considered Article 45 in the way it was intended. This will be canvassed in the second section below.

From Ireland, this constitutional innovation spread to many post-colonial constitutions in the post-war period. Amongst other examples, such principles can be found in Constitution of the Union of Burma 1947, Constitution of Nigeria 1989, and the Constitution of Namibia 1990.⁴⁰ Most significantly, they influenced the directive principles of state policy of the Indian Constitution 1950.⁴¹ Famously, in India, despite the injunction that the courts should not use these principles, they have been used as the bedrock of a substantial economic, social, and cultural rights jurisprudence.⁴²

Directive principles in comparative constitutional law scholarship

The drafters of the Irish Constitution used directive principles as a way to hedge between enforceable economic, social and cultural rights and ordinary politics. The drafters of the Indian Constitution may have thought the same. But with the Indian principles being judicially enforced, the focus on these measures as a constitutional third way fell out of the conversation. This changed somewhat as the debate on enforceable economic, social, and cultural rights measures became more focused in the early 1990s. Noted South African scholar (and later judge) Dennis Davis made a case against the inclusion of enforceable economic, social, and cultural rights in the South African Constitution, and advocated, instead, their inclusion as directive principles.⁴³ For Davis, laying down a guidelines for legislation, with perhaps some limited influence on the judiciary in terms of interpretation etc., would be a better way to broach economic, social, and cultural rights. Davis lost this argument (though the South Africa courts ultimately adopted an approach to economic, social, and cultural rights not greatly at odds with his suggestions) and scholarship subsequently focused on the relative success of the South African experiment in justiciability and pushed for moves in this direction. It is fair to say that the use of directive principles in constitutions

⁴⁰Hogan et al., *supra* n. 37, para. [7.10.02].

⁴¹C. O'Normain, 'The Influence of Irish Political Thought on the Indian Constitution', 1 *Ind YBIA* (1952) p. 156.

⁴²See I.S. Muralidhar, 'The Expectations and Challenges of Judicial Enforcement of Social Rights', in M. Langford (ed.), *Social Rights Jurisprudence: Emerging Trends in International and Comparative Law* (Cambridge University Press 2008).

⁴³D. Davis, 'The Case against the Inclusion of Socioeconomic Demands in a Bill of Rights Except as Directive Principles', 8 *South African Journal on Human Rights* (1992) p. 475.

became disfavoured. One writer in the mid-2000s described directive principles as a ‘design defect’ in constitutions.⁴⁴ However, it is important to note in this context that the constitutions of certain post-communist states – notably the Czech Republic and Slovakia – adopted a somewhat similar approach to directive principles, albeit with a slightly different framing: socio-economic rights are limited in their enforcement to the context of laws implementing them.⁴⁵ The Constitution of Poland treats certain economic, social, and cultural rights in a similar way, though the courts in practice have not given great weight to this distinction.⁴⁶ These approaches were in the minority in terms of Central and Eastern European constitutions, which in general protected economic, social and cultural rights without drawing any distinction with other rights.⁴⁷

More recently, scholars have once again looked seriously at the idea of constitutional directive principles as a third way between rights and politics. This is in part because of the growing awareness – though this is hardly a new idea⁴⁸ – that the exclusion of economic, social, and cultural rights from the dominant rights protection and discourse is likely to perpetuate inequality. Moyn has recently contended that the placing of rights language at the centre of our moral discourse, and the exclusion of socio-economic equality from that language, bears some blame for the widening socio-economic gulf in many contemporary societies.⁴⁹ However, it should be noted that Moyn’s critique may apply with more force to international rights instruments rather than domestic constitutional rights,⁵⁰ and Moyn correctly notes that rights protection cannot, on this logic, be said to be the *cause* of inequality.⁵¹

Recent scholarship from Khaitan and Weiss have raised once again the prospect of using directive principles as a constitutional tool to protect economic, social and cultural entitlements. Weiss examines directive principles in several constitutions, and asks: how should directive principles be understood in relation

⁴⁴J. Omar Usman, ‘Non-Justiciable Directive Principles: A Constitutional Design Defect’, 15 *Michigan State Journal of International Law* (2007) p. 643.

⁴⁵W. Sadurski, *Rights Before Courts: A Study of Constitutional Courts in Postcommunist States of Central and Eastern Europe* (Springer 2005) p. 179.

⁴⁶Sadurski, *supra* n. 45, p. 179.

⁴⁷Sadurski, *supra* n. 45, p. 180.

⁴⁸Davis, *supra* n. 43, p. 475-476.

⁴⁹S. Moyn, *Not Enough: Human Rights in an Unequal World* (Harvard University Press 2018).

⁵⁰See generally the work of Brinks and Gauri, focusing on the broad organisational and social impacts of rights protections and litigation, rather than a narrowly outcome-oriented view: V. Gauri and D.M. Brinks, ‘Human Rights as Demands for Communicative Action’, 20(4) *Journal of Political Philosophy* (2012) p. 407; D.M. Brinks and V. Gauri, ‘Law’s Majestic Equality? The Distributive Impact of Judicializing Social and Economic Rights’, 12(2) *Perspectives on Politics* (2014) p. 375.

⁵¹Moyn, *supra* n. 49, p. 192.

to conventional rights provisions; and how can directive principles function as a source of constitutional legal norms?⁵² Weiss argues that directive principles 'are best understood as an innovation in constitutional design that responds to perceived limitations of judicial rights enforcement as a mechanism for giving effect to particular kinds of social values and to perceived relative advantages of legislation'.⁵³ She suggests that they are *obligatory*, in that they 'place binding obligations on the state to promote particular social values', and *contrajudicative*, in that they are 'not designed to be given effect by direct judicial enforcement'.⁵⁴ As such we have to view directive principles through the lens of the legislation that such principles are supposed to undergird and help to create. Only then can we understand how directive principles create constitutional legal norms and how they will effectively vindicate rights interests. Weiss acknowledges there can be an 'enforceability problem' when the 'state may breach its constitutional obligations . . . if it fails to give effect to directive principles' and there is no judicial recourse. She admits that, at this point, 'the mechanisms to ensure the "bindingness" of those obligations are weak at best'.⁵⁵

Khaitan understands directive principles as a legacy of 'impoverishing colonial politics'.⁵⁶ This history explains the importance of economic, social and cultural rights in postcolonial nations, and their attempted constitutional entrenchment. However, Khaitan also recognises that many postcolonial states failed to live up to the aspirations outlined by directive principles. He sees such principles a thick moral norms and obligations imposed on the state by the constitutional text.⁵⁷ He argues that directive principles impose two distinct duties: a duty to endeavour to realise the directed goal, and a duty to realise the goal at some future date.⁵⁸ He suggests the principles are 'weakly contrajudicative',⁵⁹ and there can be 'limited forms of judicial engagement with directives'. He notes that this factor, inter alia, 'allows directive principles to be used as fine-grained tools of constitutional incrementalism'.⁶⁰ Khaitan notes that there are often practical concerns with the effectiveness of directive principles in politics: 'political enforcement' of constitutional commitments arouses much scepticism. He suggests, however, that this is not the case with constitutional directives in India. Since the enactment of the Indian Constitution in 1950, at least 131 pieces of primary legislation have been enacted

⁵²Weiss, *supra* n. 5, p. 917.

⁵³Weiss, *supra* n. 5, p. 917.

⁵⁴Weiss, *supra* n. 5, p. 920.

⁵⁵Weiss, *supra* n. 5, p. 925.

⁵⁶Khaitan, *supra* n. 3, p. 606.

⁵⁷Khaitan, *supra* n. 3, p. 603.

⁵⁸Khaitan, *supra* n. 3, p. 609.

⁵⁹Khaitan, *supra* n. 3, p. 603.

⁶⁰Khaitan, *supra* n. 3, p. 609.

invoking the directive principles generally.⁶¹ He notes that Ireland, when compared to India, serves as an example ‘at the other extreme, where directives seem to have largely been politically and jurisprudentially irrelevant’.⁶²

Elsewhere Khaitan has considered the expressive importance of directive principles in the Indian context, where they have proven useful to ensure the inclusion of ideological dissenters in constitutional negotiation. He identifies the three main groups of ideological dissenters in India – socialists, Gandhians and cultural nationalists⁶³ – and notes the important distinction between these types of groups and ethnocultural minorities. Ideological dissenters tend to be ‘politically optimistic’⁶⁴ and therefore ‘seek expressive recognition of their agendas rather than political insurance through constitutionally guaranteed power-sharing’.⁶⁵ This is one of the factors that make directive principles an effective tool of constitutional negotiation. He argues that there are two main techniques which were used by the framers of the Indian Constitution to ensure effective constitutional negotiation: containment, and constitutional incrementalism. He notes that both tools ‘seek to reduce the high decision costs associated with constitution-making in a deeply divided context’.⁶⁶ Directive principles played a key role in this in the Indian context.

Both Weiss and Khaitan, then, gives us reason to think that directive principles can and should play a significant role in shaping constitutional politics, as a site of a generation of constitutional norms and obligations, shaping legislation and political action, with (at most) modest judicial involvement. They offer the promise of constitutionalising economic, social, and cultural rights without the objections about legitimacy and judicial competence that typically beset such efforts and attract significant political opposition. We think that this discussion can be significantly enriched with greater discussion of the Irish example. This case study – which is an even greater failure, we think, than Khaitan allows – shows the difficulties we face in using directive principles; the contingency of their success; and the nature of the work they do in a constitution.

⁶¹Khaitan, *supra* n. 3, p. 627.

⁶²Khaitan, *supra* n. 3, p. 628.

⁶³T. Khaitan, ‘Directive Principles and the Expressive Accommodation of Ideological Dissenters’, 16(2) *International Journal of Constitutional Law* (2018) p. 389 at p. 404.

⁶⁴Khaitan, *supra* n. 63, p. 392.

⁶⁵Khaitan, *supra* n. 63, p. 392.

⁶⁶Khaitan, *supra* n. 63, p. 408.

THE FAILURE OF DIRECTIVE PRINCIPLES IN IRELAND

Ireland's directive principles of social policy, we suggest, have had almost no impact on the constitutional or political system of Ireland. They have received almost no judicial use.⁶⁷ On one occasion, they were mentioned in the context of recognising an implied right to seek employment, but this aside,⁶⁸ the judiciary have not invoked them either directly or indirectly, respecting the constitutional injunction that they are not cognisable. It might be wondered if the courts have used these principles in some other way – taken inspiration from them in developing part of the Constitution or the common law, or used them defensively to protect legislative efforts. There is little or no evidence of this, though such evidence could be hard to locate if the courts did not wish to highlight this influence, and the possibility cannot be ruled out.⁶⁹ That leaves politics, where the impact of the principles should be seen, but cannot be.

Approach and methods

Here we present the results of our research into the use of directive principles in Irish parliamentary debates. This seems to us to be the most credible way to measure their impact. Parliamentary debates see government present in detail the reasons motivating a Bill or policy and explaining their thinking on the measure. Similarly, opposition deputies oppose the Bills by setting out major objections in terms of vision of policy and politics, as well as more prosaic objections. If Irish politics were influenced by directive principles – if politicians believe such principles to be important – we would expect that to be reflected to at least some degree in these debates. Moreover, the Constitution is hardly absent from Irish politics and parliamentary debates – on the contrary, such debates are littered with

⁶⁷See Hogan et al., *supra* n. 37, para. [7.10.01] ff.; G. Hogan, 'Directive Principles, Socio-Economic Rights and the Constitution', 36 *Irish Jurist* (2001) p. 174.

⁶⁸See *Murtagh Properties v Cleary* [1972] 1 IR 330. This controversial High Court judgment has not led to any subsequent developments. Hogan suggests that the judgment uses a 'backdoor' to make Art. 45 justiciable: Hogan, *supra* n. 67, p. 180. A similar and related right was later recognised in *NHV v Minister for Justice* [2017] IESC 35 with no reliance on the directive principles.

⁶⁹The courts' general stance to social rights engagement shows no evidence of influence of the directive principles: see *TD v Minister for Education* [2001] 4 IR 259; G. Whyte, *Social Inclusion and the Legal System*, 2nd edn. (IPA 2015). There are several occasions where the courts have stressed the importance of deference to legislative judgment where the legislature is engaged in social policy, because of the legislature's unique role in this; see a famous passage of Kenny J in *Ryan v Attorney General* [1965] IR 294 at 312. However, it seems likely that this stance came from other parts of the Constitution, such as the primacy of the legislative power, and the state being the 'guardian of the common good' in taking policy action (see e.g. Art. 43) rather than from Art. 45, though the latter might have played some unspoken role.

constitutional disputes and objections. Ireland has a highly legalistic form of political engagement which sees the Constitution play a central (often obstructive) role.⁷⁰ Therefore, if directive principles are absent, it is not a symptom of some wider ignorance of the constitutional order in politics.

We undertook a detailed search of debates in the Dáil, the lower house of the Irish parliament, from the passage of the Irish Constitution of 1937 to the end of the summer 2021 parliamentary term. We attempted to find every instance where the directive principles of social policy were directly mentioned to look for their intended use: to influence socio-economic policy, or influence state policy in any other way. We did this using the search function of the Dáil Debates on the Houses of the Oireachtas website.⁷¹ We searched all debates within particular date ranges, one decade at a time. We used multiple overlapping search terms – ‘Article 45’, ‘directive principles’, ‘directive principles of social policy’ – both together and individually. We also search collectively for several possibly relevant terms – for example, ‘principles AND social policy AND constitution’ – to attempt to locate any outlying examples where they may have been obliquely or incorrectly referred to. We then examined each result to see whether the search returns represented an invocation of the directive principles or not. Each author conducted this search independently and then compared results to try to ensure that we have found every instance of the principles being mentioned. We cannot say for certain that we achieved this, but we believe that we have. We then discussed each instance and categorised them by the nature of their invocation, as discussed below.

A limitation of our methodology is that we did not include the debates of the Seanad, the upper house of the Oireachtas. This was for several reasons. First, with more than 80 years of parliamentary debate to cover, and with significant work required to conduct an exhaustive search, some exclusion was necessary for reasons of scope. We feel that a comprehensive canvassing of the debates of one chamber is better than less detailed canvassing of both. Secondly, the Seanad is an unusual chamber, one that is widely regarded as somewhat dysfunctional and in need of sweeping reform.⁷² It has an odd electoral system that sees most of its members chosen by other politicians and is often viewed as a training ground for aspiring politicians or a more sedate job for those who have previously served in the lower house and lost their seat. Therefore, its debates are a less

⁷⁰See C. Casey and E. Daly, ‘Political Constitutionalism under a Culture of Legalism: Case Studies from Ireland’, 17(2) *EuConst* (2021) p. 202; Kenny and Casey, *supra* n. 21; C. Casey and D. Kenny, ‘The Resilience of Executive Dominance in Westminster Systems: Ireland 2016-2019’, April *Public Law* (2021) p. 335.

⁷¹See (www.oireachtas.ie), visited 21 June 2022.

⁷²D. Kenny, ‘The Failed Referendum to Abolish the Ireland’s Senate: Rejecting Unicameralism in a Small and Relatively Homogenous Country’, in R. Albert et al. (eds.), *Constitutional Reform of National Legislatures Bicameralism under Pressure* (2019 Edward Elgar) p. 163 at p. 165-171.

accurate reflection of the prevailing political practice in Ireland. Finally, and most importantly, being unusually composed and designed as a consultative chamber, the upper house is excluded from budgetary oversight and has extremely limited roles in money bills and state spending,⁷³ and a limited role in all other legislation insofar as it cannot force change against the will of the lower house. Therefore, its deliberations are not supposed to have major impact upon the socio-economic state of Irish society. As such, we feel its exclusion does not weaken our conclusions, it being obviously less relevant to the core purposes and functions of the principles.

We would admit that gauging the impact of a set of ideas or values on the political process is very challenging; there is no precise measure for this, and all the proxies that we have are imperfect. There is always the possibility that there was some conscious or subconscious influence of these values of which there is no overt evidence. However, we think the approach used here is a credible way to measure the impact of directive principles in Ireland. These principles are supposed to be rhetorically significant, a form of overt constitutional politics rather than some subtle shaping of values. If they were influential on political actors, why would they not say so? There is no reason for them to obfuscate this and, given the significant role of the Constitution in Irish politics, there is in fact every reason to mention these principles if they were thought to be relevant and useful. Though inevitably imperfect, the measure we use here seems to be a good one. Particularly given the fairly emphatic results that our search returned, we feel justified in drawing conclusions from them.

Invocations of the directive principles of social policy in Dáil Éireann

Having examined the Dáil debates very closely, we felt it important to distinguish two kinds of invocations of Article 45's directive principles, as only one of them is relevant for our purpose. First, the directive principles could be invoked substantively, in the context of a policy debate on some point of socio-economic policy, to attack, defend, praise, or condemn a particular policy choice, or to make a case for augmenting some piece of law or policy. This is what Khaitan, and Weiss have in mind when they speak of such principles being important in politics. Any examples of this sort would be important evidence of the impact of the Irish principles, and their utility in creating a constitutionally-underwritten socio-economic politics. However, many more recent examples fell into a different category: a meta-invocation of the principles in constitutional change debates. The principles are mentioned in the course of arguing for *enforceable* economic, social and cultural rights to be inserted into the Constitution because the principles are insufficient.

⁷³Kenny, *supra* n. 71; Hogan et al., *supra* n. 37, paras. [4.5.08]-[4.05.24].

Or, conversely, they are mentioned in the same context as an argument that such a constitutional change is unnecessary, given that the directive principles exist to protect such interests. To put it another way, in these cases the principles are mentioned only to argue that this mechanism is adequate or inadequate to protect economic, social, and cultural interests; they are not used in any substantive attempt to protect those interests in policy.

There are many such examples in various debates about constitutional change, recommendations of various NGOs or constitutional reform bodies, or constitutional incorporation of international treaties.⁷⁴ We think that these examples are irrelevant to our core question: the usefulness or otherwise of the principles for their intended purpose in shaping socio-economic policy. Mentioning the principles in this context is not the form of morally-committed political constitutionalism that the principles are supposed to encourage, but rather is a debate about whether the principles actually provide this. As such, we have excluded these examples to leave only the former category: cases where the principles are substantively invoked, not invoked as part of a meta-argument about economic, social, and cultural rights protection. We have also excluded three instances where the invocation of the principles was extraordinarily scant, only suggesting they were without any use, or where the reference was of very unclear relevance.⁷⁵

What we are left with, after these exclusions, is a small number of invocations across the more than 80-year history of the Constitution. The vast majority of them were in the very early years of the state, with remarkably few in more recent times. We found 66 substantive references in total. Thirty of these were made in the first decade of the Constitution's history; ten more in the next decade; a total of 20 in the subsequent 40 years; and only six since 1998.⁷⁶

⁷⁴For example, the Oireachtas has on many occasions discussed, but never acted on, the recommendations of the Constitutional Convention in 2014 to constitutionally protect economic, social, and cultural rights, and similarly has regularly discussed formal domestic incorporation of the ICESCR. All such discussions are included in Supplementary Table 2, appended.

⁷⁵See Dáil Éireann debate – Thursday, 2 Nov 1972, Vol. 263 No. 3, where they were invoked only to be called 'empty gestures' in a debate on another topic; Dáil Éireann debate – Tuesday, 11 May 1982, Vol. 334 No. 4, where they were invoked only by contrast to other constitutional provisions that were not 'window dressing'; and Dáil Éireann debate – Tuesday, 21 Apr 1998, Vol. 489 No. 6, where they were mentioned (as a non-sequitur, in context) alongside a listing of constitutional rights.

⁷⁶The principles have been mentioned on more than six occasions since 1998, but the majority of recent invocations fall into the meta-argument category and are excluded. The vast majority of parliamentary time spent discussing these principles is now spent discussing their adequacy/inadequacy rather than using them to shape policy or politics.

Early invocations

The early years of the Constitution saw by far the most invocations of the principles. By our count, in the first ten years of the Constitution's coming into force, there were 30 invocations of the principles. There were a further ten in the next ten years. After this, we see a significant waning of their influence.

The first ten years were a time when the principles appeared to be regularly consulted and relied upon, and policy was regularly held up against these aspirations. The first invocation of Article 45 in the Dáil was by an opposition Deputy in January 1938, less than a month after the document came into force. He used the article, and its promises of 'all the loving things which the State should confer upon its citizens' under it, to critique what he saw as the gross inadequacy of an unemployment assistance measure.⁷⁷ The very next day it was used in another instance by an opposition deputy opposing an agriculture Bill that, he claimed, would concentrate control of beef exports in the hands of the few, not the many.⁷⁸

I suggest to Deputies that, while the Constitution has been enacted by the people, we stand between the people and the Executive, in order to see that the people get the rights that have been given to them, and to see that they are not lightly taken away.

This statement suggests a desire on behalf of this Deputy to use the Constitution – and Article 45 in particular – as a standard to which to hold the state. The article's provision related to banking and the general welfare were invoked no fewer than 14 occasions between 1938 and 1947 in the Finance Committee of the House, dealing with distributional or financial matters.⁷⁹ The article was brought up twice in respect of the Central Bank Bill 1942,⁸⁰ and in respect of other important legislation such as Rent Restrictions Bill 1944⁸¹ and the Industrial Relations Bill 1946.⁸² Other instances include critique of the government's treatment of allowances for adopted children; the provision of employment in particular areas of the country; the government's

⁷⁷Unemployment Assistance (Amendment) Bill, 1937, Second Stage, Dáil Éireann debate – Wednesday, 12 Jan 1938, Vol. 69 No. 19, Deputy William Norton.

⁷⁸Agricultural Produce (Fresh Meat) (Amendment) Bill, 1937, Final Stage; Dáil Éireann debate – Thursday, 13 Jan 1938, Vol 69, No. 20, Deputy John Lymbrick Esmonde.

⁷⁹These are enumerated in Supplementary Table 1, appended.

⁸⁰Dáil Éireann debate – Wednesday, 29 Apr 1942, Vol. 86 No. 9; Dáil Éireann debate – Tuesday, 26 May 1942, Vol. 87 No. 1

⁸¹Rent Restrictions Bill, 1944 – Committee, Dáil Éireann debate – Wednesday, 14 Nov 1945, Vol. 98 No. 9

⁸²Dáil Éireann debate – Tuesday, 23 Jul 1946, Vol. 102 No. 9; Dáil Éireann debate – Wednesday, 22 Oct 1947, Vol. 108 No. 5.

agricultural policies; a demand for social security;⁸³ and the closure of schools.⁸⁴ There was even an attempt, in 1942, to directly give effect to the principles. Three deputies moved a motion calling on the government, in order to ‘give effect without further delay to the undertakings in Article 45 of the Constitution’, to

direct its policy towards securing that the citizens may, through their occupations, find the means of making reasonable provision for their domestic needs, Dáil Éireann requests the Government immediately to formulate proposals for absorbing into useful employment at adequate remuneration all adult citizens able and willing to follow useful occupations.⁸⁵

The article was mentioned in several subsequent debates on this motion.⁸⁶ This, it would seem to us, is what the principles were designed for: invocation in parliament to try to hold the government to a high standard of social responsibility in governance.

Similarly, in 1944, Deputy Norton – who regularly invoked the principles against the government in this era – suggested that the government should ground their policy proposals in the Article. Speaking on an employment/wage matter, he suggested: ‘the Minister should say: “Here is the State’s headline under Article 45 of the Constitution. This is what we desire. We put it into legislation and that is the standard we set”’.⁸⁷

Almost all the invocations of the principles in this era were by opposition Deputies critiquing the government, trying to hold the government to the standard these principles set out. Very rarely did the government invoke them.⁸⁸ Deputy Davin once advised a government TD speaking against his motion to acquaint himself with Article 45.⁸⁹ The government almost never responded to these critiques in terms of the directive principles or engaged in substantive debate about the meaning of Article 45 with their opposition counterparts. This might be part of a broader trend whereby, in the early years

⁸³Dáil Éireann debate – Wednesday, 2 Oct 1940, Vol. 81 No. 1; Dáil Éireann debate – Thursday, 8 Apr 1943, Vol. 89 No. 14; Dáil Éireann debate – Thursday, 16 Dec 1943, Vol. 92 No. 8; Dáil Éireann debate – Wednesday, 30 Jan 1946, Vol. 99 No. 1.

⁸⁴Dáil Éireann debate – Wednesday, 23 Oct 1946, Vol. 103 No. 1.

⁸⁵Dáil Éireann debate – Wednesday, 25 Nov 1942, Vol. 88 No. 18.

⁸⁶Dáil Éireann debate – Wednesday, 17 Feb 1943, Vol. 89 No. 5; Dáil Éireann debate – Wednesday, 9 Dec 1942, Vol. 89 No. 1

⁸⁷Electricity (Supply) (Amendment) Bill, 1944 – Committee Stage; Dáil Éireann debate – Thursday, 8 Feb 1945, Vol. 95 No. 18

⁸⁸For an exception, see the Taoiseach’s invocation at Dáil Éireann debate – Wednesday, 28 Jun 1944, Vol. 94 No. 8.

⁸⁹Dáil Éireann debate – Wednesday, 22 Oct 1947, Vol. 108 No. 5

of the Constitution, the opposition made a practice of quoting the Constitution – which the Taoiseach of the day had largely written – to annoy the government and criticise its actions.⁹⁰

While invocations in this era were frequent, they very quickly took on a tone that suggested that the principles were not being taken seriously by government. As early as 1940, one Deputy complained that, given the government's failure to engage in dialogue on such points, 'Article 45 of the Constitution is meaningless'.⁹¹ Deputy Davin suggested that the article wasn't 'worth the ink and the paper it is printed upon' if it did not make the government provide adequate means for people to eat well.⁹² Deputy Norton said that to imagine the poverty of 'an old man or woman living in a cottage in rural Ireland' on what the government provided for them was to 'realise how hollow are the pretensions enshrined in Article 45 of the Constitution'.⁹³

Relatedly, one tends to see the same opposition politicians – especially Deputies Norton and Davin, later Deputy Hickey – bringing up the principles. Their impact does not seem much wider. This is attested to by the fact that one backbench TD, Patrick McGilligan, described in 1946 going to the Constitution to see what he could find to support his amendments to an Industrial Relations Bill, and seemed surprised to stumble across these principles in Article 45:

I went to the Constitution to see what assistance I could get in framing these amendments and I found in Article 45 these directive principles on social policy. It is stated that the application of those principles shall not be cognisable by the courts. The attention of the Oireachtas is directed merely to the Article and we are asked to promote legislation along the lines of the social views which are developed in Article 45.⁹⁴

⁹⁰Examples include the debates on the Sinn Féin Funds Bill 1947 and the debates on a government decision, in November 1945, to ban a march by the British Royal Legion. We are grateful to Mr Justice Gerard Hogan for bringing this point to our attention.

⁹¹Dáil Éireann debate – Wednesday, 2 Oct 1940, Vol. 81 No. 1

⁹²Dáil Éireann debate – Tuesday, 1 Jul 1947, Vol. 107 No. 5.

⁹³Dáil Éireann debate – Wednesday, 30 Jan 1946, Vol. 99 No. 1

⁹⁴Dáil Éireann debate – Tuesday, 23 Jul 1946, Vol. 102 No. 9. Having discovered them, the Deputy found occasion to invoke them again: Dáil Éireann debate – Wednesday, 23 Oct 1946, Vol. 103 No. 1; Dáil Éireann debate – Thursday, 23 Apr 1953, Vol. 138 No. 5; Dáil Éireann debate – Wednesday, 10 Jun 1953, Vol. 139 No. 7.

The next ten years, 1948 to 1957, saw a falloff in the use of the principles, though their invocation is still seen semi-regularly, with ten invocations in total. They were cited for regulation of credit and banks,⁹⁵ social welfare,⁹⁶ employment conditions,⁹⁷ public health,⁹⁸ and the cost of living.⁹⁹

After this, there is a steep decline, with far fewer invocations. There are only 20 invocations across the 40-year period from 1958 to 1997. A significant proportion of these – eight of the 20 – were in the 1980s. The 1970s saw only two invocations, and the 1990s three. Aside from very robust invocations in a controversial debate about a rent control measure,¹⁰⁰ these invocations were generally scant in terms of their content. There is also scepticism in the tone of many of the contributions. One of their rare invocations saw Deputy John A. Costello suggest that ‘70 per cent of the Deputies here and 95 per cent of the people have not read’ the principles.¹⁰¹

More recent invocations

In the period since 1998, use of the principles has almost collapsed. Substantive use of the principles is easily outnumbered by their invocation as part of a meta-debate about their adequacy.¹⁰² There are only six brief substantive invocations in the more than 20 years since 1998. We will canvas them here to illustrate the marginality of the principles to political discourse in the Dáil.

The first, in 2003, saw the Minister for Justice, responding to a somewhat vague question about youth crime, invoking the principles in a very general way in his vague response. When criticised by the questioner for not really addressing the topic in issue, the Minister responded that the questioner was

⁹⁵Dáil Éireann debate – Wednesday, 22 Mar 1950, Vol. 119 No. 15; Dáil Éireann debate – Thursday, 19 Jul 1951, Vol. 126 No. 13; Dáil Éireann debate – Tuesday, 15 Dec 1953, Vol. 143 No. 13; Dáil Éireann debate – Wednesday, 14 Mar 1956, Vol. 155 No. 4.

⁹⁶Social Welfare (Insurance) (No. 2) Bill, 1950 – Second Stage, Dáil Éireann debate – Wednesday, 11 Apr 1951, Vol. 125 No. 4.

⁹⁷Dáil Éireann debate – Wednesday, 16 Jul 1952, Vol. 133 No. 8.

⁹⁸Dáil Éireann debate – Thursday, 23 Apr 1953, Vol. 138 No. 5; Dáil Éireann debate – Wednesday, 10 Jun 1953, Vol. 139 No. 7.

⁹⁹Dáil Éireann debate – Wednesday, 26 Oct 1955, Vol. 153 No. 1.

¹⁰⁰Housing (Private Rented Dwellings) Bill, 1982 – Second Stage, Dáil Éireann debate – Wednesday, 31 Mar 1982, Vol. 333 No. 6.

¹⁰¹Third Amendment of the Constitution Bill, 1958 – Committee Stage, Dáil Éireann debate – Wednesday, 21 Jan 1959, Vol. 172 No. 7.

¹⁰²By our count there are 11 debates where the principles are invoked in this way, and often at much more length and in much more detail than when they are substantively invoked: see Supplementary Table 2, appended.

talking ‘vapid nonsense’.¹⁰³ The same Minister for Justice very briefly invoked the principles in a debate about taxation in 2006, suggesting that regulated enterprise and progressive taxation was the Constitution’s vision for society.¹⁰⁴ The third instance was a substantial and apt use: in a debate about responding to Ireland’s banking crisis in 2009, a leading opposition TD cited the directive principle that the control of credit should be pursued in the common good to argue for nationalisation of troubled banks.¹⁰⁵ Nothing came of this motion, but this is surely what the directive principles were intended to be used for. On the fourth occasion, in 2015, an opposition TD briefly mentioned the principles in a debate on the beef industry for the proposition that it should not be dominated by some to the common detriment.¹⁰⁶ Finally, in 2021, the principles were briefly invoked on two separate occasions in respect of a private members Bill to put ‘principles of social welfare’ into statute, which referenced Article 45 as being progressively realised by the social welfare system.¹⁰⁷ The principles were not discussed in any detail in this context, and the Bill was defeated at Second Stage in the House.

It is worth stressing that these are *only instances* where the directive principles were substantively invoked in the recent past, a period that involved an extraordinarily severe financial crisis; years of austerity under an EU-IMF bailout; an unprecedented housing crisis; the Covid-19 pandemic; and, accordantly, greater threats to social equality than any time in recent memory. Economic, social and cultural rights principles offer an interesting possible site of resistance and contestation to changes to social rights imposed during austerity or financial crisis response, but the directive principles in Ireland played no such role.¹⁰⁸ If these principles were not invoked, it was not for lack of suitable policy context.

Possible unspoken influence

It should be noted again that it is possible that these principles had an influence that we cannot capture with our methodology, an influence outside of express

¹⁰³Dáil Éireann debate – Wednesday, 12 Mar 2003, Vol. 563 No. 2

¹⁰⁴Dáil Éireann debate – Thursday, 7 Dec 2006, Vol. 629 No. 2

¹⁰⁵Dáil Éireann debate – Tuesday, 12 May 2009, Vol. 682 No. 2.

¹⁰⁶Dáil Éireann debate – Thursday, 3 Dec 2015, Vol. 899 No. 2

¹⁰⁷Principles of Social Welfare Bill 2021 – First Stage, Dáil Éireann debate – Wednesday, 17 Feb 2021, Vol. 1004 No. 3; Principles of Social Welfare Bill 2021 – Second Stage, Dáil Éireann debate – Thursday, 20 May 2021, Vol. 1007 No. 4.

¹⁰⁸See C. Kilpatrick and B. De Witte, ‘Social Rights in Crisis in the Eurozone: The Role of Fundamental Rights’ Challenges’, 1 *European Journal of Social Law* (2014) p. 2; C. Kilpatrick, ‘Constitutions, Social Rights and Sovereign Debt States in Europe: A Challenging New Area of Constitutional Inquiry’, in B. de Witte and C. Kilpatrick (eds.), *Constitutional Change through Euro-Crisis Law* (Cambridge University Press 2017); and in relation to Ireland, A. Nolan, ‘Welfare Rights in Crisis: The Case of Ireland’, 1 *European Journal of Social Law* (2014) p. 37.

invocations of the principles in legislative debate. It might be that the legislation enacted by the Oireachtas embodied these principles very well, even if they were not mentioned in the legislative process. Certainly, some legislation and social policy was motivated by this thinking. Coffey has assembled an interesting table of pre-1937 legislation that might correspond to the principles in Article 45.¹⁰⁹ However, we can find no enacted law that directly references the directive principles. If the legislation channelled the principles, it did so entirely silently. A detailed analysis of the language used in post-1937 legislation, to see if it includes any of the language used in Article 45, would be a worthwhile future project. Similarly, a search of the legislative record for the actual language used *in* the principles would be worth undertaking. It is possible that this could show examples of the principles having effects despite not being expressly mentioned. We did not have space, within the limits of this project, to undertake these tasks. However, the wide reading of the legislative debates on social policy topics that we undertook for this project makes us doubt that many – if any – examples of such legislation or invocation of the language used in the principles would be found in such searches. However, even if we are wrong, and there are such examples, it would not answer the question of why express invocation of the principles is absent from political debate. It would, in fact, raise further questions: why would the government not have used the rhetoric of Article 45 to advance and frame their legislative agenda, or at least to silence their various critics who accused them of ignoring the principles? Why would they not avail of this constitutional political resource to defend their agenda? And why would anyone using the language contained in the principles not cite them? This itself – the failure to animate or guide debate on these pieces of legislation, or the failure to refer expressly to the principles – would be a major failure of the effort to constitutionally embed these principles in politics. Whatever way you look at it, the directive principles have failed to live up to their promise.

CULTURE, AND ITS FRAGILITY AND COMPLEXITY

Leading Irish constitutional scholar and Supreme Court Judge Gerard Hogan once called Article 45 a ‘valiant attempt’¹¹⁰ to square a legal circle – to do something that is basically impossible. Valiant it might have been, but certainly a failure also, having no discernible impact on debates on social policy or social equality. There is some commentary in the Dáil debates lamenting that the directive principles have fallen into some disuse. Speaking in 2017 on a Bill to insert social and economic rights into the Constitution, an opposition

¹⁰⁹Coffey, *supra* n. 33, p. 242.

¹¹⁰Hogan, *supra* n. 67, p. 198.

Deputy called Article 45 of the Constitution ‘one of the most remarkable articles in that document’, that it should be ‘a guide for Members of the Oireachtas when it comes to drafting our laws’, and lamented that it ‘has not got the political or judicial attention that many believe it deserves’.¹¹¹ At the same time, to our knowledge this Deputy has not himself otherwise raised these principles in the Dáil.

In this, we think it serves as a counterpoint and a note of caution in respect of the more optimistic accounts of directive principles. To be clear, we do not think that our findings bolster the more severe critiques of directive principles – that they are ‘design flaws’ in constitutions.¹¹² Nor do we go so far as to say that they have ‘mere moral appeal’ and ‘no practical implication’.¹¹³ We would not deny that they seem to have had an impact on Indian political discourse and legislation, alongside their judicial invocation. Khaitan also effectively shows that they may have been useful in India as a way of accommodating ideological dissenters in the constitutional project.¹¹⁴ We would not deny or disparage these successes. Instead, we think the Irish case shows what directive principles are actually attempting to do – to create or embed a political and legal culture – and illustrates the scale of the difficulties that beset attempts to do this. It shows that the success of directive principles is contingent, happenstantial, and always uncertain.

For directive principles to work, they have to create an ethic or culture in both the political and legal communities. Culture is a difficult term to define, and is hugely varied in its use in comparative constitutional law.¹¹⁵ For our purposes, we will define cultural in the context of constitutionalism as the broad set of norms, suppositions, assumptions, modes of thought, values and social beliefs held by state officials and by ordinary citizens that are engaged when they interpret or consider the constitution.¹¹⁶ These values and beliefs help to unpack and transform the words and broad values of the constitution into more tangible and concrete meanings and

¹¹¹Dáil Éireann debate – Wednesday, 22 Mar 2017, Vol. 943 No. 2.

¹¹²Usman, *supra* n. 44.

¹¹³Khaitan, *supra* n. 63, p. 390.

¹¹⁴Insofar as Khaitan’s research shows rhetorical reliance on the directive principles in India, this is significant, but Khaitan’s case is that they were relied upon by dissenters who had vested political interests in asserting the principles (put there for this purpose) against potentially-unwilling opponents. This does not necessarily say much about whether these principles can serve as true guides and inspirations for those who may not be so politically wedded to them.

¹¹⁵See, for one usage, R.B. Siegel, ‘Constitutional Culture, Social Movement Conflict and Constitutional Change: The Case of the de facto ERA’, 94 *California Law Review* (2006) p. 1323. There are many others.

¹¹⁶For a more detailed account of culture and its role in constitutional law, see D. Kenny, ‘Examining Constitutional Culture: Assisted Suicide in Ireland and Canada’, 17(1) *Journal of Comparative Law* (2022) p. 85.

consequences.¹¹⁷ As one of the authors has previously suggested, culture is ‘an intermediate layer between concrete legal rules and their realisation and application, shaping and filtering their reading through a set of fundamental and foundational views that undergird the legal order’.¹¹⁸

We will separate for our purposes two aspects of constitutional culture: political culture and legal culture. The former relates to these understandings in the political sphere, broadly defined, and the latter to the legal sphere in lawyering, courts and adjudication.¹¹⁹ These cultures are likely to overlap to a significant degree, but will also vary depending on the particular dynamics at play in a constitutional system. Interestingly, these cultures are neither entirely separate from the text of the constitution, nor entirely shaped by it. Constitutional text cannot define or prescribe a culture, because aspects of the culture will have predated the constitution and shaped it, and the constitutional text itself – including any parts attempting to shape a culture – will always be read and interpreted in light of cultural suppositions and beliefs. The constitution can shape and influence the culture, even as it is shaped and influenced *by* that culture.

Culture has two related traits that make it challenging to grapple with: its complexity and its variability. Its complexity comes from the fact that culture can come from so many sources: from the constitution, to the practice of politics, the political rhetoric of the moment. It also is likely to have complex relationships with a broader public culture, being influenced by other cultural trends in society.¹²⁰ With so many influences and inputs, having unpredictable and variable effects, it is very hard to map and fully know culture, and it is a very hard thing to create or control deliberately. Relatedly, because it is subject to so many influences, and because our control over it is limited, it is variable and can change in a somewhat unpredictable way. This means that elements of the culture that we value might be fragile and hard to preserve.

¹¹⁷This is similar to Legrand’s definition of ‘interiorised legal culture’: ‘an array of predispositions, predilections, propensities, or inclinations [that] is the outcome of a process of transformation of often unconscious aspirations or expectations according to the concrete indices of what is probable, possible, or impossible for an identifiable community into relatively durable tendencies that are internalised intergenerationally through socialisation and that crystallise into patterns of action’: P. Legrand, ‘Comparative Legal Studies and the Matter of Authenticity’, 1(2) *Journal of Comparative Law* (2006) p. 365 at p. 376.

¹¹⁸Casey and Kenny, *supra* n. 70, p. 372.

¹¹⁹On the idea of a professional legal culture around courts and judging, see D. Kenny, ‘Merit, Diversity and Interpretive Communities: The (Non-party) Politics of Judicial Appointments and Constitutional Adjudication’, in L. Cahillane et al. (eds.), *Judges, Politics and the Irish Constitution* (Manchester University Press 2017).

¹²⁰See S. Fish, ‘Change’, in S. Fish, *Doing What Comes Naturally* (Duke University Press 1989) p. 141. Complexity is meant here in a scientific sense: see J. Gleick, *Chaos* (Viking 1987).

Culture is pervasive and influential, but it is also fluid (and vague) in a way that hard constitutional mandates are not. By virtue of its fluidity, culture is also very powerful, able to achieve what constitutional mandates cannot: it can guide policy in an active and reactive way, changing to meet new circumstances, changing as views and facts change behind it. This is why directive principles have such potential in the socio-economic sphere: they could create cultural respect for such values that would have benefits far greater than judicial enforcement, due to its limitations, can provide.

Directive principles are an attempt to create or instil a culture: an effort to inspire, shape, and control the political and legal culture that will influence how the Constitution is read, to control otherwise uncontrolled constitutional processes, such as the making of legislation and social policy. It is not, in this context, a mere suggestion, or attempt at persuasion. In *directing* state policy, it is trying to leverage the constitution's imprimatur and authority to have a great effect, to suggest to those it is addressed to they ought to feel bound to follow the direction set out. However, the extent of this sense of being bound is dependent on politicians internalising this cultural norm. The only way that principles and values will influence politics and political outcomes is if there is a sense in the political community that these ideas should be central to political discourse and decision-making and they then act accordingly. A constitutional duty of this sort cannot be made effective simply by being mandatory, as mandatory reference to such principles might be nothing more than an exercise in box-ticking. Political actors have to feel obligated to act in accordance with the principles.

Directive principles in their anti-adjudicative form also have to create a *legal* culture that respects the injunction that the courts should not make judicial use of them. The requirement that they not see judicial use can be put as a harder constitutional command than the political duty to regard them, but – as the Indian example shows – courts can interpret their way around this injunction if they wish. The legal culture must also not undermine these values by regarding them as somehow second rate compared to legally- or judicially-enforceable parts of the constitution, lest this marginalise the principles in discourse around the constitution. Therefore, cultural failure can occur on either side: directive principles may collapse into judicial use, or politically ossify, or both, if this attempt to instil cultural norms does not work.

Institutional design or constitutional structures cannot guarantee that this attempt to instil culture will be effective.¹²¹ Though these choices can have significant impact on culture, culture is linked to these facets of the constitutional order in a non-linear and indirect way, making it very difficult to control or predict. You cannot, in short, create a culture by way of constitutional design, though the design choices you make will have a (complex, subtle, and perhaps unpredictable) impact on culture. Trying to create or instil culture through constitutional text may be particularly difficult. It has the advantage of speaking from a place of authority, assuming – as is generally likely –

¹²¹Casey and Kenny, *supra* n. 70, p. 373-374.

that the constitution will command respect. But it has the disadvantage of fixity: it cannot adapt and change easily to react to other political and legal cultural forces and changes. Moreover, there are, as Weiss notes, no obvious mechanisms to police lack of conformity.¹²² Therefore, for textual efforts at cultural development to succeed, they have to tap into a broader cultural commitment to honour constitutional injunctions. One would suspect that the more the principles cut against – rather than flow with – the broader political culture, and the objectives of political actors, the harder it will be to have them taken seriously. In short, we should be wary of thinking that constitutional text or constitutional commitments *alone* can create or maintain a culture. While it can play a role in this, culture is much more complicated to create, change, or buttress.¹²³

The judicial respect for the Irish Constitution's injunction not to use the directive principles is a sign of cultural success; even during its most activist period, the Irish Supreme Court never used these principles. On the other hand, these directive principles failing to influence political judgement, as they have in the Irish case, is a failure to develop political culture: a political *forgetting* of certain values of social equality of which the collective memory of the Constitution tried always to remind us. The nature of the Irish failure is interesting. On a simple analysis, the directive principles succeeded at first but then fell out of use, suggesting a sort of cultural drift, where politics moved past these principles and left them behind. However, this may not be an accurate picture. The principles were only ever invoked by opposition legislators, never by the government, which controlled the legislative and policy agenda. They didn't appear to influence government at all when invoked by their opponents. Looked at in this way, the failure was present from the start, and realisation of the futility of invoking these principles is what gradually ended the practice. Some further historical work on the substantive content of the government's legislative programme might confirm this, and show with greater certainty whether this was a failure in terms of the *discursive* culture of politics or in terms of *substantive* outcomes. Either way, it is a failure.

The reasons for this failure are hard to know. They probably relate to the government's disinclination to invoke them. But this answer just raises further questions: why did the government – for much of the early period of the Constitution led by the chief architect of the Constitution, Éamon de Valera¹²⁴ – not wish to use these core constitutional principles? Answers to this question would be speculative and require a close analysis of the political dynamics of this period and the broader culture of the Irish legislature which we do not have time to undertake here.

¹²²Weiss, *supra* n. 5, p. 925.

¹²³See Fish, *supra* n. 119, on the challenges of directing change.

¹²⁴De Valera led the Irish government from 1932–48; 1951–54; and 1957–59. At this juncture, he was elected to be the (non-executive) President.

Another way to articulate this insight, and to think about how directive principles might succeed or fail, is to think in terms of *narrative*. Law is full of narratives, and they are essential to both our use and understanding of law.¹²⁵ Constitutional narratives may be of particular importance.¹²⁶ But law lacks a narratology – a theory of what constitutes narrative, how it is used, and the role it plays.¹²⁷ It seems that to succeed, directive principles of this sort have to be accompanied by, or help to produce, a story about their meaning, purpose, and importance that becomes part of the broader constitutional narratives of that place. Ireland's directive principles came with a narrative that was compelling to the judiciary: judges engaging with these principles is bad for politics and illegitimate. The political narrative that accompanied the principles did not work: there was no message that they bedded down into Irish politics about the centrality and importance of these ideas. It is hard to say why this was, as this should be a compelling story: the people created a new independent state, and in doing so, committed it to these admirable social principles which you, as political actors, should follow. Maybe what it lacked was a political champion who would repeat this lesson until it became part of the fabric of politics. It is impossible to say for certain.

Whether we think of this failure as cultural or narrative – these may be the obverse and reverse of the same coin – the lesson we can draw from this failure is important: attempts to instil culture or create narrative can fail for a variety of complex reasons that would be hard to foresee and predict.

Constitutional attempts to instil culture are also complicated by the fact that culture will always to some extent *precede* the constitution's formulation of it – to be put in a constitution, it has to be in the political discourse already – and the constitution provisions may be an attempt to capture or preserve a culture that is already partially or fully extant. Where there is sufficient cultural support to write directive principles into a constitution, this suggests that the cultural commitment to these ideas might be relatively strong. In such a case, the additional benefit to the constitutional commitment is hard to gauge, as the culture, or its core elements, already existed; the hard part was done. The constitutional entrenchment of that culture may have helped to preserve and defend it from erosion, or it may have added very little. There is no obvious way to know what the constitutional commitment to a culture adds in reality, and it will vary significantly depending on context. It may be that directive principles succeed best when they offer a channel and a focal point for an *existing constitutional*

¹²⁵R. Cover, 'Nomos and Narrative', 97 *Harvard Law Review* (1983-1984) p. 4.

¹²⁶P. Brooks, 'The Rhetoric of Constitutional Narrative: A Response to Elaine Scarry', 2 *Yale Journal of Law and Humanities* (1990) p. 129.

¹²⁷P. Brooks, 'Narrative Transactions – Does the Law Need a Narratology?', 18(2) *Yale Journal of Law and the Humanities* (2006) p. 1.

culture to play out. To put it in narrative terms, these principles do best when they reenforce or retell a story we already know.

This suggests, we think, that there is a risk that writing directive principles into a constitution will either fail to inspire a culture that is absent – the culture is not there to support them and make them real, and the constitution cannot create it – or largely redundant, as the goals we seek with directive principles will be fulfilled by the *existing culture* that has spurred their inclusion. They might serve a useful role in creating culture in certain instances, or they might contribute in some way to maintaining a culture. That is not *nothing*, but it is not a transformative effect either, and it suggests that the number of cases where these principles will have a major impact may be small.

To be clear, our point here is not that, since an effort to instil or protect culture may fail, that we should therefore not undertake such an effort, or that it is generally futile to try. Rather, we think the Irish example illustrates that we should approach this use of directive principles – or any other constitutional design feature designed to foster a political culture – in a cautious way, mindful of their limitations, and how such their success or failure depends on vast cultural forces around them. Culture is both too complicated to know fully and too unpredictable in terms of change for us to know its resilience. If we want to change or embed a culture, we must do much more than writing constitutional text, and doing this alone may have little effect and prove a cold comfort. This might then be seen as a conservative case for inaction, but it is not. It is, first, a case for broader action: if we want to shape and influence culture, we need to think much more broadly than constitutionally-articulated principles, and engage in the messy and unpredictable exercise of trying to develop appropriate ethics in politics. Secondly, it is a case for acting even when we know we cannot be sure – or even very confident – in the outcome.¹²⁸ Since we cannot control cultural forces fully, our choice is either inaction, or doing our best to achieve the results we want in our prevailing circumstances. We see no case for the former, and think the obvious course is not inaction, but action with an acknowledgement of limitation. As with so many things, we should approach this constitutional design tool with caution, modesty, and humility as to what we can achieve. Perhaps this is the human condition: to try our best to protect and pass on the values and the culture that we care about, knowing, in the end, that we may fail, and that to some extent, the future is out of our hands.

Supplementary material. For supplementary material accompanying this paper visit <https://doi.org/10.1017/S1574019622000165>



¹²⁸Schlag calls this a willingness to act without warrant: P. Schlag, 'The De-differentiation Problem', 41 *Continental Philosophy Review* (2009) p. 35.