Augmenting the Rule of Law:
The Changing Conception of 'Rule of Law' in the Law and Development Paradigm

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ABSTRACT (ENGLISH): Since the turn of the century, development has undergone a radical transformation. The enhancement of human capabilities has grown to overshadow the market fundamentalism which previously guided development projects. This injection of capabilities into development theory has resulted in a call to reconceptualise the relationship between law and development. Answering this call, this thesis considers the impact these changes have on the prevailing conception of rule of law. Drawing from the seminal texts of Amartya Sen, this thesis rethinks the rule of law in the third movement of law and development doctrine. Ultimately, this thesis will propose an augmented rule of law which includes: open impartiality, deliberative democracy, and second generation rights.

In order to illustrate the need for an augmented rule of law this thesis will present a case study on the reception services for asylum seekers in Ireland, known as 'direct provision'. While Ireland ranks highly on all development indexes, marginalised groups, such as asylum seekers, continue to face persistent inequality. The failure of the current rule of law paradigm to meaningfully address the plight of these marginalised individuals underscores the pressing need for a new approach to rule of law reform, one which can tackle global poverty, and align the rule of law with the 21st century conception of development as freedom.

RESUMÉ (FRANÇAIS): Depuis le début de ce nouveau siècle, le développement a subi une transformation radicale. L'amélioration du « potentiel humain » a fini par supplanter le fondamentalisme de marché qui servait auparavant de guide aux projets de développement. Cet apport en potentiel dans la théorie du développement a engendré un besoin de refonte de la relation entre le droit et le développement. Répondant à ce besoin, la présente thèse aborde les impacts de ces changements sur la conception conventionnelle de l'État de droit. Basée sur les textes fondateurs d'Amartya Sen, la présente thèse repense l'État de droit dans le troisième

mouvement de la doctrine du droit et du développement. Enfin, la présente thèse proposera un État de droit enrichi comprenant une impartialité ouverte, une démocratie délibérative et des droits de deuxième génération.

Pour illustrer ce besoin d'enrichir l'État de droit, la présente thèse proposera une étude de cas portant sur les services d'accueil des demandeurs d'asile en Irlande, ce que l'on appelle « direct provision ». Bien que l'Irlande puisse se vanter de ses bons indicateurs de développement, les groupes marginalisés tels que les demandeurs d'asile continuent de faire face à des inégalités persistantes. L'échec du paradigme actuel de l'État de droit à résoudre efficacement les problèmes de ces individus marginalisés souligne à quel point nous avons besoin de réformer l'État de droit pour qu'il soit à même d'appréhender la pauvreté mondiale et de l'aligner avec la conception du développement en tant que liberté, propre au XXIe siècle.

To my niece, Esmae Vida Farrington, who inspires me to build a better future for the generations to come. May all children grow to reach their full potential.

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CHAPTER 1 – INTRODUCTION

"Wealth is evidently not the good we are seeking; for it is merely useful and for the sake of something else" - Aristotle[1]

1.1 OVERVIEW

Since the turn of the century development has been reconceptualised beyond its traditional parameters. Reforms which had consistently focused on increasing economic growth had failed to tackle global poverty and in many circumstances widened the divide between rich and poor. While increasing capital was considered an invariable good, inequity in wealth distribution had left this capital inaccessible to those who needed it most. As poverty persisted in both the Global North and South, scholars became increasingly aware of the need for a more nuanced approach to development.

In the early 21st Century the work of these scholars culminated in the birth of a new wave of development thinking. At the centre of this movement were 'human capabilities', encompassing the core economic, social, and cultural determinants which enable individuals to realize their full potential. Development became focused on pluralist reforms which were tailored to each country's political and cultural demands, and development became a project for all nations. In the wake of this revolution, there has been a call to rethink the relationship between law and development. Answering this call, this thesis considers the relationship between the rule of law and development within this new paradigm.

To examine this changing dynamic, the author conducts an in-depth analysis of the theoretical underpinnings of the law and development movement. In particular, the author focuses on the seminal works of Amartya Sen, the founding father of the capabilities approach. Drawing from

[1] Aristotle, *The Nicomachean Ethics* (Oxford; New York: Oxford University Press, 1984) at Book I, 1096a.5

Sen's texts on development and justice, a new rule of law paradigm is proposed, which includes deliberative democracy, open impartiality and second generation rights. These additions augment the rule of law, allowing increased public participation and scrutiny, requiring nations to consider a plurality of voices from within and without, and firmly entrenching second generation rights protections into rule of law reform. To illustrate the need for this 'augmented rule of law' the author conducts a case study on the reception services for asylum seekers in Ireland, known as direct provision.

Direct provision gives a poignant insight into the continued plight of marginalised groups within developed nations. By considering a case study from a developed, rather than developing nation, this thesis illustrates how nations which rank highly on development indexes are still failing marginalised individuals. This failure highlights the need for a new rule of law rhetoric, one which reflects the third movement of law and development's emphasis on tackling persistent inequality in all nations.

To begin the author introduces the reader to the law and development movement, the role of law in institutional reforms, and the methodology of this study.

1.2 HISTORICAL BACKGROUND TO THE LAW AND DEVELOPMENT PARADIGM

Law and development doctrine emerges from the crystallisation of three intersected and interrelated ideologies; economic theory, legal theory and the policies and practices of

development institutions.[2] Each of these ideological spheres have a reciprocal relationship, they are "analytically separable but practically intertwined."[3]

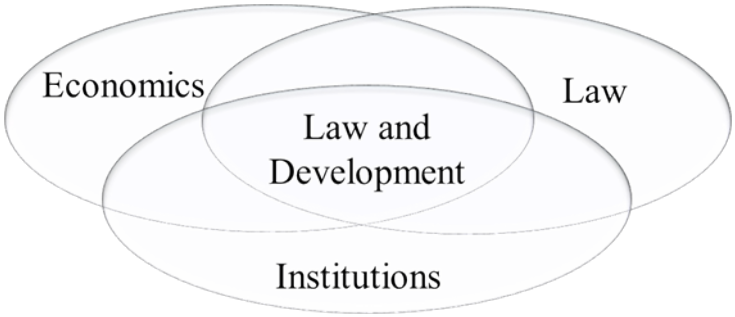

Figure 1. Source: David M. Trubek & Alvaro Santos, "An Introduction: The Third Moment in Law and Development Theory and the Emergence of a New Critical Practice" in David M. Trubek & Alvaro Santos eds, *The New Law and Economic Development: A Critical Appraisal* (Cambridge: Cambridge University Press, 2006)

As ideology is rarely static, shifting views on theoretical approaches in each sphere will alter the dynamic of law and development doctrine as a whole, ultimately replacing the preceding orthodoxy. There have been three identifiable law and development movements, where a doctrine has crystallised into a comprehensive and widely accepted orthodoxy.[4]

i. The First Movement

Law and development has had a complex relationship since interest in the intersection of these two disciplines first emerged in the second wave of globalisation.[5] The first era of globalisation

[2] David M. Trubek, "Max Weber on Law and the Rise of Capitalism" in Julio Faúndez ed, *Law and Development: Critical Concepts in Law* (London: Routledge, 2012): The intersecting themes of law and development doctrine have their history in the works of classical theorist such Weber, who studied society through a multi-disciplinary approach. Weber recognised the interdependence of law, politics and economics and the structuring authority of legal institutions in society. Weber maintained that there was a direct correlation between "rational laws" and the presence of modern industrial capitalism. It is this Weberian philosophy which emphasised the interrelation of capitalism and "legalism." Reforming legal institutions and rules become intimately linked with economic development.
[3] David M. Trubek & Alvaro Santos, "An Introduction: The Third Moment in Law and Development Theory and the Emergence of a New Critical Practice" in David M. Trubek & Alvaro Santos eds, *The New Law and Economic Development: A Critical Appraisal* (Cambridge: Cambridge University Press, 2006) at 4.
[4] *Ibid* at 2.
[5] *Ibid* at 1.

had been heavily influence by classical legal theory which "consolidates nineteenth century liberal ideas about law in a market society," and stresses "the importance of individual autonomy and sees the primary role of law being protection of property and free transactions." [6] Conversely, the second wave of globalisation, stretching from 1900 to 1968, embraced the core ideals of social law and consequentialism. During the second wave of globalisation and in the aftermath of the Second World War, there was a peak in bi-lateral aid from developed nations to the Global South. Academics, who had been studying within this underpopulated field, became key players in guiding assistance projects.[7] Although these academics emanated largely from the social sciences, lawyers became increasingly involved in the study and guidance of development programs. The first movement of law and development occurred during this period, beginning in 1950-60.

During this movement, law was considered as a force which could "be moulded and manipulated to alter human behaviour and achieve development,"[8] and proponents advocated for the centrality of legal institutions in the development debate. Guided by modernization theory and structural functionalism, the first movement envisaged development as "an inevitable evolutionary process" which would replicate Western societies throughout the Global South.[9] Modernisation theory rested on four core tenets: rationalisation,[10] nation

[6] *Ibid* at 9.
[7] David M. Trubek & Marc Galanter, "Scholars in Self-Estrangement: Some Reflections on the Crisis in law and Development Studies in the United States" in Julio Faúndez ed, *Law and Development: Critical Concepts in Law* (London: Routledge, 2012) at 323.
[8] Elliot Burg, "Law and Development: A Review of the Literature and a Critique of 'Scholar in Self-Estrangement'" (1977) 25 Am J Comp L 492 at 505.
[9] Brian Z Tamanaha, "The Lessons of Law-and-Development Studies" (1995) 89:2 AJIL 470 at 471.
[10] *Ibid* at 471: "The first, *rationalization*, was based upon the familiar dichotomies found in the social theories of Durkheim, Weber, Tonnies and Parsons, involving the shifts from particular to universal, from ascription to achievement, and from affectivity to affective neutrality – all of which purportedly accompanied the functional differentiation of society."

building,[11] democratization[12] and mobilisation.[13] American legal scholars were implementing these core tenets of modernization and 'legal liberalism'[14] through reforming not merely legal institutions, but legal education in the developing world. At the same time, a Keynesian model of economic governance which supported active participation by the state in the market, was in full flourish. The private sector was considered too weak to provide a foundation for economic growth and instead the state controlled key sectors of the economy and foreign capital. Trubek and Santos refer to the first movement as 'Law and Developmental State.'[15]

In the first movement, law was used as an instrumental tool to "create the formal structure for macroeconomic control." [16] By transplanting regulatory systems from developed nations, developing nation's own regulatory systems would be modernized, creating the institutional conditions for growth. However, law had a more expansive role than merely structuring regulatory control, the development of legal institutions was considered a pivotal step towards increased equality, participation, government accountability and responsiveness, alongside the protection of basic human rights.[17] Outside of developing legal systems, first movers envisaged a central role for legal education in "modernising" developing nations. They believed that as legal education was developed, a more policy centric legal profession would emerge, capable

[11] *Ibid* at 471: "The second element was an emphasis on national integration or *nation building*, particularly important in view of the many ethnic conflicts that threatened developing countries."
[12] *Ibid* at 471: "The third element was *democratization*, which emphasised pluralism, competitiveness and accountability."
[13] *Ibid* at 471: "The final element was *mobilisation* or participation, to be accomplished especially though education, with an aim towards expanding the proportion of the populace actively involved in the political arena."
[14] *Ibid* at 473: "Trubek and Galanter detailed the core characteristics of the liberal rule-of-law model, which they labelled "legal liberalism," as follows: 1) society is made up of individuals who consent to the state for their own welfare; 2) the state exercises control over individuals through law, and it is constrained by law; 3) laws are designed to achieve social purposes and do not offer a special advantage to any individuals or groups within the society; 4) laws are applied equally to all citizens; 5) courts are the primary legal institutions with the responsibility for defining and applying the law; 6) adjudication is based upon a comprehensive body of authoritative rules and doctrines, and judicial decisions are not subject to outside influence; and 7) legal actors follow the restraining rules and most of the population has internalized the laws, and where there are violations of the rules enforcement action will guarantee conformity.'"
[15] *Trubek & Santos, supra* note 3 at 5.
[16] *Ibid.*
[17] *Trubek & Galanter*, *supra* note 7 at 329.

of modernizing legal institutions.[18] Through the identification of societal and economic interests and the corresponding legal reforms necessary to achieve those interests, legal scholars could act as social engineers.[19]

The first movement, however, contained many oversights which ultimately led to its downfall. Trubek and Galanter considered the liberal legalism paradigm to be "inherently problematic,"[20] stating that the ethnocentric approach of scholars at the time made them blind to alternative possibilities to the liberal legalism paradigm.[21] Modernisation theory was criticised for "ethnocentrisms, evolutionism, invalid technological reasoning and naiveté."[22] When transplanting regulatory and educational systems from developed nations, many policy makers failed to take account of the social stratification and authoritarianism which existed in much of the developing world.[23] With the presence of totalitarian political institutions, enhancing the power of legal institutions often meant that the instrumental use of law simply perpetuated existing inequalities.[24] Furthermore, modernizing legal institutions without enhancing social safety nets, deepened inequality as access to justice increased in cost and systematically benefitted those better off.[25] Confidence in legal liberalism began to wane as Americans became disillusioned with the role of law in their own society and consequentially its role in promoting development in the Global South.[26] At the same time a new economic theory was taking the world by storm, Keynesian economics was out, neoliberalism was in, and with it a

[18] *Trubek & Santos, supra* note 3 at 5
[19] John Henry Merryman, "Comparative Law and Social Change: on the Origins, Style, Decline & Revival of the Law and Development Movement" in Julio Faúndez ed, *Law and Development: Critical Concepts in Law* (London: Routledge, 2012) at 365.
[20] David Trubek & Marc Galanter, "Scholars in Self-Estrangement: Some Reflections on the Crisis in Law and Development Studies in the United States" (1974) 4 Wis L Rev 1062 at 1099.
[21] *Trubek & Galanter*, *supra* note 7 at 330.
[22] *Tamanaha, supra* note 9 at 472.
[23] *Trubek & Galanter*, *supra* note 7 at 334.
[24] *Tamanaha, supra* note 9 at 474.
[25] *Trubek & Galanter*, *supra* note 7 at 330.
[26] *Trubek & Galanter*, *supra* note 7 at 330; see also, *Tamanaha, supra* note 9 at 472: states that universities were the site of widespread conflict and protest during the Vietnamese War.

new law and development orthodoxy was emerging, one which was to be exponentially more expansive than its predecessor.

ii. The Second Movement

The second movement saw a resurgence of classical legal thought and a revival of the free market in the 1980s. Being heavily influence by neoliberalism, the second movement is referred to as 'Law and the Neoliberal Market.' Neoliberal economics which emphasised the role of the market in promoting economic growth, relegated the state to the role of facilitator in market expansion. As the economic vision of development changed, so too did the role of law in development. Law was no longer conceived as an instrument for state policy, but a means to limit the power of the state, protect business from state intervention, encourage foreign investment, promote free trade, and bring developing economies into the growing global market. There was a fundamental shift from an interest in public law to private law, with little attention given to the regulatory function of law, or its position as a protector of the marginalised and vulnerable. Law was instead conceived as a vehicle for facilitating transacting and protecting individual's investments and property rights. In this matter, the judiciary played a key role as a watchdog on the state and promoter of the free market.[27] The function of the rule of law also changed, and was used to simultaneously limit state intervention whilst providing a "fundamental institutional framework for the operation of market economies."[28]

However, as Trubek and Santos note, confidence in the Washington consensus, which codified neoliberal policies, began to fade, as neoliberalism failed to deliver on its promise of economic

[27] *Trubek & Santos, supra* note 3 at 2-6
[28] Okezie Chukwumerije, "Rhetoric Versus Reality: The Link Between the Rule of Law and Development" (2009) 23 Emory Intl Rev 383 at 397.

growth.[29] Shock therapy in Latin America and Eastern Europe had produced devastating results and deepened the inequality and asymmetry of bargaining power in these regions.[30] Furthermore, transplanting legal institutions had had severe repercussions. Neoliberal policymakers had consistently failed to take into consideration the intersection between existing legal, political, economic, social, and cultural institutions in the host nations. As a result, enacting piecemeal change almost invariably disrupted the delicate institutional ecosystem, creating widespread disharmony and deepening existing inequalities.[31] Ultimately, "successful policies could not be disentangled from local context."[32]

iii. Orthodoxy in a state of flux

The staunch market fundamentalism of the second movement had placed undue focus on economic growth, often further entrenching social inequalities, breaching human rights and exacerbating ethnic tensions within developing nations.[33] The instrumentalist approach to law in development had failed to fully achieve the desired results. Although neoliberalism adeptly stimulated economic growth across many countries, and still does, it could not surmount the issue of wealth redistribution. The end of the Cold War, alongside the manifest failure of structural adjustment programmes,[34] all added to the growing need to redefine development as

[29] *Trubek & Santos, supra* note 3 at 6.
[30] Naomi Klein, *The Shock Doctrine: The Rise of Disaster Capitalism* (Toronto: Vintage Canada, 2008): Shock therapy was used to exploit or create disasters in developing nations, after which, widespread neoliberal reforms would be introduced, often violently.
[31] For more see: Gérard Roland, "Fast-Moving and Slow-Moving Institutions" in János Kornai, László Mátyás & Gérard Roland, eds, *Institutional Change and Economic Behaviour* (Houndmills; Basingstoke; Hampshire; New York: Palgrave MacMillan, 2008).
[32] *Trubek & Santos, supra* note 3 at 6.
[33] Kerry Rittich, "The Future of Law and Development: Second-Generation Reforms and the Incorporation of the Social" in David M. Trubek & Alvaro Santos eds, *The New Law and Economic Development: A Critical Appraisal* (Cambridge: Cambridge University Press, 2006).
[34] Peter Uvin, "From the Right to Development to the Rights-Based Approach: How 'Human Rights' entered Development (2007) 17:4-5 Dev Pract 597 at 597: Uvin elaborates that structural adjustment programmes largely failed due to a lack of government accountability which prompted a major push for good governance and democracy.

more than merely growth of gross national product (GNP). The complexity of overcoming inequalities became more apparent as economic growth alone failed to eradicate poverty. A more intricate response to global poverty was called for, with economic growth becoming just one piece of a much bigger puzzle.

As the development community moved away from a needs-based approach, the field became more focused on human-rights. The needs-based approach which was primarily preoccupied with utilitarian concerns surrounding the delivery of services, focused predominantly on securing additional resources. On the other hand, the rights-based approach addresses issues of wealth redistribution and calls for "existing resources to be shared more equally and for assisting the marginalised people to assert their rights to those resources."[35]

It is unsurprising in many regards that this move towards human rights occurred during the post-Cold War period. In the aftermath of the Cold War confrontations the world had become increasingly globalised. The conflict era saw large-scale decolonisation alongside the evolution of a substantial international framework for human rights protections. Rights had been at the centre of many of these developing nations' resistance and liberation movements.[36] As Manji has aptly argued:

> The struggle for independence in Africa was thus informed, at the base, by the experience of struggles against oppression and brutal exploitation experienced in everyday life. These struggles constituted the emergence of a tradition of struggles for rights which was organic to and informed by the specific histories and experienced those involved […] The concept of rights was […] forged in the fires of anti-imperialist struggles.[37]

[35] Andrea Cornwall & Celestine Nyamu-Musembi, "Putting the 'Rights-Based Approach' to Development into Perspective" (2004) 25:8 Third World Quarterly 1415 at 1415-1417.
[36] *Cornwall & Nyamu-Musembi*, *supra* note 35 at 1420.
[37] Firoze Manji, "The Depoliticisation of Poverty" in Deborah Eade ed, *Development and Rights: Selected Essays from Development in Practice* (Oxford: Oxfam GB, 1998) at 14.

In the aftermath of these liberation movements the functions of such human rights motivated structures devolved to the states which increasingly codified rights into laws and constitutions, [38] and became actors on the global stage.

With the emergence of these new states, the balance of power within the United Nations was undergoing a rapid transformation, and with it came demands for a more inclusive and considered approach to development. The introduction of voices from the Global South into the international human rights fora began to bridge the divide between development, largely considered the realm of economists, and human rights, which was manned by lawyers and activists.[39] In 1986 the Declaration on the Right to Development was adopted, under much opposition from Western states. The declaration emphasised the role of human rights in promoting development and recognised that:

> "development is a comprehensive economic, social, cultural and political process, which aims at the constant improvement of the well-being of the *entire population and all individuals* on the basis of their active, free and meaningful participation in development and in the fair distribution of benefits resulting therefrom"[40] [emphasis added]

Within a decade, the international community was to further bridge the growing divide between first and second generation rights. At the 1993 World Conference on Human Rights held in Vienna, the Vienna Declaration and Programme of Action was adopted. The declaration stressed the universal, indivisible, interdependent and interrelated nature of human rights. The potential of both declarations to effect mass change should not, however, be overstated. The declarations are non-binding and represent, what Uvin terms, a "rhetorical victory" which is devoid of any resource-transfer obligations.[41] Rhetorical or otherwise, these declarations represented a substantial shift in the international world order, and as Uvin unwillingly

[38] *Ibid* at 16.
[39] *Cornwall & Nyamu-Musembi*, *supra* note 35 at 1422.
[40] Declaration on the Right to Development, G.A Res.41/128 4 December 1986 UN Doc. A/RES/41/12.
[41] *Uvin, supra* note 34 at 598.

concedes, there may be some power in discourse, namely, in the ability for verbal changes to redefine the remit of acceptable action.[42]

On the fringes, there was an even more subtle change occurring. Kennedy noted a visible shift in legal education and the ideological persuasions of the contemporary student. Students of law and development were no longer ardently supporting one-size fits all neoliberalism, or social democratic internationalism. Instead the nuances of a nation's political, cultural, economic, and social institutions were given greater attention. In particular, consideration of the legal arrangements of a nation began to outweigh the emphasis on universal economic or political theories.[43] Alongside the reconceptualization of the economic dimension of development, in the wake of neoliberalism's stunning failures, scholars refocused the politics of development on human rights, social services and a broadly conceived rule of law.

A culmination of the visible failures of the second movement, alongside radical changes in the demographic of the international community, and academic thinking, resulted in a call to reconceptualise development. The shortcomings of the second movement illustrated the need for appropriate state intervention and regulation, the need to consider the context of the country, increased local participation and the creation of social safety nets.[44] However, many theorists went further and began to decentralise the role of the market in development and centralise the enhancement of 'human capabilities'. A more holistic approach to development was crystallising into a third orthodoxy of law and development doctrine.

[42] *Uvin, supra* note 34 at 599.
[43] David Kennedy, "Law and Developments" in John Hatchard, Amanda Perry-Kessaris & Peter Slinn, eds, *Law and Development: Facing Complexity in the 21st Century* (London: Cavendish, 2003) at 17-18.
[44] *Trubek & Santos, supra* note 3 at 7.

iv. The Third Movement

The third wave of globalisation is the foundation of the third movement of law and development doctrine. The third wave of globalisation amalgamated core tenets of the first and second wave. During the third wave of globalisation two separate concepts, that emanated from the first and second wave were incorporated into legal theory: policy analysis and public law neo-formalism. The former envisages a consequentialist analysis of legal problems, while the latter employs deductive reasoning by reference to codified legal sources. Consequentialism was seen as a necessary response to market failures and the increasingly apparent need for appropriate state intervention and judicial regulation of the market. Although there was a revival of first wave globalisation concepts such as consequentialism, formalism was not rejected in its entirety, and remained key for preventing abuse of judicial and state power.[45]

This convergence in legal thought is reflected in the third movement of law and development, whose parameters are more nuanced than its predecessors. Although there are grounding concepts which receive widespread agreement, such as the role of human rights in development and the need for appropriate state intervention, these concepts can be construed either broadly or narrowly, resulting in diametrically opposed positions. Despite the potential for difference in the third movement there is consensus amongst scholars that the new doctrine accepts the creation of conducive environments for successful markets, alongside social supports and measures to counteract the inherent imperfections of these markets.[46]

Law was no longer conceived solely as an instrumental tool to stimulate economic growth, instead law reform became a constitutive element of development itself.[47] Rittich notes that "respect for the rule of law, the implementation of particular institutions and the recognition of

[45] *Ibid* at 7-13.
[46] *Trubek & Santos, supra* note 3 at 8.
[47] *Ibid* at 9.

certain legal rights have become definitional to the achievement of development itself."[48] The judiciary are entrusted with greater responsibility including: protecting a wider range of rights, reducing poverty and promoting the social.[49] This broadly construed conception of law and development doctrine is, it is submitted, essential for achieving a form of development which is malleable to circumstance, thus evading the 'one-size fits all' approach of the first and second movement.

At the forefront of this movement was Nobel Prize winner, Amartya Sen. Sen considered development to be inextricably linked to human freedoms. Sen rejected the traditional view that certain political or social freedoms were not conducive to development and instead considered these substantive freedoms to be among the *constituent components* of development.[50] The removal of un-freedoms then became *constitutive* of development. Removing un-freedoms requires a comprehensive approach which tackles the primary causes of pervasive inequality, such as: poverty, tyranny and restricted opportunities.[51] Prior to this conception of development, social reforms were often considered extraneous to and in opposition of the pursuits of economic development.[52]

Thus, freedoms were not orchestrated to satisfy a political project. On the contrary, freedoms were to encompass not only the traditional notion of development as social modernization but other determinants such as social and economic arrangements as well as civil and political rights.[53] Sen considered there to be an interconnection and interdependency between certain 'crucial' instrumental freedoms, including: economic opportunities, political freedoms, social facilities, transparency guarantees, and protective security. Only through collaboration could

[48] *Rittich, supra* note 33 at 205.
[49] *Trubek & Santos, supra* note 3 at 9.
[50] Amartya Sen, *Development as Freedom* (New York: Anchor Books, 2000).
[51] Peter Boettke & J. Robert Subrick, "Rule of Law, Development, and Human Capabilities" (2003) 10 Supreme Court Economic Review 109 at 110.
[52] *Rittich, supra* note 33 at 203.
[53] *Sen, supra* note 50 at 4

these instrumental freedoms work to increase human capacity and thus result in development. Therefore, these freedoms were considered to have mutually reinforcing connections, and must be achieved through an integrative approach which encompasses economic, social and political considerations.

For Sen, poverty is not, as was previously considered, merely the lowness of incomes but consisted of the deprivation of human capabilities.[54] These 'capabilities' are considered to have a *two-way* relationship with public policy, capable of influencing public policy through participation and capable of being enhanced through public policy.[55] Therefore, Sen is concerned with the 'agency aspect' of individuals, their ability to participate in processes[56] and the actual opportunities they have to achieve their aspirations. There is a cunning complementarity in this logic, as increasing social supports would in turn increase individual capacity to engage in economic activities and thus continues the cycle of growth and development. Therefore, human capabilities are central to Sen's approach and act as both the means and ends of development.

Although Sen is somewhat elusive as to the specific capabilities to be bestowed on each individual, Nussbaum has provided more clarity on this subject. She identified ten central capabilities built upon a foundation of human dignity. These capabilities are: life; bodily health; bodily integrity; senses, imagination, and thought; emotions; practical reason; affiliation; relationship with other species; play, and; control over one's environment. These central capabilities belong "first and foremost to individual persons, and only *derivatively* to groups."[57] She terms this approach the 'capabilities approach.' Although there is not yet a consensus on these capabilities, her thesis acts as a credible starting point for nations wishing to reorient their

[54] *Ibid* at 87.
[55] *Ibid* at 18.
[56] *Sen, supra* note 50 at 17: processes relate to civil and political rights such as voting privileges.
[57] Martha C. Nussbaum, Creating Capabilities: The Human Development Approach (Cambridge, Massachusetts; London, England: The Belknap Press of Harvard University, 2011) at 33-35.

development projects towards the third movement. Furthermore, there is a complementarity between Nussbaum's list of capabilities and the first and second generation rights protections contained within numerous international instruments.

Crucially, for this thesis, development has become an objective for developed nations. The 'trickle-down' theory of the second movement did not appreciate the diversity and incommensurability of human capabilities. While wealthy countries ranked highly on the development scale, many individuals within these nations were prevented from accessing this capital due to systemic discrimination.[58] Aggregate measurements of development, such as GDP, failed to consider the realised actuality of these marginalised groups. For instance, an African American male living in Harlem and earning more than his counterpart in Kerala, India has a lower life expectancy, despite the substantially higher GDP of the United States.[59] Similarly, the Atebellum puzzle, which found that a Georgian Southerner's life expectancy declined as growth increased, supports the contention that economic growth is not the ultimate determinant of human well-being.[60] Remedying inequalities amongst these marginalized groups has thus become an equally vital objective of the third movement. Sen stated that:

> We must also examine, on the other side, the persistence of deprivations among segments of the community that happen to remain excluded from the benefits of the market-oriented society, and the general judgements, including criticisms, that people may have of life-styles and values associated with the culture of markets.[61]

In this way all nations are, as Nussbaum notes, 'developing nations.'[62]

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[58] *Ibid* at ix.
[59] *Boettke & Subrick, supra* note 51 at 115.
[60] *Ibid* at 115. Boettke & Subrick cite John Kolmos & Peter Coclanis, "On the Puzzling Cycle in the Biological Standard of Living: The Case of Antebellum Georgian" (1997) 34 Explorations in Econ Hist 433 at 433-459. Similarly, Boetkke and Subrick cite Sen at 115: "life expectancy increased when GDP per capita fell, and decreased when GDP per capita rose in the UK from 1900 to 1960."
[61] *Sen, supra* note 50 at 7.
[62] *Nussbaum, supra* note 57 at x.

This is not to deny the crucial role played by GDP in enhancing individual capacity, rather it emphasises that the market cannot act to preclude the role of social support in enriching human lives. Rather the success of economic growth should not be measured solely against its ability to raise private incomes, but also in its capacity to increase social revenue and expand social services.[63] As a result the third movement has become known as the 'incorporation of the social' as it deemphasises the economy in development and refocuses policy on enhancing the social.[64] Rittich describes the incorporation of the social as one of the most significant events in the field of development.[65]

The third movement of law and development has been backed by "second generation" reforms to the development agenda, also referred to as the "post-Washington consensus."[66] Furthermore, several prominent international organisations have begun incorporating the social into their development policies, in line with Sen's view of development as freedom. The World Bank reconceptualised development in their Comprehensive Development Framework (CDF), "by going beyond its macroeconomic and financial aspects to focus on structural, social, and human concerns."[67] The CDF informs the World Bank's strategy papers for poverty reduction that ground the formulation of development policy for specific states.[68] The CDF emphasises a pluralist approach to development and promotes an increasing focus on human rights, good governance, and the rule of law.[69] Further support for the third movement is found in the widespread endorsement of the Millennium Development Goals and their successor, the Sustainable Development Goals (SDG). The SDGs were adopted in 2015 and encompass a far

[63] *Sen, supra* note 50 at 40.
[64] *Trubek & Santos, supra* note 3 at 12.
[65] *Rittich, supra* note 33 at 203.
[66] *Ibid* at 203.
[67] Alvaro Santos, "The World Bank's uses of the 'Rule of Law' Promise in Economic Development" in David M. Trubek & Alvaro Santos, eds, *The New Law and Economic Development: A Critical Appraisal* (Cambridge: Cambridge University Press, 2006) at 253.
[68] *Rittich, supra* note 33.
[69] *Ibid* at 204.

reaching plan to "end poverty, protect the planet and ensure prosperity for all."[70] The SDGs specify 17 goals to be achieved by the contracting states by 2030, including: poverty alleviations, gender equality, environmental protections, as well as economic concerns.

v. The Role of Law and Institutions in the Third Movement

However, despite these rhetorical victories, the fate of marginalised groups remains much the same. There has been little change in "the institutional architecture or the substantive content of the core legal reform agenda."[71] The limited role of legal institutions in the second movement to the protection of property rights, facilitation of the market and the enforcement of contracts, is still deeply engrained in the current institutional framework of many nations. Through its market-centric conception of development, the second movement had exacerbated many of the social inequalities which existed in both developing and developed nations. In many ways, this entrenched social inequality into nation's institutional fabric, making incorporating the social much more complex. While the reform agenda remains focused on 'getting institutions right' the realised actuality that goes beyond this institutional picture fails to be addressed in any significant way.

Institutions are "the rules game in a society or, more formally, are the humanly devised constraints that shape human interaction."[72] They provide a framework for human interaction and in doing so reduce uncertainty and increase stability. Essentially, institutions "define and limit the sets of choices of individuals,"[73] This definition has been heavily influenced by the dominant position of economics in defining development goals, explaining the strong choice

[70]United Nations Sustainable Development Goals, online: http://www.un.org/sustainabledevelopment/sustainable-development-goals/
[71] *Rittich, supra* note 33 at 205.
[72] Douglass North, *Institutions, Institutional Change and Economic Performanc*e (Cambridge: Cambridge University Press, 1990) at 3.
[73] *Ibid* at 4.

theoretic approach which focuses on humans interactions with their environment. For interveners, understanding human behaviour is considered vital for achieving development. Essentially, if human behaviour can be predicted, because it is governed by institutions, then logic dictates that human behaviour can be altered if those governing institutions are changed.

However, economic theories of human behaviour are incomplete and do not always provide realistic assumptions about human interactions. North noted that actors consistently make decisions based on incomplete, or inadequate information, and are constrained in their choices by institutions that may be inherently unpredictable or unfair. Therefore, even within the institutional framework there remains the necessity to resort to imperfect subjective rationality, which may perpetuate inefficient paths. Additionally, where each actor may start with the same, if incomplete, information, there is nothing to suggest that similar divergent initial models will result in a convergence.[74] While institutions may provide a framework for a given society, what that framework ultimately supports is essentially left to chance. This has often allowed majoritarian rule to dictate what structures emerge.

Furthermore, the Olsonian view that "inefficient institutions may survive for a long time because groups with stakes in institutional change fail to get organised and solve their collective action problems,"[75] further illustrates that institutions are not perfect indicators of human interaction. Such collective action problems may be exacerbated in authoritarian regimes where collective action is systematically repressed, explaining the persistence of inefficient institutions under certain conditions. However, North concludes that "under conditions of limited information and limited computational ability, constraints reduce the

[74] *Ibid* at 7-8.
[75] *Roland, supra* note 31 at 140-141.

costs of human interaction as compared to a world of no institutions."[76] Ultimately, despite their imperfections, institutions still "matter."[77]

These cautionary tales provide some insight into the current disconnect between rhetoric and reality. While reforms continue to conform to aggregate measurements of institutional quality as a baseline for development assessment, minority interests will remain concealed. Where those groups cannot overcome their collective action problems, institutional change in their favour is unlikely to occur. This critique can be extended to the mechanisms through which institutional change is promoted, in particular, the central focus of this thesis: the rule of law.

While classical rule of law theorists were not primarily concerned with development, the rule of law was believed to have inherent moral value, which justified its entrenchment into the development project.[78] Interveners have consistently used rule of law reforms as a means to manipulate institutional environments and alter the discursive, distributive and constitutive roles of law. The discursive, or ideological, role of law will define the parameters of legal protection and the social objective of legal reform. While the distributive role of law designates the power distributed to particular social groups within a given society. The constitutive element refers to the role of legal rules and institutions in "(re)constructing the very subjects and activities that they are often imagined merely to regulate."[79] In this way, Rittich explains,

[76] *North, supra* note 72 at 36.
[77] There is prevailing support for the primacy of institutions in promoting development. For more see: Dani Rodrick & Arvind Subramanian, "The Primacy of Institutions" (2003) 40:2 Finance Dev 31: Rodrik and Subramanian, when discussion the prevailing patterns of prosperity around the world, confirmed, through an empirical study, that the quality of institutions has an overriding effect on development. Geography had at best a weak direct effect, while trade had no direct effect on income. Both exhibited a strong indirect effect, however solely through influencing institutional quality; Elias Braunfels, "Further Unbundling Institutions" (2016) Norwegian School of Economics, Working Paper No. SAM 13: Elias Braunfels showed overwhelming support for Acemoglu and Robinson's thesis that "inclusive institutions" matter most.; Daron Acemoglu & James A. Robinson, *Why nations fail: the origins of power, prosperity, and poverty* (New York: Crown Publishing, 2012).
[78] *Chukwumerije, supra* note 28 at 387.
[79] *Rittich, supra* note 33 at 215.

law does not simply "rule" a society, it "makes" it.[80] In this way legal rules "constitute the frame in which social objectives are pursued."[81]

Indeed, the data supports interveners in their pursuit. Barro found that an improvement of one rank in the rule of law index caused an estimated 0.5 percent annual increase in a nation's growth rate.[82] Similarly, Sala-i-Martin found that there was a strong correlation between the rule of law index and economic growth.[83] Furthermore, Boettke and Subrick found that "the adoption of an institutional framework, which includes the rule of law, promotes economic development and improves the capabilities of humans."[84]

However, while the rule of law has been used to alter institutional environments, the "success" of rule of law reform projects has been measured against the "quality" of the corresponding institutional framework. As discussed above, such approaches to reform have allowed minority interests to slip through the gaps, being at best controlled for in aggregate measurement techniques, or ignored completely. The failures of both rule of law reform projects to protect the interests of marginalised groups, and the failure of development indexes to meaningfully quantify these failures, has prompted the author to reconsider the rule of law in the third movement of law and development. While interveners are concerned with reforming the rule of law in given nations, this author is concerned with reforming the rule of law itself by answering the question:

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[80] *Ibid* at 215.
[81] *Ibid* at 216.
[82] Robert J Barro, "Determinants of Economic Growth: A Cross Country Empirical Study" (1996) The National Bureau of Economic Research NBER Working Paper No. 5698 at 26-28.
[83] Xavier Sala-i-Martin, "I Just Ran Two Million Regression" (1997) 87:2 AM Econ Rev 178.
[84] *Boettke & Subrick, supra* note 51 at 111: Boettke and Subrick note that this proposition is supported by the literature: "More recently, Kaufmann, Kraay, and Zoido-Laboton, using a more objective measure of the rule of law, find that the rule of law is once again positively correlated with economic growth." For more see: Daniel Kaufmann, Aart Kraay & Pablo Ziodo-Laboton, "Governance matters" (1999) World Bank, World Bank Policy Research Paper No. 2196, October 1999), and; Xavier Sala-i-Martin, "I Just Ran Two Million Regression." (1997) 87:2 AM Econ Rev 178.

How should the rule of law be conceived in the third movement of law and development?

In order to answer this question, the author returns to the roots of the third movement, the seminal works of Amartya Sen. Sen's texts on development and justice will provide the theoretical foundation upon which the rule of law will be reconstructed. Placing the enhancement of human capabilities, and the removal of unfreedoms at the centre of her rule of law paradigm, the author 'augments' the current conceptions of the rule of law by transposing certain elements from Sen's theories into a rule of law context. In order to illustrate the need for an 'augmented' rule of law, the author applies her theory to a practical case.

The case study considers the reception services of asylum seekers in Ireland, known as 'direct provision.' Reception conditions are defined by Thornton as "those social support conditions in place which are provided to asylum seekers whose claim for refugee status has not yet been determined."[85] By considering the plight of marginalised groups within the context of a developed nation, the author highlights the deficits which continue to exist in paper-perfect institutions. While Ireland, like all its developed counterparts, ranks highly on development scales, inequality persists. This inequality has remained unquantified and unaddressed, despite the recent reforms to the development agenda.

[85] Liam Thornton, "'Upon the Limits of Rights Regimes': Reception Conditions of Asylum Seekers in the Republic of Ireland" (2007) 24:2 Refuge Canadian Periodical on Refugees 86 at 87.

vi. Case Study

The case study considers the failure to implement third movement reforms for a specific group of persons, namely, asylum seekers in direct provision. In 2000, Ireland introduced the system of direct provision in response to an "immigration crisis." Direct provision replaced the existing system of reception, which had treated asylum seekers on a par with nationals, with a much more restrictive public-private partnership. The introduction of direct provision was largely motivated by economic concerns and is characteristically neoliberal in nature. Direct provision was introduced at the tail end of the second movement, in which market fundamentalism flourished, little attention was given to human rights, and development was seen as a project for developing countries and not the developed. Seventeen years later, these components of the second movement still underpin the system today, impeding reforms in line with the third movement's more expansive definition of development.

It should be noted that the author is concerned with asylum seekers and does not consider recognised refugees, as direct provision does not provide services to those who have received a determination on their status. Until such a determination is made, asylum seekers are subject to precarious rights guarantees. The rights contained within the Refugee Convention are only applicable to those "lawfully staying" in the State. Professor Goodwin-Gill states that the use of the term "lawfully staying" in the Convention limits the provisions application to those "refugees lawfully resident in the contracting State, that is, those who are, as it were, enjoying asylum in the sense of residence and lasting protection."[86] Cholewinski states it is therefore necessary to distinguish "lawful residence" from "simple presence" or "lawful presence."[87] As the Irish authorities have explicitly denied asylum seekers from qualifying as habitually

[86] Guy S Goodwin-Gill & Jane McAdam, *The Refugee in International Law* (Oxford: Oxford University Press, 2007) at 308.
[87] Ryszard Cholewinski, "Economic and Social Rights of Refugees and Asylum Seekers in Europe" (1999) 14 Geo Immigr LJ 709 at 711.

resident for the purposes of supplementary welfare allowance, it seems highly unlikely that asylum seekers would be considered "resident" for the purposes of the Refugee Convention. Due to this distinction asylum seekers are considerably less secure, and this vulnerability often leads to situations of significant deprivation.[88]

Furthermore, the Irish constitutional order provides limited protection for socio-economic rights, which are conceived as mere directive principles, non-justiciable, ineffective and practically meaningless for marginalised individuals attempting to assert their second generation rights. Additionally, Ireland has chosen to opt out of both the Recast Reception Directive and its predecessor, which provide minimum standards for the reception conditions of asylum seekers across the European Union. Asylum seekers in Ireland are, thus, thrust into a human rights limbo, they are neither the object of (positive) legal reform nor the subject of legal protections, and have been increasingly disempowered within the current rule of law paradigm.

1.3 METHODOLOGICAL CONSIDERATIONS

i. Methodology

In order to answer the above question, this thesis engages interdisciplinary and doctrinal methods. Newell and Green define interdisciplinary studies as "inquiries which critically draw upon two or more disciplines and which lead to an integration of disciplinary insights."[89] This form of integration does not provide unquestionable results, instead it "takes disconnected material or ideas and synthesise them into something new."[90] The interdisciplinary method

[88] *Ibid* at 711.
[89] William H Newell & William J Green, "Defining and Teaching Interdisciplinary Studies" (1982) 30:1 Improving College and University Teaching 23 at 27.
[90] David J Sill, "Integrative Thinking, Synthesis and Creativity in Interdisciplinary Studies" (1996) 45:2 The Journal of General Education 129 at 133.

allows the author to consider insights from disciplines that are often characterized as contrasting or compatible but different,[91] to challenge the fundamental assumptions of a given discipline.

Law and development doctrine is characteristically interdisciplinary in nature, emanating from the intersection of three distinct but interrelated fields: economics theory, legal theory and institutional theory. In the field of development, law is not a substitute for economics or institutions, but a distributional tool which reflects the ideological commitments of a nation. Therefore, law is not a development policy, it is "an opportunity to re-focus attention on the political choices and economic assumptions embedded in policy-making."[92] Twinning further notes this critical function of law, to expose to view and evaluate important "presuppositions and assumptions underlying legal discourse generally and in a particular phase of it."[93]

This critical practice is a distinctive feature of the third movement of law and development doctrine.[94] The third movement has emerged to challenge the general assumptions which underpinned the second movement. Furthermore, the third movement, in its nuanced approach to development, encourages an internal critique. Development in the third movement is context specific and legal reforms cannot be enacted on a one-size fits all criteria, instead the economic, legal, social and political framework of a given society must be taken into consideration when enacting institutional reforms. Therefore, in order to critique a specific element of the development project, such as the rule of law, the critic must be aware of the intersecting and interrelated theories which guide legal reforms under the third movement's approach to development and law. Consequentially, any critique of a legal system, or an element thereof,

[91] *Newell & Green, supra* note 89 at 29.
[92] *Kennedy, supra* note 43 at 19-20.
[93] William Twinning, *General Jurisprudence: Understanding Law from a Global Perspective* (Cambridge: Cambridge University Press, 2009) at 7.
[94] *Trubek & Santos, supra* note 3 at 13.

through the lens of the third movement's conception of development, is inherently interdisciplinary.

The inherently interdisciplinary nature of the third movement's law and development doctrine creates greater complexity for the study of reforms under this paradigm. The author is aware of her natural limitations in fully addressing this complexity. Being first and foremost a legal scholar, the author's knowledge of economic and institutional theory is secondary to her legal knowledge. However, the scholarly study of law and development doctrine cannot be considered in isolation of the other interconnected theories which combine to make law and development doctrine. Therefore, the author will, to the best of her abilities, consider the economic, legal and institutional theories which underpin the third movement.

The doctrinal method will be utilised throughout the case study to examine the institutional framework governing direct provision. The doctrinal method will be engaged to analyse the system's legislative framework and outline the domestic, European and international human rights framework which govern the social rights of asylum seekers in Ireland. The following criteria will be used to assess the Irish state's human rights obligations:

i. identify the social rights provision that pertain to asylums seekers reception conditions
ii. examine any relevant judicial or monitoring body decisions
iii. examine any relevant legal commentary
iv. apply the above to the system of direct provision, making a determination on required reforms

Relevance will be established with reference to two further criteria: the object of the case/commentary, namely asylum seekers, and; the subject of discussion, namely, second generation rights as they relate to reception conditions. This assessment will provide

preliminary assumptions on the reforms to Ireland's reception conditions, which are required in light of the third movement's conception of development.

ii. Structure

This thesis is divided into four chapters. Chapter one introduced the reader to the law and development paradigm, tracing the dynamic relationship between the two disciplines over the past century, noting, in particular, the recent reorientation of development around the enhancement of human capabilities. This seismic change in development thinking has prompted international organisations and scholars alike to rethink the relationship between law and development. However, while development thinking has undergone a significant transformation, there still remains a disconnect between rhetoric and reality. This disconnect has prompted the author to reconsider the rule of law in the third movement.

Chapter two considers the changing conception of the rule of law. The author gives a broad overview of the various theories that have shaped the principle, before considering how the rule of law should be conceived in the third movement. Using Sen's theories of development, justice, democracy and human rights, the author proposes an alternative conception of the rule of law, one which accords more closely with the pursuits of the third movement of law and development.

Chapter three presents a case study on direct provision. Direct provision illustrates the practical need for change in the rule of law paradigm. The author gives a brief introduction to the history of reception in Ireland before considering the "immigration crisis" which led to direct provision's introduction. The system of direct provision, its legal basis, and case law are outlined. The author then examines the second generation rights which should pertain to

asylum seekers under international and European law. Finally, the system of direct provision is assessed against the author's conception of the rule of law.

Finally, the author presents her conclusions and recommendations in Chapter 4. The author submits that the rule of law should be augmented by the following principles: open impartiality, deliberative democracy, and second generation rights. It is further submitted that an accomplishment based method of assessment should be used to evaluate rule of law reform projects. The inclusion of these principles fosters greater public inclusion in decision making, increases public scrutiny of government actions, and creates a credible commitment towards nations' international obligations.

CHAPTER 2 – AUGMENTING THE RULE OF LAW

"Let me hasten to add that it is not enough to just adopt laws or create institutions. Laws can discriminate and exclude the poor, women, minorities or others. Institutions can be mismanaged and manipulated for the benefit of the privileged few. People whose rights are violated can be left without a remedy because the courts are too far away or litigation is too expensive. That is rule by law, not rule of law." – Irene Khan[95]

2.1 INTRODUCTION

Although "no other single political ideal has ever achieved global endorsement,"[96] the rule of law remains a site of considerable contestation, meaning everything to everyone. The rule of law has become somewhat disconnected from its historical roots, and has grown into a malleable concept enlisted to cure the world's woes. The recent injection of pluralism into the rule of law by the development project has further exacerbated the ill-defined parameters of this concept. Perhaps, not necessarily an evil in and of itself, pluralism certainly creates some difficulty when deciphering what the rule of law is and how it is achieved.

The universalist approach was abandoned by third movers, as it was incapable of satisfying the irreducibly diverse nature of human capabilities. Unlike its rigid counterpart, the pluralist approach is designed to be adaptive to context and responsive to local circumstances. This flexibility allows the rule of law to consider the competing interests of all segments of society. However, when taken to excess, pluralism can leave the rule of law vulnerable to abuse. Where a theory lacks grounding principles, it allows nearly all states to claim they abide by the rule of law as they conceive it. Ramanujam and Caivano have argued that "the pendulum may have swung to the other extreme, and that the newly ascendant pluralist approach may

[95] Irene Khan, "Statement on the Rule of Law, Peace and Security, Human Rights and Development" (27 February 2014) online: http://www.idlo.int/news/events/statement-rule-law-peace-and-security-human-rights-and-development

[96] Brian Z Tamanaha, *On the Rule of Law: History, Politics, Theory* (Cambridge; New York: Cambridge University press, 2004) at 3.

overemphasize pluralism at the expense of core rule of law principles."[97] They argue for a core-tenets approach which would allow space for pluralism, whilst ensuring rule of law reform abides by certain foundational principles, including: an independent and impartial judiciary, equality before the law, predictability and certainty, as well as checks and balances. A unifying foundation would certainly enhance the credibility of rule of law reform projects, creating a credible starting point for institutional change. Once those core-tenets have been satisfied, the pluralist approach gains more merit. At this point, nations must consider where they lie on the development scale and what that means for rule of law reform in their society. Both the injection of pluralism into the development project, alongside the need to temper relativism with guiding principles, has been influential to the rule of law posited by the author later in this chapter.

In this chapter, the author presents the theoretical framework, against which the case study will be assessed. By drawing from the theories of Amartya Sen on development, justice, democracy and human rights, the author posits an 'augmented rule of law.' It is submitted that this augmented rule of law will create a balance between pluralism and guidance. To begin, however, the author considers the various existing constructions of the rule of law, before advancing on these conceptions.

[97] Nandini Ramanujam and Nicholas Caivano, "The BRIC Nations and the Anatomy of Economic Development: The Core Tenets of Rule of Law" (2016) 9:2 Law Dev Rev 269 at 269.

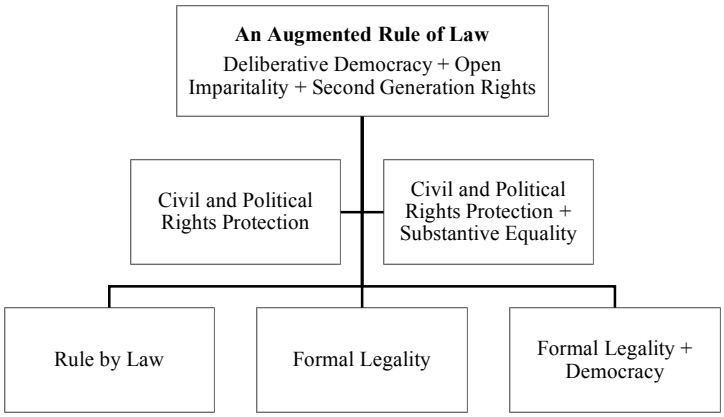

Figure 2. Rule of law spectrum. Source: Author's own

2.2 THE VARYING CONCEPTIONS OF THE RULE OF LAW

The first documented mention of the rule of law appeared with the term 'isonomia' which described a state that guaranteed principles of equality, certainty and transparency in law making.[98] Although, the rule of law is often associated with Western liberal-democracies, the concept originated in non-liberal societies and sprung from the minds of Greek theorists such as Plato and Aristotle, who were notoriously against popular democracy.[99] Aristotle spoke passionately on the susceptibility of men's spirit to mortal desires and the powerful ruler's potential for abuse:

> he who bids the law rule may be deemed to bid God and Reason alone rule, but he who bids man rule adds an element of the beast; for desire is a wild beast and passion perverts the minds of rulers, even when they are the best of men. The law is reason unaffected by desire.[100]

[98] Geoffrey de Q. Walker, *The Rule of Law: Foundation of Constitutional Democracy* (Melbourne: Melbourne University Press, 1988) at 3.
[99] *Tamanaha, supra* note 96 at 10-11. Tamanaha explains that both Aristotle and Plato viewed popular democracy as potentially "the rule of the mob, uneducated and lacking in talent, susceptible to seduction by a demagogue, with a leveling effect on society. Furthermore, neither was an egalitarian. They believed that people had unequal talents in political capacity, virtues, and excellence – often associated with birth status – and held that those who are superior should rule and deserve more rewards." Cicero also contested popular democracy.
[100] Aristotle, *Politics* edited by Stephen Everson (Cambridge: Cambridge University Press, 1998) Book III, 1286 at 78.

The rule of law was conceived as an instrumental tool to curb these passions of man, preventing both the arbitrary use of power by a governing elite, and the rise of a tyrannical populous. Even at this early stage there was contestation over the meaning and use of the rule of law.[101] However, all agreed that it was a means to limit power, and protect the community from abuse of authority. The rule of law was thus born in the belly of debate, and has remained there ever since.

The following sections give a brief overview of this debate. Although space limits the author from doing justice to the many theorists who have contributed to the rule of law rhetoric, she will outline some of the seminal theories that have shaped the rule of law over the centuries.

i. The Formal Conception of the Rule of Law

In its most narrow conception, the rule of law is perceived as a means not to "limit the power of the state but to serve it."[102] Therefore, the government is obliged to promote the efficient application of laws, however they are not subservient to those laws.[103] Although this conception of the rule of law is widely criticised by Western scholars it has been endorsed by a very small minority, most notably, the communist government of China, who conform to a so-called 'rule of law with Chinese characteristics.'[104] This form of rule of law is commonly referred to, critically, as 'rule by law.'

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[101] *Tamanaha, supra* note 96 at 10-11. At the same time, the Athenian democrats envisaged a different role for the rule of law, to limit the capacity of elites to capture government, rather than as a limitation on the population at large.
[102] *Ibid* at 93.
[103] Thomas Carothers, "The Rule-of-Law Revival" in Thomas Carothers, ed, *Promoting the Rule of Law Abroad: In Search of Knowledge* (Washington, D.C.: Carnegie Endowment for International Peace, 2006) at 5
[104] This is a good example of how a pluralistic conception of the rule of law which does not adopt the core tenets approach can be problematic. It allows nations such as China to claim to abide by a "rule of law" which is culturally relative to their society without satisfying the core-tenets proposed by Ramanujam and Caivano (see *Ramanujam & Caivano, supra* note 97). This approach is often considered to leave the rule of law devoid of any substance.

The most common conception of the rule of law is that of 'formal legality,' which has its roots in the works of 19th and 20th century theorists. Joseph Raz, a prominent formalist, noted that the "law must be capable of guiding the behaviour of its subjects."[105] It is this principle which Raz identified as the "basic intuition" underpinning the rule of law.[106] The core tenets of formal legality are most aptly construed by Lon Fuller, who identified eight main principles in the rule of law, namely: generality, publicity, prospectivity, intelligibility, consistency, practicability, stability and congruence.[107] In order to achieve these basic tenets, there must be certain procedural guarantees in place that reflect our notion of natural justice.[108] These include: the right to a fair hearing by an independent and impartial judiciary; the right to advice and representation from independent counsel, and the right to appeal.[109] Additionally, a formal rule of law also provides for equality before the law. Renowned British constitutionalist, A.V. Dicey stated that "every man whatever be his rank or condition, is subject to the ordinary law of the realm and amenable to the jurisdiction of the ordinary tribunal." [110]

This equality guarantee has generated a split in thinking within the formal school. Hayek considered that "equality prohibited the enactment of laws that made arbitrary distinctions among people."[111] However, as Tamanaha notes, this definition is problematic as the use of the word "arbitrary" naturally engenders substantive considerations to which a formal rule of law is blind. [112] The more popular formal conception of the equality guarantee is as follows:

> [The] law applies equally to everyone according to its terms (whatever those might be), without taking account of wealth, status (government official or public), race or religion, or any other

[105] Joseph Raz, *The Authority of Law: Essays on Law and Morality* (Oxford: Oxford University Press, 2009) at 214.
[106] *Tamanaha, supra* note 96 at 93.
[107] Lon L Fuller, *The Morality of Law* (New Haven: Yale University Press, 1977)
[108] *Tamanaha, supra* note 96 at 93.
[109] Jeremy Waldron, "The Rule of Law and the Importance of Procedure" (2010) NYU School of law, Public Research Paper No. 10-73 at 7.
[110] Albert V Dicey, *The Law of the Constitution* (Oxford: Oxford University Press, 2013) at 193
[111] *Tamanaha, supra* note 96 at 94.
[112] *Ibid* at 94.

characteristic of a given individual. Everyone is equal before the law no matter who they might be.[113]

This definition provides for formal rather than substantive equality, which accords more closely with Dicey's intentions. Formal equality requires that the rights and obligations specified are universal, in that they attach to each individual considered as a legal person, irrespective of social position. The only additional requirements are that the individual has reached the age of majority and they do not fit within a bracket of narrowly defined and legally prescribed exceptions.[114]

Dicey also proposed that the common law technique was more suited to rights protection than the continental constitutional tradition.[115] Believing, as he did, that constitutions were ineffective instruments for rights protection as they were too easily amended. Once again, this proposition has led some to believe he was asserting the existence of human rights and their implicit protection by the rule of law. However, as Craig notes, Dicey is merely referring to the manner in which rights, if they do exist, should be protected.[116]

In any of its definitions, the formal conception of the rule of law is unconcerned with the substance or morality of laws, simply with the restriction of arbitrary use of power. This absence of substantive considerations has given the formal rule of law an internal neutrality which offers universal appeal.[117] Any issue of content was detached from formal legality as the rule of law was considered an inappropriate forum for substantive considerations. In support of this divorce, Waldron stated that the rule of law is just "one star in a constellation of ideals that dominate our political morality: the others are democracy, human rights, and economic

[113] *Ibid* at 94.
[114] Freidrich Hayek, "Planning and the Rule of Law" in Julio Faúndez ed, *Law and Development: Critical Concepts in Law* (London: Routledge, 2012).
[115] Paul Craig, "Formal and Substantive Conceptions of the Rule of Law," (1997) Public Law 467 at 472
[116] *Ibid* at 472.
[117] *Tamanaha, supra* note 96 at 94.

freedom."[118] Those other ideals should thus be pursued by different means. To do otherwise would rob the rule of law of its independent function[119] of furthering "individual autonomy and dignity by allowing people to plan their activities with advance knowledge of the potential legal implications."[120]

This independent function was considered to be a moral good in itself, as societies that conformed with the formal and procedural requirements of the rule of law would be more likely to have just laws. [121] This inherent moral value, allowed governments who satisfied the conditions of formal legality to demand the obedience of their citizens. [122] However, this logic has proved dangerous, with many tyrannical regimes legitimating their tyranny simply by virtue of the presence of a formal rule of law. In many of these nations the rule of law legitimated "the existing power structure within society, by making it appear that power was impersonal."[123] Essentially, a formal rule of law supported the monopolisation of power.

Critics of the formal conception have argued that: without substantive protections, the rule of law is incapable of restricting arbitrary power in any meaningful way. The compliance of authoritarian regimes such as apartheid South Africa and Nazi Germany with the rule of law, are often cited in support of this statement. Even Raz conceded that:

> A non-democratic legal system, based on the denial of human rights, on extensive poverty, on racial segregation, sexual inequalities, and racial persecution may, in principle, conform to the requirements of the rule of law better than any of the legal systems of the more enlightened Western democracies … It will be an immeasurably worse legal system, but it will excel in one respect: in its conformity with the rule of law.[124]

[118] *Waldron, supra* note 109 at 3.
[119] *Craig, supra* note 115 at 469.
[120] *Tamanaha, supra* note 96 at 94.
[121] *Ibid* at 95.
[122] *Ibid* at 95.
[123] *Craig, supra* note 115.
[124] *Raz, supra* note 105 at 211.

Indeed, in the aftermath of the Second World War, the German people were painfully aware that a positivist conception of rights combined with a legitimating formal rule of law was a powerful tool for a tyrannical State. It was due to this revelation that Germany's post-War Constitution "injected substantive content into the rule of law with a vengeance."[125] The German Constitution recognised the binding principle of human dignity which guided all State action, alongside the "universal and extra-legal character" of rights which "exist prior to and irrespective of their official recognition by the State."[126] Legal positivism was categorically rejected and the protection of substantive rights were positioned within the rule of law, external to State authority and even outside the power of the demos.[127]

Tamanaha makes a powerful historical argument against the formal conception of the rule of law:

> The emptiness of formal legality […] runs contrary to the long tradition of the rule of law, the historical inspiration of which has been the restraint of tyranny by the sovereign. Such restraint went beyond the idea that the government must enact and abide by laws that take on the proper form of rules, to include the understanding that there were certain things the government or sovereign could not do. The limits imposed by law were substantive, based upon natural law, shared customs, Christian morality, or the food of community. Formal legality discards this orientation. Consistent with formal legality, the government can do as it wishes, so long as it is able to pursue those desires in terms consistent with (general, clear, certain, and public) legal rules declared in advance […] With this in mind it is correct to conclude that formal legality has more in common with the idea of rule *by* law than with the historical rule of law tradition.[128]

Even with the addition of democracy, a formal rule of law remains empty of content, as democracy is void of substantive pronunciations. The addition of democracy simply makes the rule of law subservient to the will of the populous, it becomes an instrument of people rather than governments. However, there is nothing to suggest that democracies will produce just laws. The presence of democracy alongside formal legality in no way negates the criticisms launched

[125] *Tamanaha, supra* note 96 at 108.
[126] *Ibid* at 109.
[127] *Ibid* at 109.
[128] *Ibid* at 96.

against formal legality, and may indeed provide an alternative forum through which abuse of power may be legitimated.[129] Although, some have argued that liberal democracy naturally engenders a respect for certain fundamental civil liberties,[130] there is equal consensus that majoritarian rule has perpetuated inequalities for marginalised groups.[131] While democracy may appear neutral, it will almost invariably portray the interests of the dominant class.

Therefore, adhering to a formal rule of law is to adopt a means that can never truly satisfy its ends, be that the limitation of power or the enhancement of human capabilities. If the purpose of the rule of law, in the development project, is the removal of un-freedoms, then a formal rule of law is clearly destined to fail in this pursuit. Rather than abandoning the rule of law, theorists have reconceived the doctrine as a triumvirate of formal legality, democracy, and substantive rights.[132]

ii. The Substantive Conception of the Rule of Law

T.R.S. Allan contended that substantive and procedural fairness were indivisible as each were premised on respect for human dignity.[133] Allan noted that throughout the adjudicative process rules could not be, and were not conceived in isolation from concepts such as substantive justice and fairness.[134] The procedural rules were, essentially, inextricably linked to matters of substantive fairness. Therefore, proponents of the substantive conception of the rule of law consider not only the abovementioned procedural and formal protections, but also the content of the laws being administered. Although proponents of the substantive conception agree that

[129] *Ibid* at 96-100.
[130] *Carothers, supra* note 103 at 4.
[131] Amartya Sen, *The Idea of Justice* (Cambridge, Massachusetts: The Belknap Press of Harvard University, 2011).
[132] *Tamanaha, supra* note 96 at 110.
[133] Trevor R.S Allan, *Law, Liberty and Justice: The Legal Foundations of British Constitutionalism* (Oxford: Clarendon Press, 1993) at 21-22.
[134] *Craig, supra* note 115 at 476.

the rule of law must possess more than formal considerations, there are varying degrees of substantive protection envisaged in this school of thought. While, nearly all agree that the rule of law should protect certain fundamental civil and political rights, there is less consensus on the inclusion of any form of substantive equality or socio-economic rights guarantees.

Dworkin considered the rule of law as inseparable from considerations of justice, and advocated for a substantive rule of law which included individual rights on the basis that:

> citizens have moral rights and duties with respect to one another, and political rights against the state as a whole. It insists that these moral and political rights be recognized in positive law, so that they may be enforced *upon the demand of individual citizens* through courts or other judicial institutions of the familiar type, so far as this is practicable. The rule of law on this conception is the ideal of rule by an accurate public conception of individual rights. It does not distinguish, as the rule book conception does, between the rule of law and substantive justice; on the contrary it requires, as part of the ideal of law, that the rules in the book capture and enforce moral rights.[135] [emphasis added]

However, there have been a number of criticisms of a substantive rule of law, particularly the democratic legitimacy of judicial protection of individual rights. While Dworkin tactfully evaded these criticism by anchoring rights in the community, this has not assuaged the concerns of formal scholars.

Substantive conceptions of the rule of law such as Dworkin's "depends on there being initial agreement between the legislature, the courts, the administrative agencies, and the constitution."[136] Therefore, consensus on moral rights is an even more treacherous territory than the incorporation of rights which have been made explicit through treaties or constitutions. The non-commensurability of rights, existing beyond a legislative basis, has presented a challenge to substantive theorists wishing to evade the remits of constitutional limitations on the judiciary. Furthermore, in states whose bench lacks diversity there remains another apprehension that the

[135] Ronald Dworkin, *A Matter of Principle* (Cambridge, Massachusetts: Harvard University Press, 1985) at 11-12.
[136] Susan Kneebone, *Refugees, Asylum Seekers and the Rule of Law: Comparative Perspectives* (Cambridge: Cambridge University Press, 2009) at 41.

class interests of a homogenous judiciary will be reflected in their rights determinations. Removing rights from the political arena and transporting them into the judicial arm of government is, therefore, a controversial proposition.

In support of a strong judicial role in rights protection, proponents point to the declaratory function of the judiciary, initially identified by classical theorists.[137] Under this line of thinking, the judiciary does not create law, merely declares it. In doing so they endow those pre-existing norms with a measure of certainty, predictability and transparency. [138] Adherents of the naturalist school of rights would find no difficulty in asserting a strong declaratory role of the judiciary. On the other hand positivists would be perturbed to assign the judiciary such authority, fearing the bounds of judicial creativity if given such an extensive law-making function. [139]

A further split in the substantive school emerges not from the conflict between naturalist and positivist conceptions of rights, but between the existence of formal and substantive equality in the rule of law. The motivation to exclude substantive equality was explored most extensively by Friedrich Hayek. Hayek considered extensive economic planning to be inherently discriminatory as it required the State to make and impose value judgements on wealth and opportunity distribution. This type of "totalitarian planning" would ultimately result in laws that discriminated between certain classes of people and promote a rule of status rather than a rule of law.[140] Rather, the rule of law should take an instrumental approach, allowing individuals to pursue their various ends without benefitting any particular group, or removing hurdles for disadvantaged groups. [141]

[137] *Walker, supra* note 98 at 162.
[138] *Ibid* at 163.
[139] *Kneebone,* supra note 136 at 49-50.
[140] *Hayek, supra* note 114 at 7.
[141] *Santos, supra* note 67.

Whilst Hayek does not deny that formal equality may produce economic inequality, he sees neutrality as a necessary element of the rule of law. To undermine the law's neutrality, through policies aimed at substantive ideals of distributive justice, would lead to the destruction of the rule of law's core principles, namely: transparency, predictability and generality.[142] While individuals should be entitled to predict which rules apply to them, universality in laws allows individuals to exercise their self-determination in deciding how they engage with those rules. Hayek contends that:

> as planning becomes more and more extensive, it becomes regularly necessary to qualify legal provisions increasingly by reference to what is "fair" and "reasonable"; this means that it becomes necessary to leave the decision of the concrete case more and more to the discretion of the judge or authority in question.[143]

Therefore, Hayek's rejection of substantive equality is intertwined with concerns over the democratic legitimacy of judicial decision making.

O'Donnell also advocates for a substantive rule of law, terming it a democratic rule of law which protects political and civil rights alongside formal legality. However, he too believes that substantive equality is incompatible with the rule of law. In his own words, O'Donnell claims that "an individual is not, and should never be seen as, a subject, a supplicant of the good will of the government or the state."[144] Further, he claims that one of the fundamental

[142] *Hayek, supra* note 114 at 7-8.
[143] *Ibid* at 7.
[144] Guillermo O'Donnell, "Why the Rule of Law Matters" in Julio Faúndez ed, *Law and Development: Critical Concepts in Law* (London: Routledge, 2012) at 20.

dimensions[145] of democracy is that "the legal system must treat like cases alike irrespective of the class, gender, ethnicity, or other attributes of the respective actors."[146]

iii. The International Development Community and the Rule of Law

The international development community has categorically supported a substantive rule of law. Most development organisations have had no difficulty in adopting a rule of law which incorporates, formal legality, individual rights, democracy and substantive equality. As early as 1959, the International Commission of Jurists stated that:

> The 'dynamic concept' which the Rule of Law became in the formulation of the Declaration of Delhi does indeed safeguard and advance the civil and political rights of the individual in a free society; but it is also concerned with the establishment by the state of social, economic, educational and cultural conditions under which man's legitimate aspirations and dignity may be realised. Freedom of expression is meaningless to an illiterate; the right to vote may be perverted into an instrument of tyranny exercised by demagogues over an unenlightened electorate; freedom from government interference must not spell freedom to starve for the poor and destitute.[147]

In a similar vein, the Declaration of the 1990 Conference on Security and Cooperation in Europe affirmed that:

> the rule of law does not mean merely a formal legality which assumes regularity and consistency in the achievement and enforcement of democratic order, but justice based upon the recognition and full acceptance of the supreme value of the human personality and guaranteed by institutions providing a framework for its fullest expression.

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[145] *Ibid at 19*. O'Donnell claims there are four dimensions to measure effectiveness: "At one level, which we might call "interinstitutional," the authority of a judge dealing with a criminal case would be nil were it not joined, at several stages, by that of police officers, prosecutors, defence attorneys, and so on, as well as by, eventually, higher courts and prisons. Horizontally, in a democratic legal system no state institutions or officers are supposed to escape from legal controls regarding the lawfulness of their actions. In a third, territorial, dimension, the legal system is supposed to extend homogenously across the space delimited by the state—there must be no places where the law's writ does not run. In a fourth dimension—that of social stratification—the legal system must treat like cases alike irrespective of the class, gender, ethnicity, or other attributes of the respective actors."

[146] *Ibid* at 19.

[147] International Commission of Jurists, "The Rule of Law in a Free Society: A Report of the International Congress of Jurists" (5-10 January 1959) online: https://www.icj.org/rule-of-law-in-a-free-society-a-report-on-the-international-congress-of-jurists-new-delhi-india-january-5-10-1959/

Furthermore the declaration states that democracy was an "inherent element of the rule of law."[148] Similarly, the United States Agency for International Development's definition of the rule of law states that:

> The rule of law… refers to a principle of governance in which all persons, institutions and entities, public and private, including the State itself, are accountable to laws that are publicly promulgated, equally enforced and independently adjudicated, and which are consistent with international human rights norms and standards.[149]

USAID's guide on the rule of law affirms that reference to "human rights norms and standards" includes both first and second generation rights.

The International Development Law Organisation (IDLO) recently issued a statement on the rule of law, peace and security, human rights and development, in which they emphasised the substantive nature of the rule of law. In this statement, the director-general of IDLO, Irene Khan, urged the international community to go beyond the current position on the rule of law and come to a more dynamic understanding of the relationship between development and the law. Khan stated that understanding the relationship between the rule of law and development would aid international communities and national governments in combatting "institutional capacity deficits" which act as barriers to eradicating poverty and addressing inequalities.[150]

Khan went on to state that:

> the rule of law, properly understood, provides not only certainty and predictability of the law but also substantive justice. Equality, accountability and respect for human rights – both economic, social and cultural rights as well as civil and political rights – are integral parts of the rule of law in this sense.[151]

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[148] Organization for Security and Co-Operation in Europe, "Document of the Copenhagen Meeting of the Conference on the Human Dimension of the CSCE" (29 January 1990) online: http://www.osce.org/odihr/elections/14304?download=true

[149] United States Agency for International Development, "Guide to Rule of Law Country Analysis: The Rule of Law Strategy Framework: A Guide for USAID Democracy and Governance Officers" (August 2008) online: http://pdf.usaid.gov/pdf_docs/Pnadm700.pdf

[150] *Khan, supra* note 95.

[151] *Ibid.*

To support this statement, Khan points to the United Nations General Assembly resolution 68/116 (2012) on the rule of law at the national and international level which reaffirmed the mutually reinforcing nature of the rule of law, human rights and democracy as "universal and indivisible core values and principles of the United Nations."[152] More recently, the secretary general of the United Nations stated that "it is critical that [States] enable a strong system based on the rule of law, consistent with international obligations, especially those derived from human rights law."[153]

The author is inspired by Khan's call to rethink the relationship between law and development, particularly in light of the substantial shift in law and development doctrine since the turn of the century. In light of these changes, it is necessary to provide greater clarity on what form the rule of law should take in the third movement. While the above definitions provide guidance, they are all theoretically opposed to one another. Although pluralism encourages diversity, the rule of law must be designed to achieve the aims it is intended to pursue. Accordingly, the author intends to reorient the rule of law around the removal of un-freedoms, whilst anchoring her theory in the foundational purpose of the rule of law, the prevention of the arbitrary abuse of power by government or tyrannical populous.

2.3 AUGMENTING THE RULE OF LAW

Following Dworkin's proposition that our understanding of the rule of law is inextricably linked to our theoretical views, [154] the rule of law has been reconceptualised over the years to meet the demands of the reigning orthodoxy. The rule of law has been shaped and influenced

[152] General Assembly Resolution, "The Rule of Law at the National and International Level" A/RES/68/116 (18 December 2013) available at http://www.un.org/en/ga/search/view_doc.asp?symbol=A/RES/68/116
[153] General Assembly Resolution, "Strengthening and Coordinating United Nations Rule of Law Activities" (20 July 2016) A/71/169 available at https://www.un.org/ruleoflaw/wp-content/uploads/2017/05/2016-SG-report-on-RoL-activities-A-71-169.pdf
[154] Ronald Dworkin, *Law's Empire* (Oxford: Hart Publishing, 1986).

by these theoretical movements since its conception. Therefore, understanding the rule of law today, requires a deeper enquiry into the theoretical underpinnings of the third movement of law and development. As Sen is the founding father of the capabilities approach it only seems natural to return now to his views on justice, human rights, and democracy, to develop a new rule of law paradigm. The following sections consider each of these areas in turn.

i. The Idea of Justice

Sen considers the concept of justice in his seminal work *The Idea of Justice*, in which he proposes an 'accomplishment based theory' of justice which focuses on the capabilities that individuals actually have. This approach is a radical departure from the transcendental institutionalism that has consistently underpinned mainstream thinking on justice. Without denying the central role institutions play in promoting justice, Sen rejects transcendental institutionalism as theoretically unsustainable. Although showing great admiration for Rawls' work, he sees a metaphysical flaw in Rawlsian reasoning; a unanimous consensus on fairness can never be realised and thus the foundation of fairness upon which 'just institutions' are supposedly built can never be established. A unanimous consensus on fairness can never be established due to the irreducible diversity of capabilities. At best, societies can come to a partial resolution that weighs the alternative approaches. Furthermore, the assumption that 'just institutions,' if they were theoretically feasible, would naturally create just results in all circumstances ignores the realised actuality that goes beyond the organisational picture.[155]

However, the acknowledgement that there may never be a "perfect solution" should not undermine the pursuit of justice, simply alter the means by which it is pursued. Instead justice requires a framework for practical reasoning which is capable of choosing between feasible

[155] *Sen, supra* note 131 at 18.

alternatives rather than attempting to identify a "perfect solution."[156] Sen draws seven basic principles from social choice theory to add to his social realisation approach. These principles are: comparison; recognition of competing principles, allowing and facilitating re-examination, permissibility of partial resolutions, diversity of interpretations and inputs, precise articulation and reasoning, and a central role for public reasoning in social choice.[157]

The main message to take away from Sen's theory is the injection of plurality and objectivity. Plurality is central to Sen's theory of justice. Not only does Sen recognise that a grand theory of justice can never be realised due to the inescapable plurality of competing interests, he also notes that in order to meet the demands of justice where competing interests exist, a cross-section of individuals must be considered. This approach is known as 'open impartiality',[158] which allows voices into the debate on the basis of an enlightenment rather than membership entitlement. This enables justice to transcend the borders of sovereign states to consider voices that enlighten the debate, regardless of the status of the speaker. Impartiality has been a core tenet of the rule of law since its inception. However, most formulations consider 'closed impartiality' as the minimum required to satisfy the rule of law.

This notion of 'open impartiality' is inextricably linked to the requirement of objectivity. Without open impartiality decision makers would fall foul of their 'positional perspectives.' Sen uses the analogy of an individual who looks at the sun and the moon and determines that they are the same size. Although a truthful statement is made from the individual's position, the truth of that statement is solely confined to that individual's positionality, it cannot withstand trans-positional scrutiny. If decision-makers do not move beyond their positionality, they will remain shackled to the biases that entrench injustice into the very core of their

[156] *Ibid* at 9.
[157] *Ibid* at 106-110.
[158] *Ibid* at 123.

societies. Injustices can only be surmounted when decision-makers broaden their informational basis, and take a comparative approach, involving a plurality of voices which extend beyond their own sovereign borders.[159] The 'closed impartiality' which reigns supreme in rule of law reform projects today, simply perpetuates existing inequalities. Particularly when nations are global actors with immense decision-making power, 'closed impartiality' allows domestic governments to remain disconnected from their international obligations and legitimately disregard the global repercussions of their choices. [160]

Sen not only requires decision-makers to reason with 'open impartiality' but to use their power to remove injustices in all instances. Identifying injustices is closely linked to his social realisation approach. If justice is measured against the social realisation of capabilities, by asking what freedom does a person actually have to do the things they value, then injustice is surely the absence of freedoms, whether through lack of opportunity or procedural hurdles. Just as Sen considers the removal of unfreedoms to be *constitutive* of development, the removal of those same unfreedoms becomes *constitutive* of justice

ii. Democracy

Sen recognises an intimate relationship between justice and the practice of democracy, based on the central position of public reasoning in the pursuit of justice.[161] Therefore, Sen does not consider democracy as being satisfied by a limited 'ballot box' approach, there must be the

[159] *Ibid* at 169.
[160] Evan Fox-Decent, "Is the Rule of Law Really Indifferent to Human Rights?" (2008) 6:27 Law and Philosophy 533: Fox-Decent makes the compelling argument that the rule of law is not indifferent to human rights by virtue of the fiduciary duty which exists between the State and the people affected by an exercise of sovereign power. Of particular interest is how Fox-Decent characterises the subjects of this fiduciary duty as not merely citizens but all those citizens and non-citizens within or outside the state's territorial jurisdiction. Under his conception of 'subject' the State must consider the repercussions of their actions on a much broader scale, encompassing all individuals affected by an exercise of sovereign power.
[161] *Sen, supra* note 131 at 326.

presence of 'deliberative democracy' which enables a plurality of voices to be engaged in public reasoning. Sen supports this proposition by reiterating his famous statement that "no major famine has occurred in a functioning democracy with regular elections, opposition parties, basic freedom of speech and a relatively free media."[162] Although, this statement is undoubtedly true, Sen notes that injustices are still deeply entrenched in democratic societies. Overcoming these injustices, requires more than electoral freedom, it requires the equal representation of all individuals. Without abandoning democracy, Sen considers that majoritarian rule can work where there is a space for minority voices.

Democracy is intertwined not only with visions of justice but of development, economic performance, social opportunity, political voice and public reasoning. Marginalised individuals' voices are amplified through 'government by discussion' allowing them to access the protective function of democracy which provides them with human security. In achieving both justice and development, plurality is key and democracy can only be capable of 'open impartiality' where it acts as a stage for all voices. However, Sen is not naïve or utopian in his approach and recognises that democracy cannot overcome "the poisonous fanaticism of communal thinking" without the presence of an active and engaged public alongside an independent media.[163]

iii. Human Rights

Sen considers human rights as "strong ethical pronouncements as to what *should* be done."[164] In order to prevail, these claims must be able to withstand open and informed scrutiny,

[162] *Ibid* at 342: Sen notes the informational, protective and incentive function of the media. A strong media is capable of disseminating information, which forms values within a society who then place pressure on the government, incentivising it to change.
[163] *Ibid* at 352.
[164] *Ibid* at 257.

involving 'open impartiality.' Although legislation or common law may give rights legal enforcement, their existence is not contingent upon a legal basis. Instead, rights are ethical tenets, which may be disputed and used to reason. It is through public reasoning that these articulations of social ethics maintain their objectivity.[165] As rights exist independently from law, "the ways and means of advancing the ethics of human rights need not, thus, be confined only to making new laws."[166] Therefore, ethics of human rights can be constructively deployed by non-legal actors, including social monitoring organisations and activists. It is through these interrelated avenues of protection that rights are safeguarded and promoted. Ultimately, legislation may enable individuals and groups to assert their rights, however, rights are not inexorably tied to law.

Furthermore, Sen untangles the distinction between first and second generation rights. Again, guided by his vision of development, democracy and justice as all geared towards the pursuit of human capabilities, Sen considers second generation rights to be inextricably linked to these concepts. He rejects both the 'institutionalisation critique' and 'feasibility critique' as arbitrary means of distinguishing first and second generation rights. The 'institutionalisation critique' claims that only second generation rights have economic and social preconditions and are thus too indeterminate to be the subject of an affirmative duty. However, both classes of rights impose imperfect obligations, which undermine the formulation of precise correlate duties.[167] Nussbaum notes that the very idea of 'negative liberty' is an incoherent idea as all rights require affirmative action, including government expenditure.[168] Additionally, although certain rights are not fully realised or fully realizable at present, this does not undermine the ethical

[165] Amartya Sen, "Human Rights and The Limits of Law" (2005) 27 Cardozo L Rev 2913 at 2916.
[166] *Ibid* at 2919.
[167] *Sen, supra* note 131 at 382.
[168] *Nussbaum, supra* note 57 at 65-67.

significance of these rights, which motivate action towards altering institutions and changing social attitudes. [169]

iv. An Augmented Rule of Law

Utilising Sen's theories of development, justice, democracy, and human rights as a foundation, the author reconstructs the rule of law. The author does not reject the contention that the rule of law should not be a panacea for all the world's woes. However, as a supporting pillar in development projects the rule of law must be constructed for the aims it is intended to pursue, whether that be the restriction of arbitrary use of power or the enhancement of human capabilities. As the removal of un-freedoms is *constitutive* of both development and justice, it naturally follows that the removal of those same un-freedoms should be *constitutive* of the rule of law. Therefore, the author has placed the enhancement of human capabilities at the centre of her rule of law theory.

Drawing from Sen's theories, the author proposes the following additions to the rule of law:

a) Open impartiality

b) Deliberative democracy

c) Second generation rights

These principles are intended to augment the existing formal and substantive conceptions which pre-exist the recent changes in development and law doctrine.

It is submitted that an accomplishment based approach to rule of law reform will allow room for plurality whilst giving guiding principles to nations. By focusing on the realised actuality

[169] *Sen, supra* note 131; *Sen, supra* note 165 at 2924.

of human capabilities instead of the institutional framework, states will have a measure of freedom in deciding how to promote rule of law in their societies.

The preceding section has clearly articulated the need for an 'augmented' rule of law to achieve the third movement's development objectives. However, it prudent to briefly consider the necessity for these principles to be packaged within rule of law reforms rather than promoting the author's proposed principles independently. Reorienting the rule of law towards the removal of un-freedoms should not consequentially disconnect the rule of law from its historical roots; the prevention of abuse of power by government or populous. An 'augmented' rule of law may appear on its surface to be a radical departure from the historical roots of the rule of law. However, it not only realigns rule of law reform with development objectives, it also anchors the rule of law once again in its historical foundations.

The first and second movement's failures provided interveners and theorists with many lessons on the limitations of not only a development agenda preoccupied with economic growth, but also of the reigning conception of the rule of law during these periods. As discussed within the introduction, the legal reform projects of the first and second movement had failed to tackle issues of wealth and power distribution and entrenched inequality within the institutional architecture of both developing and developed nations. Rule of law reforms became instrumental tools used to legitimate the monopolisation of power in a governing elite, or in less extreme cases, created an uncritical support for majoritarian rule. The latter case, is still clearly identifiable in developed nations who rank highly on development indices yet continually fail to meet the needs of marginalised groups within their societies. These nation's actions, and more pertinently, their failures are legitimated by the current conception of rule of law.

Therefore, it is respectfully submitted that the contention that the rule of law would be corrupted by the inclusion of substantive considerations is highly misguided. The purpose of the rule of law is to prevent the abuse of power by either government or populous. Therefore, the only consideration which must be had is whether the current paradigm achieves those goals. The rule of law has been intellectually marred by criticisms which focus the debate on its constituent elements rather than its comprehensive purpose. Once again, this is exacerbated by the method by which the rule of law is measured. By focusing on the presence of the principles rather than the outcome of those principles, nations and their people are deceived into believing they are achieving a State of rule of law rather than rule by law, however for the marginalised individuals who continue to be ostracised by majoritarian rule, these indices are practically meaningless. There is a serious deficit within the current rule of law rhetoric which has shifted the theoretical debate away from considerations of the current state of affairs in a nation to their compliance with a rigid and inflexible paradigm which does not achieve its purpose.

It is submitted that the author's proposed additions to the rule of law are all powerful tools through which both abuse of power can be constrained, and development can be obtained. Impartiality has been a fundamental principle of the rule of law since its inception. The 'closed impartiality' of the current paradigm, however, allows the perpetuation of biases and legitimates decision-makers disregard for the global repercussions of their actions. Similarly, a ballot-box conception of democracy simply perpetuates majoritarian rule and legitimates democratically elected governments wilful blindness to the plight of marginalised individuals. Conversely, deliberative democracy will amplify the voice of the marginalised groups, restraining the ability of the majority to abuse the disproportionate power bestowed on them by electoral freedoms.

While the author contends that the three identified principles are interdependent, it should be noted that, in particular, open impartiality and deliberative democracy are preconditions for the

inclusion of second generation rights. Open impartiality and deliberative democracy create a foundation upon which rights protections can be legitimately expanded to socio-economic guarantees. As preconditions, these principles counteract criticisms raised against the democratic legitimacy of rights being protected through an unelected judiciary, as deliberative democracy envisages a dialogue between the government and its people, and the three arms of government. Essentially open impartiality and deliberative democracy provide the necessary safety nets against potential abuse of judicial power.

In conclusion, far from being an affront to the rule of law, these principles are woven into the very fabric of rule of law, they are the means to its end.

2.4 CONCLUSION

This chapter outlined the theoretical framework through which the following case study is analysed. The author began by examining the competing conceptions of the rule of law under the existing paradigms. This investigation included an examination of the critiques of each of these conceptions. Noting that these conceptions are aligned with theoretical approaches which predate the third movement of development, the author reconstructed the rule of law in light of recent changes in development thinking. Using the seminal texts of Amartya Sen as a foundation for her 'augmented' rule of law, the author submitted that the rule of law should contain three additional principles: open impartiality, deliberative democracy, and second generation rights. It is further submitted that an accomplishment based method of assessment should be adopted. In order to illustrate the need to augment the existing conceptions of the rule of law with these principles, the author applies these principles to a specific case study in the following chapter.

CHAPTER 3 – ASSESSING THE NEED TO AUGMENT THE RULE OF LAW

A CASE STUDY OF DIRECT PROVISION

"We have an image of ourselves as a modern, liberal democracy with a commitment to the rule of law and the protection of human rights. To some extent, this image may be justified. But there may also be significant blind spots in our self-appraisal as a society. I suggest that our treatment of asylum seekers over the past decade or so represents one such blind spot."[170] *– Emily O'Reilly (Ombudsman for Children)*

The author posited an augmented rule of law after re-examining the relationship between law and development. Drawing heavily on Sen's theories of development, justice, democracy, and human rights, the author submitted that the rule of law is in dire need of reform. Although development and law doctrine has undergone a substantial change, reforms remain embedded in the second movement. Rule of law reforms still conform to a limited notion of the rule of law, in which second generation rights, deliberative democracy, plurality and open impartiality play a peripheral role, if at all. In particular the author is concerned by the persistent marginalisation of minorities within her own nation, Ireland.

Ireland has a Human Development Index (HDI) of 0.923 which gives it an outstanding ranking of eight in the world.[171] However, when adjusted for inequality, Ireland's ranking drops by 7.9% down to an index of 0.850. In fact, nearly all developed nations experience a drop in their HDI once it is adjusted for inequality.[172] These figures clearly show that something is awry in developed nations, confirming the contention that developed nations are failing to address inequality amongst marginalised groups. In order to highlight these shortcomings, the author

[170] Emily O'Reilly, "Asylum Seekers in Our Republic: Why Have we Gone Wrong? (2013) 102:406 Irish Quarterly Review 131 at 131.
[171] United Nations Development Programme, "Human Development Reports" (2016) online: http://hdr.undp.org/en/countries/profiles/IRL
[172] *Ibid.* There is no information available on New Zealand's inequality-adjusted HDI. Example: Unites States of America sees a 13.5% decrease, Australia, 8.2%, France 9.4%, Italy 11.5%.

has chosen to conduct a case study of Ireland's reception services for asylum seekers, colloquially known as direct provision.

Like many of its European counterparts, Ireland has experienced a surge in inward migration over the past two decades. In response, Ireland radically overhauled its reception conditions, moving from an inclusive needs-based assessment to a discriminatory status-based approach. Direct provision was conceived during the second movement and displays all the hallmarks and all the failings of that movement's neoliberal ideals. Although development has been reconceived as an object for developed nations there is yet to be any reform of the direct provision system.

This chapter begins by giving a brief history of Ireland's reception conditions, before moving to consider the 'immigration crisis' which prompted the introduction of the direct provision system. The incompatibility of direct provision with the author's proposed rule of law will be assessed after outlining the second generation rights protections which should be afforded to asylum seekers under European and international law. In particular, the author highlights: the absence of open impartiality in judicial reasoning, the adherence to 'ballot box' democracy, and the underwhelming second generation rights protections which result.

3.1 A ROCKY ROAD FOR RECEPTION

Since the great famine, Ireland has had an all too familiar relationship with mass emigration. During this time, over one million died, whilst another one million left Ireland to seek refuge elsewhere, most who left never returned and made new lives abroad. As a consequence the Irish diaspora can be found in all the far flung corners of the globe, with an estimated 70 million

individuals across the world claiming Irish heritage.[173] However, Ireland's experience with inward migration is much more recent. It is only in the last three decades that Ireland has witnessed notable levels of immigration. Before the curtain fell on the 20th century, Ireland had relatively little need for the aggressive style of migration planning seen across Europe today, and those who graced Irish shores were generally accommodated within the traditional welfare system.

In the late 1990's Ireland began to experience an increase in inward migration, a situation it would quickly term a 'crisis'. Alongside an increase in economic immigration Ireland saw a significant rise in the number of individuals escaping persecution or indiscriminate violence within their home nations. In 1992 there were a mere 39 applications for asylum,[174] however, by 2002 this number had increased to 11,598.[175] Ireland was clearly unprepared for this influx and the ad hoc systems that previously catered to minimal numbers of asylum seekers were insufficient to cope with this rapid increase.

Ireland inherited it's asylum system from its former ruler, who was influenced by the Beveridge model of welfare consisting of a tripartite system encompassing: social insurance, social assistance, and universal child benefit.[176] However, Ireland never fully committed to this model, which contributed to Ireland's troubling start to refugee reception.[177] Although Ireland

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[173] Department of Foreign Affairs, "The Global Island: Ireland's Foreign Policy for a Changing World" (2015) online: https://www.dfa.ie/media/dfa/alldfawebsitemedia/ourrolesandpolicies/ourwork/global-island/the-global-island-irelands-foreign-policy.pdf at 17

[174] Angèle Smith, "Neoliberal Landscapes of Migration in Ireland" in Diane Sabenacio Nitiham & Rebecca Boyd, *Heritage, Diaspora and the Consumption of Culture: Movements in Irish Landscape* (Surrey; Burlington: Ashgate, 2014) at 79.

[175] Irish Refugee Council, "Direct Provision: Framing an Alternative Reception System for People Seeking International Protection" (2012) online: http://www.irishrefugeecouncil.ie/news-media/direct-provision-framing-an-alternative-reception-system-for-people-seeking-international-protection at 17.

[176] *Thornton, supra* note 85 at 88.

[177] Eilís Ward, "A Big Show-Off to Show What We Could Do: Ireland and the Hungarian Refugee Crisis of 1956" (1996) 7 Irish Studies in International Affairs at 131 at 132-133. Ward notes that Ireland remained "almost untouched by the estimated sweep of 60 million persons rendered homeless and/or stateless by World War Two" as Ireland refused to resettle Jewish populations. At the "European Intergovernmental Committee on Refugees, which met in Evian, France, in July 1938 […] Irish representatives argued that, as a country of gross emigration, Ireland could 'make no real contribution' to refugee resettlement. Nevertheless it is clear that certain groups were specifically discouraged, Jews in particular." Furthermore Ward refers to a "now notorious

acceded to the Refugee Convention in 1956 and the Protocol in 1967, there were no official determination procedures within the State until the late twentieth century. Indeed, it was not until 1951, and at the request of the Council of Europe, that Ireland provided a definition of refugee.[178] Those who did seek asylum within Ireland were accommodated by ad hoc systems mainly administered by charitable or religious organisations.

In the 1950's Ireland accepted 539 Hungarian asylum seekers under a UN refugee programme.[179] This was the first time Ireland had made any form of substantial commitment to refugee populations across the globe, or even Europe.[180] Ward notes that Ireland's involvement in the resettlement programme was largely motivated by politics rather than humanitarian considerations, as Ireland was in the midst of courting UN membership.[181] These motivations were reflected in the haphazard treatment of the 539 Hungarian souls now in the Irish state's care. Drawing a crude distinction between citizens and aliens, Ireland's domestic legislation placed a seemingly arbitrary criteria on the admittance of Hungarian refugees, in what appeared an attempt to limit their liability. [182]

The Hungarian asylum seekers were hosted in old army camps by the Irish red cross.[183] Although they received free medical care, clothing, food and other essential items, there was a dominant feeling of discontent within the camps, whose residents were under the impression

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Department of Justice memo of 1945, [in which] it was said that because Jews do not become assimilated with the native population like other immigrants, there is a danger than any big increase in their numbers might create a social problem." This was used to justify the refusal to admit 100 Jewish children from Poland, considering them a "potential irritant in the body politic."

[178] *Ibid* at 135: the definition was as follows: "a person who, or reasons of race, nationality or political opinion, was unable to return to the territory from which he or she came."

[179] *Ibid* at 131.

[180] *Ibid* at 131.

[181] *Ibid* at 131. Within weeks of agreeing to host the Hungarian refugees Ireland received it's UN membership.

[182] *Ibid* at 136. The criteria was as follows: (a) the identity of all refugees would be established; (b) they would be in good health; (c) they would be suitable on grounds of race and religion, to ensure assimilation, and; (d) they would be screened for 'security.' citing Memo, Department of Defence, following a meeting between the Departments of Defence, External Affairs, Justice and Health (20 November 1956). NA D/T S13373 D

[183] *Thornton, supra* note 85 at 88.

that Ireland was only a temporary stop on the way to North America.[184] One resident described the conditions as a "concentration camp" where they were deprived of work and "hope of life."[185] Their malcontent with the circumstances forced upon them was not merely expressed through statements such as that quoted, but also through more radical displays such as hunger strikes.

Thornton notes a similar discontent within the political sphere, however not one of sympathy, but a rhetoric of fear that exhibited a strong stance against refugees.[186] The Irish government found themselves in an embarrassing situation, which was narrowly evaded due to the intervention of a religious organisation that arranged onward passage to North America. Unfortunately, a similar rhetoric is echoed throughout the 35 direct provision centres dotted across the island today. Many of the themes identified in the 1950s are reflected in the current approach to reception: the subjugation of asylum seekers' needs to the economic needs of the State; privatisation of government responsibilities; ghettoization of asylum seekers; absence of domestic legislation and; the unwillingness of the State to provide adequate housing, educational or economic opportunities for asylum seekers.[187]

Over the next 40 years, Ireland played host to a small number of refugee populations who were treated progressively better than their predecessors. In the mid 1970s a voluntary group known as the Committee for Chilean Refugees in Ireland alongside religious organisations, hosted a small group of Chileans, providing them with support in the absence of any official determination procedure. In the late 70s, Ireland also hosted 212 Vietnamese asylum seekers, providing more extensive support, however 25% of these asylum seekers were cared for and

[184] *Ward, supra* note 177 at 131. Ward explains that it is unknown where this misconception arose from, was it Geneva or Dublin to blame. Either way, the state failed to register or act upon the concerns of the Hungarian refugee population, who were forcibly prevented from voicing their opinions before the Dail.
[185] *Thornton, supra* note 85 at 88.
[186] *Ibid* at 88.
[187] *Ward, supra* note 177 at 139-140.

housed by charitable and religious organisations.[188] In comparison to their predecessors, this group received limited English language support, availed of the right to work and their children were placed in mainstream education. The first state run and funded refugee program did not come until 1992, when Ireland committed to taking in 455 Bosnians. The Bosnians were dispersed throughout the country, where local authorities were responsible for their accommodation and welfare needs. They were also entitled to work and access social support on the same conditions as Irish nationals. In 1995 Ireland introduced, for the first time, legislation specifically related to refugees. Ward referred to the Refugee Bill (1996) as representing a break from Ireland's conservative stance on asylum policy and rendering Ireland as "amongst the most liberal regimes in Europe."[189]

At this point, asylum seekers became accommodated within the traditional welfare structures. They were assessed for social welfare support on a needs-based approach, through which they could access social welfare payments of £76,[190] rental supplement for accommodation in the private sector and a number of other social welfare payments, including child benefit for those persons accompanied by a child.[191] Furthermore, where an asylum seeker did not satisfy the needs-test, they were still entitled to supplementary welfare allowance which aimed to provide immediate and flexible assistance to low-income persons. Social welfare allowance was, at the time, available to "every person in the State whose means are insufficient to meet his needs."[192] Asylum seekers were initially housed in induction centres for a period of one-week, after which they would be accommodated in the private sector with the financial assistance of the HSE.[193] All asylum seekers were (and still are) entitled to free medical care, where they satisfy the non-

[188] *Thornton, supra* note 85 at 88.
[189] *Ward, supra* note 177 at 131.
[190] Free Legal Advice Centre, "Direct Discrimination? An Analysis of the System of Direct Provision in Ireland" (July 2003) online: https://www.flac.ie/publications/direct-discrimination/ at 8.
[191] *Thornton, supra* note 85 at 89.
[192] *Ibid* at 89.
[193] *Ibid*.

discriminatory means test.[194] Essentially, asylum seekers in the pre-millennium era were treated on a par with other persons seeking to access welfare within the State. However, asylum seekers were (and still are) ineligible to work, and are therefore entirely reliant on the mercy of the state.

3.2 A CRITICAL JUNCTURE – IRELAND'S 'IMMIGRATION CRISIS'

In the late 1990s a rhetoric of fear entered the social and political sphere, echoing the shameful treatment of the Hungarian asylum seekers in the 1950s. The news was awash with fear-mongering and stories about criminality amongst asylum seekers, whose sole purpose for coming to Ireland was, purportedly, to exploit the vulnerable Irish state and its people. Some of the headlines at the time included: "Refugee Rapists on the Rampage";[195] "Refugees; Police Act to Smash Gang";[196] "Refugees Get £20 Million Payments"[197]; "Refugee Tried to Bite Me to Death,"[198] and; "Free Cars for Refugees; Cash Grants Buy BMW's"[199]

Maria Patterson conducted an empirical study on the representation of refugees and asylum seekers in the Irish media in the years leading up to the immigration crisis and the year in which direct provision was introduced. Her study found that the media often provided "images of disproportionate rates of immigrants, crisis' in housing, population and health caused by the presence of refugees and asylum seekers and a sense that the majority of those seeking refuge are 'bogus' or 'ungenuine'."[200] The widespread reference in political circles to "genuine" refugees, who would appreciate what they got, supported the media's portrayal of many claims

[194] *Ibid* at 89.
[195] "Refugee Rapists on the Rampage" The Irish Daily Star (13 June 1997). Cited in *Thornton, supra* note 85.
[196] "Refugees; Police Act to Smash Gang" Evening Herald (6 June 1997). Cited in *Thornton, supra* note 85.
[197] "Refugees Get £20 Million Payments" Evening Herald (6 June 1997). Cited in *Thornton, supra* note 85.
[198] Refugee Tried to Bite Me to Death" Sunday World (February 2000). Cited in *Thornton, supra* note 85.
[199] "Free Cars for Refugees; Cash Grants Buy BMW's" Irish Daily Mirror (16 December 2002)
[200] Maria Patterson, *Representations of Refugees and Asylum Seekers in the Irish Print* Media (MAThesis, National University of Ireland, Maynooth, Faculty of Arts, 2001) [unpublished] at 151.

as bogus or fraudulent.[201] Thornton notes that these rumours became so widespread that the UNHCR and the National Consultative Committee on Racism and Interculturalism (NCCRI) had to run "an informational campaign on the true nature of reception systems for asylum seekers within Ireland."[202]

She further noted the effect these media reports had on fostering a negative view of asylum seekers amongst the general public.[203] The media had reported extensively on the "threat" posed by asylum-seekers and refugees but consistently failed to provide the public with any unbiased information on the definition of refugee, the circumstances which motivate their movements, or the destitution they face due to an inability to work legally. Furthermore, the consistent failure of the media to explore alternative explanations for the housing 'crisis,' supported a conclusion that the only explanation was the rise in asylum applications.[204] Additionally, only 11.3% of media coverage examined the negative consequence of racism, compared to 16.6% of reports which focused on the criminal activities of immigrants.[205] In Patterson's own words "the image invariably presented to the reader's mind is that Irish people are under threat."[206] As the late Mr. Justice Adrian Hardiman once stated, the cry of emergency is "an intoxicating one, producing an exhilarating freedom from the need to consider the rights of others."[207] With this rhetoric the media had created the perfect conditions for a complete overhaul of the Irish reception system.

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[201] For more see: *Thornton, supra* note 85.
[202] *Thornton, supra* note 85 at 93.
[203] *Patterson, supra* note 200 at 152. Patterson acknowledges the difficulty of measure the extent to which the media affects opinion, as many of the effects are often indirect. She notes that Cohen and Young (1973) have argued that the print media "relate directly to the present social situation, have wide circulation and enjoy the high credibility that enhances their capacity to influence how people think."
[204] *Ibid* at 157.
[205] *Ibid* at 155.
[206] *Ibid* at 155.
[207] *O'Reilly, supra* note 170 at 137.

Asylum applicants had been sufficiently vilified, such that the public began to appeal to the government for a resolution to the housing crisis, supposedly created by asylum seekers. The Minister for Justice Equality and Law Reform seized upon this opportunity by implementing extreme changes in Ireland's reception system. The Minister referred to the introduction of a new system as a matter of "extreme urgency,"[208] a necessary response to the number of asylum applications which were "spiralling out of control."[209] Ireland was facing a critical juncture.[210]

It should be recalled at this stage, that the immigration crisis occurred towards the end of the second movement of development, during which neoliberalism was still the dominant political and economic ideology. Like most western European states, in the aftermath of the second world war and during the first movement of development, Ireland had adopted a Keynesian economic model alongside a social democratic government.[211] This model of governance had failed to provide the sustainable growth Ireland had sought and Ireland was plunged into a deep recession in the late 1970s.

Following in the footsteps of most developed nations at the time, Ireland moved towards more conservative politics. Parties pursuing neoliberal economic programmes gained widespread support[212] with neoliberal ideologies quickly assuming a "common-sense status within the

[208] Meeting of Minister of Justice, Equality and Law Reform with the Secretary General (Monday 8 November, 1999).
[209] Minutes of reconvened Interdepartmental Committee on Immigration, Asylum and Related Issues (Monday 8 November 1999).
[210] Daron Acemoglu & James A Robinson, *Why Nations Fail: The Origins of Power, Prosperity, and Poverty* (New York: Crown Business, 2012) at 76. A critical juncture is defined as a "major event or confluence of factors disrupting the existing economic or political balance of society." Acemoglu and Robinson's explain that during a critical juncture, a nation may radically alter their institutional framework, from "inclusive" to "extractive." Extractive institutions are the antithesis of inclusive institutions. Unlike their inclusive counterparts, which are considered engines of prosperity, extractive institutions are "designed to extract incomes and wealth from one subset of society to benefit a different subset."
[211] Proinnsias Breathnach, "From Spatial Keynesianism to Post-Fordist Neoliberalism: Emerging Contradictions in the Spatiality of the Irish State" (2010) 42:5 Antipodes 1180 at 1182.
[212] *Ibid* at 1182. "Involving the dismantling of the welfare state, the primacy of monetary over employment policy, privatisation, deregulation and an emphasis on fostering entrepreneurialism through supply-side economic policies."

country's political class."[213] Incorporating strong elements of neoliberalism and European welfarism, Ireland adopted a hybrid economic model, described by McGuirk as 'emergent' neoliberalism.[214] An in-depth analysis of the growth of neoliberalism in Ireland is outside the scope of this study, however it suffices to say that Ireland began to incorporate the core tenets of neoliberalism into its political and economic strategy. Ireland began the process of deregulating their market, incentivising foreign direct investment, and increasing privatisation of public services. Furthermore, the state entered into deals with entrepreneurs across the state that cumulatively restructured Ireland's institutional framework.[215] Although Kitchen *et al* claim that the rolling out of neoliberal reforms was not met with a corresponding rolling in of welfare services, they fail to take account of the experience of asylum seekers during this time.[216]

However, a number of commentators have noted the neoliberal exploitation of the immigration crisis. President Michael D. Higgins, observed that "economy and society need to be reconnected through a shared sense of ethics and value so that both operate in the same moral universe."[217] The President's words reflect the diminution of other equally valuable social objectives by fundamentalist market economics. Smith commented that "the social landscapes and experiences of asylum seekers in Ireland are managed to exclude them from fully integrating into Irish society, yet fully including them as part of the neoliberal market economy."[218] Darling notes that "the framing of asylum seekers as a 'burden' emerges as a discursive and symbolic achievement of the neoliberal politics of asylum accommodation."[219]

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[213] Rob Kitchin, Cian O'Callaghan & Mark Boyle, "Placing Neoliberalism: The Rise and Fall of Ireland's Celtic Tiger" (2012) 44:6 Environmental and Planning A 1302 at 1304.
[214] *Ibid* at 1306.
[215] *Ibid* at 1306.
[216] *Ibid* at 1307-1308.
[217] cited in: *O'Reilly, supra* note 170 at 139.
[218] *Smith, supra* note 174 at 77.
[219] Johnathan Darling, "Privatising Asylum: Neoliberalisation, Depoliticisation and the Governance of Forced Migration" (2016) 41:3 TOC 230 at 230.

While Kitchen *et al* even identified that "much of the policy transformation of the Celtic Tiger era movements were, then, to an extent the outcome of a certain political pragmatism – doing what was necessary at the time to satisfy the needs of various sectors of the voting public."[220] Essentially, the plight of asylum seekers was transformed into a capitalist venture.

The ability of neoliberalism to effectively exploit a situation of crisis is further considered in Klein's seminal text *Shock Doctrine: The Rise of Disaster Capitalism*, in which she identifies the propensity for neoliberalism to exploit crises to solidify its position in the political agenda. Klein refers to the Friedmanite policy of shock therapy which was used to "test" the effectiveness of neoliberal policies by exploiting or manufacturing crisis in developing nations. The crisis would be used to justify the radical overhaul of a nation's political and economic arrangements by implementing, often through violent means, sweeping neoliberal reforms. She examines a number of situations in which neoliberal reforms were forcibly enacted in response to a crisis, and highlights the devastating consequences that emerged from this approach. Although the Irish immigration crisis certainly contained many elements of shock therapy, or the shock doctrine, it was not quite as aggressive in its approach, or widespread in its scope. However, Klein's research highlights the proclivity for neoliberalism to capitalise on a critical juncture and explains the system that emerged in the wake of the immigration crisis.[221]

3.3 DIRECT PROVISION EMERGES AS THE SAVING GRACE OF THE IRISH IMMIGRATION CRISIS

The system which emerged as the saving grace of the Irish immigration crisis is, unsurprisingly, characteristically neoliberal in nature. The system operates as a public-private partnership and

[220] *Kitchin et al, supra* note 213 at 1307.
[221] for more see: *Klein, supra* note 30.

is designed to extract wealth from vulnerable and marginalised individuals for the benefit of a neoliberal elite. For-profit enterprises enter tenders to win contract to provide bed and full board for asylum seekers.[222] Proprietors of hotels, hostels, guesthouses and caravan parks have all entered such contracts. The private operators of these centres are under no contractual obligation to abide by the State's human rights commitments, however they are under a contractual obligation to maximise their capacity, and subjected to fines where capacity is not met.[223] Although contractors were now responsible for accommodating one of the most vulnerable groups within a society, there was no requirement for any contractors to have experience catering for the needs of asylum seekers, vulnerable persons or minors, and without exception no contractor, at the time, possessed any.[224] Furthermore, any reference to dignity in the Reception and Integration Authority's (RIA) house rules has been removed.[225] This is contrary to the Executive Committee of the UNHCR's published recommendations that "various reception measures respect human dignity and applicable human rights law and standards."[226]

Life in direct provision paints a troubling picture. Within the centres, families share one room where they play, study and sleep, while single parents and their children are forced to share rooms with strangers. Asylum seekers are prohibited from cooking and share meals provided by the centre with the other residents, who often number in the hundreds. Asylum-seekers are barred from entering the labour force and if they wish to pursue third level education they are subject to international student fees. Furthermore, an asylum seeker must obtain permission

[222] Free Legal Advice Centre, "One Size Doesn't Fit All: A Legal Analysis of the Direct Provision and Dispersal System in Ireland, 10 years on" (November 2009) online: https://www.flac.ie/download/pdf/one_size_doesnt_fit_all_full_report_final.pdf at 26.
[223] *Ibid* at 18.
[224] *Irish Refugee Council, supra* note 175 at 15.
[225] Reception and Integration Authority, "Direct Provision Reception and Accommodation Centres: House Rules and Procedures" (2015) online: http://www.ria.gov.ie/en/RIA/House%20Rules%20Revised%202015%20English.pdf/Files/House%20Rules%20Revised%202015%20English.pdf
[226] *Irish Refugee Council, supra* note 175.

from the Minister for Justice, Equality and Law Reform before they may enter into full-time education, or travel abroad.[227] Although the system was intended to accommodate newly arrived asylum seekers for no more than six months, on average an asylum seeker spends three years and eight months in direct provision with some resident for more than ten years.[228]

There appear to be a number of equally unpleasant justifications underlying the system of direct provision. One such justification was premised on the artificial distinction between the rights of asylum seekers and refugees, and those of the general population.[229] An alternative motivation appears to be a wish to emulate the policy changes in the United Kingdom. In the same year direct provision was introduced, the UK replaced cash payments to asylum seekers with a £35 voucher to be used in designated stores.[230] There were certainly fears at the time within the political sphere that Ireland would become a "hotspot" for migration if it did not temper its welfare policies in line with the United Kingdom's conservative stance.[231] What is undoubted is that the system of direct provision was motivated by second movement ideals, aimed at economic prosperity above basic humanity.

i. The Legal Basis for Direct Provision

Direct provision was introduced through a series of ministerial circulars and exists on an administrative rather than legislative footing. The legislative justification for the circulars is found in the discretionary executive power contained in section 180(1) of the Social Welfare (Consolidation) Act 1993. S. 180(1) states that:

> Whenever it appears to a health board that by reason of exceptional circumstances the need of a person can best be met by the provision of goods or services instead of the whole or part of any

[227] *Free Legal Advice Centre, supra* note 190 at 10.
[228] Carl O'Brien et al, "Lives in Limbo" (2014) The Irish Times, online: http://www.irishtimes.com/news/lives-in-limbo
[229] *Thornton, supra* note 85.
[230] *Free Legal Advice Centre, supra* note 190 at 10.
[231] *Ibid* at 10.

> payment to which he would otherwise be entitled under this Chapter, the health board may determine that such goods or services be provided for him under arrangements made by the board.[232]

The newly established, Reception and Integration Agency (RIA) was formed in 2001 under the auspices of the Department of Justice, Equality and Law Reform (DJELR) to oversee the administration of direct provision. The RIA operates as a departmental division of the DJELR. Despite assurances that the RIA would only operate on a non-statutory basis for a limited time, the RIA is yet to be placed on a legislative footing.[233]

Supplementary Welfare Allowance Circular 04/00 outlined the new accommodation procedure: asylum seekers would spend an initial period in an 'arrivals reception centre' in Dublin, before being dispersed throughout the country to direct provision centres.[234] Asylum seekers were allocated a weekly allowance of €19.10, this figure was described as a "residual income maintenance payment to cover personal requisites" and was calculated by deducting the cost of housing an individual in direct provision from the basic standard Supplementary Welfare Allowance.[235] Although the supplementary welfare allowance has increased since the introduction of direct provision, asylum seekers' "residual" allowance remains the same.

In addition to the weekly allowance, individuals accompanied by children are entitled to a supplementary payment of €9.60 per week. Asylum seekers are also entitled to apply for an urgent needs payment, which provides financial assistance in instances of flood or fire damage, unsurprisingly there have been very few successful claims. Asylum seekers also receive two exceptional needs payments per year of €100, to cover the cost of clothing.[236] Additional

[232] Social Welfare (Consolidation) Act 1993.
[233] *Free Legal Advice Centre, supra* note 222; and *C.A. & anor v Minister for Justice Equality and Law Reform and ors* [2014] IEHC 532.
[234] *Free Legal Advice Centre, supra* note 222 at 13.
[235] *Ibid* at 13.
[236] *Free Legal Advice Centre, supra* note 190 at 15.

discretionary payments include, the 'back to school clothing and footwear allowance'. These discretionary payments do not carry a habitual residence requirement.

Where an individual refuses accommodation in direct provision, Supplementary Welfare Allowance Circular 05/00, states that such persons would only be entitled to the residual direct provision allowance and were not entitled to access the supplementary welfare allowance in its entirety.[237] The limited exceptions which existed at the time were expanded by the Department of Social and Family Affairs Ministerial Circular 05/00 to include heavily pregnant women and nursing mothers.[238] Those who qualified for an exception were to be accommodated within the traditional welfare system.[239] However, Department of Social and Family Affairs Circular 02/0391 stated that "all needs of asylum seekers, including those with medical or special needs, were now being catered for within the direct provision system."[240] Section 13 of the Social Welfare (Miscellaneous Provision) Act 2003 officially withdrew rental supplement entitlements from asylum seekers. Section 13(4)(a)(i) states that:

> a person shall not be entitled to a payment referred to in subsection (3) where –
>
> (i) The person is not lawfully in the State, or
> (ii) the person has made an application to the Minister for Justice, Equality and Law Reform for a declaration under paragraphs (a) or (c) of section 8(1) of the Refugee Act 1996.

Furthermore, a "habitual residence condition" was introduced in May 2004.[241] Access to certain basic payments including child benefit, one parent family payment, disability allowance, carer's allowance, supplementary welfare allowance, old age, widow(ers) and orphan's pension became contingent upon habitual residence, being unable to satisfy this condition, asylum seekers are excluded from the system. The condition was motivated by the pending European Union enlargement and fears surrounding 'welfare tourism' and 'welfare

[237] *Ibid* at 13.
[238] *Thornton, supra* note 85 at 89.
[239] *Ibid* at 89.
[240] *Ibid* at 90.
[241] *Free Legal Advice Centre, supra* note 222 at 53.

shopping.' However there appeared to be an additional incentive to reduce the number of asylum applicants in Ireland. The habitual residence condition was placed on a legislative footing by s.246 of the Social Welfare Consolidation Act 2005, which states that:

> … it shall be presumed, until the contrary is shown, that a person is not habitually resident in the State at the date of the making of the application concerned unless the person has been present in the State or any other part of the Common Travel Area for a continuous period of 2 years ending on that date.[242]

s.246(7) of the Social Welfare Consolidation Act 2005 as amended provides that asylum seekers, defined as "a person who has applied to the Office of the Refugee Applications Commissioner for recognition as a refugee in accordance with the Refugee Act 1996, and whose application has not yet been determined," are not considered habitually resident.[243] This exclusion is further supported by a number of guidelines, which state that asylum seekers are automatically disqualified by virtue of their status from satisfying the habitual residence requirement. The "Guidelines for Deciding Officers on the Determination of Habitual Residence" (2016) state that:

> asylum seekers only have permission to remain in the State until their application for refugee status or subsidiary protection have been determined and cannot be considered to satisfy the HRC [Habitual Residence Condition] during this period.[244]

Although there has been a significant drop in the number of applications over the past two decades, the system of direct provision remains. Compared with the 11,598 applications made in 2002 , a decade later, there were a mere 940 applications lodged in 2012. The Irish Refugee Council has estimated that the financial and societal cost of continuing to operate direct provision centres far exceeds the price of accommodating asylum seekers within the traditional

[242] Section 246(1) Social Welfare Consolidation Act 2005.
[243] Department of Social Protection, "HRC – Guidelines for Deciding Officers on the Determination of Habitual Residence" (2016) online: https://www.welfare.ie/en/Pages/Habitual-Residence-Condition--Guidelines-for-Deciding-Offic.aspx#sect6
[244] *Ibid.*

welfare system. The system of direct provision cost an estimated 70 million euro in 2012, whereas the Irish Refugee Council's proposal would have cost nearly 20 million euro less, and would allowed asylum seekers to live in dignity.

ii. Case Law on Direct Provision

As explained in the introduction, the Irish Constitution creates an explicit distinction between civil and political rights, and socio-economic rights. The latter are non-justiciable, other than the right to education, and are thus offered little protection through the courts. Although the courts attempted to protect these rights through an unenumerated rights doctrine, the doctrine failed as it lacked a unifying theoretical foundation to guide the courts in uncovering and protecting socio-economic rights. This section will not explore the unenumerated rights doctrine in-depth, as it has been expertly and extensively reviewed in scholarly literature elsewhere. Instead the minimal case law surrounding the constitutionality and conventionality of direct provision will be considered.

a. *C.A. & anor v Minister for Justice Equality and Law Reform and ors* [2014] IEHC 532

The applicants were residents of direct provision centres, awaiting determination on their status. The court was tasked with assessing the following three issues:

> a. Does 'direct provision', either in part or because of cumulative effect, breach the applicants' fundamental human rights?
>
> b. Is Article 15.2 of the Constitution breached because 'direct provision' is an administrative scheme without legislative basis (apart from the prohibitions on work and social welfare)?

> c. Is the weekly cash payment (adults €19.10 and children €9.50) known as the Direct Provision Allowance *ultra vires* the Social Welfare Consolidation Act 2005 or otherwise unlawful?[245]

The applicants were successful on a number of grounds. MacEochaidh J held that certain elements of the RIA's house rules were unlawful, notably: unannounced room inspections, monitoring of presence including the requirement to notify intended absence, and restrictions on guests entering the rooms of asylum seekers in direct provision. The court found these rules to be a disproportionate and unjustified interference with the applicants' right to private and family life, protected by Article 8 European Convention on Human Rights (ECHR). The court further held the complaints handling procedure to be deficient. MacEochaidh J held that the RIA could not act as an independent and impartial arbiter where it had existing contractual relations with the owners of the accommodation centre, and were also the author of the House Rules.

The applicants, however, were unsuccessful on a number of grounds. MacEochaidh J held that the Charter of Fundamental Rights of the European Union ('The Charter') was inapplicable in this case. As Ireland had opted out of the Reception Directive and its Recast, there was no application of European Law against which the Charter could be assessed. Furthermore, the court held that there was insufficient evidence to assess the constitutionality and conventionality of the length of the applicants stay in direct provision. In relation to socio-economic rights, MacEochaidh J accepted the respondents' argument that matters concerning public expenditure were outside the remit of the court. However, MachEochaidh J stated that:

> Nonetheless, where State action results in a breach of human rights and where the only remedy is the expenditure of additional money, the Court, in my opinion, must be entitled to make an appropriate order, even if the consequence is that the State must spend money to meet the terms of the order […] In my view in a situation where an applicant claims that 'direct provision' is having such adverse effects on her life as to cause harm and where such circumstances are backed up by appropriate medical and other independent evidence, a Court would be entitled to grant

[245] *C.A. & anor v Minister for Justice Equality and Law Reform and ors* [2014] IEHC 532 at para 6.

> appropriate relief, even if the only remedy for the wrong involved the expenditure of additional resources by the State.[246]

However, seemingly due to a lack of objective evidence, the applicants claim of a breach of their socio-economic rights was rejected. On the matter of the direct provision payment scheme, it was held that the applicant did not have legal standing to challenge the legality of the payment. Furthermore, MacEochaidh J stated that the proper place to make such a complaint and agitate for an increase was the political arena rather than the High Court.

Finally, the court rejected the argument that direct provision was a violation of article 15.2.1 of the Constitution and a breach of the separation of powers. The applicants had argued that for direct provision to be lawful, there must be "enabling legislation which would restrict the respondents to implementing principles and policies set down in statute."[247] MacEochaidh J accepted the respondent's contention that the executive was entitled to exercise its constitutional executive powers, independently from the legislature. Accordingly, where the executive is operating under its constitutional powers rather than delegated legislative power, precedent relating to the requirement for guiding legislative principles and policies does not apply. MacEochaidh J held that:

> the mere fact that 'direct provision' could have been placed on a legislative footing does not mean that this must happen. I am satisfied that the Government was entitled to establish and implement a system of 'direct provision' of material support for protection applicants without policy input or legislative input from the Oireachtas (with the exception of approval for expenditure)[248]

b. *N.V.H v Minister for Justice Equality and Law Reform and ors* [2017] IESC 35

[246] *C.A. & anor v Minister for Justice Equality and Law Reform and ors* [2014] IEHC 532 at para 12.6.
[247] *C.A. & anor v Minister for Justice Equality and Law Reform and ors* [2014] IEHC 532 at para 14.5.
[248] *C.A. & anor v Minister for Justice Equality and Law Reform and ors* [2014] IEHC 532 at para 14.25.

In a recent landmark decision, the Supreme Court held the absolute prohibition on asylum seekers entering employment to be unconstitutional. Delivering the unanimous majority judgement for the court, O'Donnell J held that section 9(4) of the Refugee Act 1996 was unconstitutional in its present form and allowed the legislature 6 months to rectify the unconstitutionality. Section 9(4), which was repealed by s.6 of the International Protection Act 2015 ('the 2015 Act'), prohibits asylums seekers from entering employment before a determination had been made on their status. S.16(3)(b) of the 2015 Act replicates the prohibition contained in s.9(4).

The case, N.V.H. v Minister for Justice Equality and Law Reform and ors,[249] was brought by a Burmese man who had spent over eight years in direct provision. The court, upholding the dissenting judgement of Hogan J in the High Court, held that the appellant was "entitled to rely on the unenumerated right to work protected by Article 40.3 of the Constitution."[250] After quickly dispensing with the appellants arguments under the European Convention on Human Rights and the Charter of Fundamental Rights of the European, the Supreme Court went on to consider the constitutionality of the provision. O'Donnell J held that

> the obligations to hold persons equal before the law "as human persons" means that non-citizens may rely on the constitutional rights, where those rights and questions are ones which relate to their status as human persons, but that differentiation may legitimately be made under article 40.1 having regard to the differences between citizens and non-citizens, if such differentiation is justified by that difference in status. In principle therefore I consider that a non-citizen, including an asylum seeker, may be entitled to invoke the unenumerated personal right including possibly the right to work which has been held guaranteed by article 40.3 if it can be established that to do otherwise would fail to hold such a person equal as a human person.[251]

The Court concurred with Hogan J in the High Court, that there was extensive precedent supporting the existence of an unenumerated right to work protected by article 40.3.[252]

[249] *N.V.H v Minister for Justice & Equality and ors* [2017] IESC 35.
[250] *N.V.H v Minister for Justice & Equality and ors* [2017] IESC 35 para 3.
[251] *N.V.H v Minister for Justice & Equality and ors* [2017] IESC 35 at para 11.
[252] *N.V.H v Minister for Justice & Equality and ors* [2017] IESC 35 at para 12: See; *Landers v. The Attorney General* (1975) 109 I.L.T.R. 1, *Murtagh Properties v. Cleary* [1972] I.R. 330, *Murphy v. Stewart* [1973] I.R. 97 and *Cafolla v. O'Malley* [1985] 1 I.R. 486.

O'Donnell J found that the right to work was deeply connected to the dignity and freedom of the individual, which is an aim of the Irish Constitution. O'Donnell J stated that the dicta of the UN Committee on Economic Social and Cultural Rights, which emphasised the importance of employment to the realization of human dignity, reflected the thinking of the Constitution's founders. This led to the conclusion that the freedom to seek and take up employment was a fundamental element of an individual's human personality and was accordingly guaranteed protection by article 40.1.

However, O'Donnell J held that although article 40.1 required individuals as human persons to be held equal before the law, this did not prohibit the legislature from making legitimate distinctions between citizens and non-citizens. This distinction was justified by the difference in connection to the labour market and economy between citizens and non-citizens. Secondly, the court acknowledged that the number of successful asylum applications is a relatively small proportion of those who apply for status. However, as there was no temporal limit on the determination process, s.9(4) essentially operated as an indefinite and absolute suspension of an asylum seeker's right to work. Such an absolute prohibition, it was held, caused "damage to the individual's self-worth, and sense of themselves, [which is] exactly the damage which the constitutional right seeks to guard against."[253] Accordingly, the Supreme Court held the absolute prohibition to be unconstitutional and a disproportionate interference with asylum seekers' right to work. At present, it remains to be seen what steps the legislature will take to amend the infringement.

[253] *N.V.H v Minister for Justice & Equality and ors* [2017] IESC 35 at para 20.

3.4 SECOND GENERATION RIGHTS PROTECTIONS IN EUROPEAN AND INTERNATIONAL LAW

Before moving to assess the system of direct provision in relation to the author's proposed rule of law, the second generation rights, which should be afforded to asylum seekers under European and international law, will be outlined in some depth. The sections are categorised by instrument. The author considers the application of these instruments in turn. Beginning with the human rights law in Europe, the author examines the rights applicable to asylum seekers in Ireland under European Union Law, the European Convention on Human Rights (ECHR), and the European Social Charter (ESC). The author then considers the application of international human rights law to asylum seekers in Ireland, focusing on the Refugee Convention and the International Covenant on Social, Economic and Cultural Rights (ICESCR).

i. European Human Rights Law

a. European Union Law

European Council Directive 2003/9/EC (27 January 2003) and the recast provide minimum standards for the reception of asylum seekers. However, Ireland is excused from participating in Title V of Part III of the Treaty on the Functioning of the European Union, which relates to the Common European Asylum System, by Protocol No.21 'On the Position of the United Kingdom and Ireland in Respect of the Area of Freedom, Security and Justice.' Acting under Article 3 and 4 of Protocol No.21 Ireland decided to 'opt out' of the Reception Conditions Directive and its Recast. According to Article 51 of the Charter of Fundamental Rights of the European Union, the Charter is only applicable when Member States are implementing EU law. Therefore, the Irish courts cannot make determinations on alleged violation of the Charter

unless the domestic laws in question are implementing European Union law.

b. The European Convention of Human Rights

The European Court of Human Rights (ECtHR) has indirectly recognised, through its jurisprudence, a right of migrants to a minimum standard of living within the European Convention on Human Rights (ECHR). This encompasses a number of social rights, including a right to adequate housing, health, education and work. The Court has also held that extreme poverty among vulnerable persons could amount to inhuman and degrading treatment. States which fail to address such extreme poverty could be found in breach of Article 3 ECHR. However, applicants face a high threshold when proving inhuman and degrading treatment.

In the seminal case of *M.S.S. v Belgium and Greece*,[254] the Court found a violation of Article 3. In this case the applicant, an Afghan national, was deprived of all essential and basic human needs. On arrival in Greece, he was detained in an overcrowded room with limited access to sanitation facilities, detainees lacked basic nutrition and slept on dirty mattresses, or the floor. After his release, the applicant became homeless and relied on charity to survive. He further alleged that he was beaten by police after attempting to leave Greece. Although the Court found the treatment of the applicant to amount to a violation of article 3, they reiterated the high threshold for finding such a breach:

> The Court has held on numerous occasions that to fall within the scope of Article 3 the ill-treatment must attain a minimum level of severity. The assessment of this minimum is relative; it depends on all the circumstances of the case, such as the duration of the treatment and its physical or mental effects and, in some instances, the sex, age and state of health of the victim.[255]

[254] *M.S.S. v. Belgium and Greece*, [GC] (January 2011) ECHR no. 30696/09.
[255] *M.S.S. v. Belgium and Greece*, [GC] (January 2011) ECHR no. 30696/09 at para 219.

This case was considered by the Irish Courts in *C.A and T.A v Minister for Justice Equality and Law Reform*, in which the applicant claimed that the conditions in direct provision centres amounted to a breach of Article 3.[256] MacEochaidh J found there was insufficient evidence to prove that life in direct provision amounted to inhuman and degrading treatment. Although the applicant's article 3 argument was unsuccessful in this case, the Court did not close the doors to future cases which exhibited more compelling and sufficient evidence.

However, the applicant successfully argued that the house rules in the direct provision centre amounted to a violation of Article 8. Article 8 states that, "everyone has the right to respect for his private and family life, [and] his home." Although Article 8 does not provide a right to be provided with housing,[257] it protects asylum-seekers housing rights by ensuring their home is respected.[258] The ECtHR stated in the case of *Buckley v. United Kingdom* that Article 8 "concerns rights of central importance to the individual's identity, self-determination, physical and moral integrity, maintenance of relationships with others and a settled and secure place in the community."[259] However, the ECtHR affords States a wide margin of appreciation when making determinations on alternative forms of accommodation, emphasising that an interference with an individual's rights may be justifiable under Article 8(2).[260] Applying the Convention in a domestic context, the Irish High Court in the case of *C.A and T.A v Minister for Justice Equality and Law Reform* found that unannounced room inspections violated the applicants Article 8 rights.

[256] *C.A. & anor v Minister for Justice Equality and Law Reform and ors* [2014] IEHC 532.
[257] *Chapman v. the United Kingdom* (GC) (18 January 2001) ECHR no.2738/95 at para 99 "it is important to recall that Article 8 does not in terms recognise a right to be provided with a home. Nor does any of the jurisprudence of the Court acknowledge such a right." and ECtHR, *Dogan & Ors v Turkey* (GC) (24 June 2004) ECHR no.8803-8811/02, 8813/02 and 8815-8819/02 at para 138-39.
[258] *Gillow v. the United Kingdom* (24 November 1986) ECHR Series A no.109 at para 55 the Court held that the applicant's right to respect for their home was "pertinent to their own personal security and well-being."
[259] *Buckley v United Kingdom* (25 September 1996) Reports of Judgements and Decisions 1996-IV
[260] *Chapman v. the United Kingdom* (GC) (18 January 2001) ECHR no.2738/95.

The Court has held that certain facets of the right to health are accorded protection under Article 2 and 3. The ECtHR confirmed that State's responsibility under article 2 and 3 is engaged when enacting health care policy. Accordingly, a state cannot put an individual's life at risk by denying them access to healthcare.[261] Additionally, the jurisprudence of the court has held that "insufficient funding for health treatment could raise an issue under Article 8 and the right to the respect of private and family life."[262] States also have an obligation to the protection of patient's lives through appropriate hospital regulations[263] and must guarantee a healthy environment under Article 2 and 8.[264] Although asylum seekers have access to free medical care, there is an argument that direct provision centres fail to guarantee a healthy living environment protected under Article 2 and 8.

Breen contends that the conditions in direct provision centres could amount to a violation of the ECHR, citing the overcrowded conditions and the increased risk of physical and mental illness amongst residents of such centres. Breen cites a consultant psychiatrist who stated that "the system of Direct Provision could do as much long-term damage to asylum seekers' mental health as the trauma from which they had fled."[265] Whilst recognising that the ECHR does not ensure an obligation to provide a home, Breen notes that "this lack of obligation cannot be interpreted as permitting the imposition of intolerable living conditions upon individuals."[266] This author is inclined to agree with Breen's determination. However, it should be noted that

[261] Yannis Ktiskakis, "Protecting Migrants under the European Convention on Human Rights and the European Social Charter" (February 2013) Council of Europe online: https://rm.coe.int/168007ff59 at 56. See *Cyprus v. Turkey* (GC) (10 May 2001) ECHR no. 25781/94 para 219; *Powell v. the United Kingdom* (4 May 2000) ECHR no. 45305/99; *Nitecki v. Poland* (21 March 2002) ECHR no. 65653/01.
[262] *Ktiskakis, supra* note 261 at 57. See *Sentges v. the Netherlands* (8 July 2003) ECHR no. 27677/02; ECtHR, *Pentiacova and Others v. Moldova* (4 January 2005) ECHR no. 14462/03.
[263] *Nitecki v. Poland* (21 March 2002) ECHR no. 65653/01; *Calvelli and Ciglio v. Italy* (GC) (17 January 2002) ECHR no. 32967/96 at para 49; Erikson v. Italy (26 October 1999) ECHR no. 37900/97.
[264] *López Ostra v. Spain* (9 December 1994) ECHR Series A no. 303-C at para 51-58; *Öneryildiz v. Turkey* (30 November 2004) ECHR no. 48939/99 at 71, 90, 94-96.
[265] Claire Breen, "The Policy of Direct Provision in Ireland: A Violation of Asylum Seekers' Right to an Adequate Standard of Housing" (2008) 20:4 International Journal of Refugee Law 611 at 624.
[266] *Ibid* at 625.

the ECtHR does not have the same restrictive hearsay requirements as the Irish courts, which proved to be an insurmountable barrier for the applicants in *C.A & T.A*.

c. The European Social Charter

The European Social Charter (revised) (ESCr) is a counterpart to the European Convention on Human Rights and guarantees fundamental socio-economic rights. Like most socio-economic rights instruments, the ESCr has limited enforcement mechanisms. The ESCr has two main supervisory mechanisms: the reporting procedure, and the collective complaints procedure. The European Committee on Social Rights (ECSR) monitors compliance with the ESCr. Unlike the ECtHR, the ECSR does not address individual complaints. However, collective complaints may be lodged by specific categories of organisations without having exhausted all domestic remedies and without a requirement of victimhood to obtain locus standi.[267] Though the ESCr is binding in nature, the decisions of the ECSR are merely declaratory and cannot be enforced in the domestic legal system[268]

Although the ESCr's scope is reduced by its limited enforcement mechanisms, the ECSR's decisions can influence a domestic court when interpreting a Member State's obligations under the ESCr. In a similar vein to the ECtHR and other domestic courts around the world, the ESCR has stated that socio-economic rights should be protected indirectly through the right to life. The ECSR, in the case of *International Federation of Human Rights Leagues v. France*[269] has stated that certain socio-economic rights are intrinsically linked to an individual's human

[267] Trinity FLAC, A Guide to the Revised European Social Charter (FLAC, Dublin: 2016) at 15.
[268] Council of Europe, "Collective Complaints Brochure (2013) online: http://www.coe.int/t/dghl/monitoring/socialcharter/Presentation/CollectiveComplaintsBrochure2013_en.pdf
[269] *International Federation of Human Rights Leagues v. France*, Complaint (3 November 2004) ECSR No. 14/2003, merits, 3 at para 30.

dignity and right to life. Therefore, those rights must be applied to all persons present on the territory of a contracting state.[270]

Article 16, 19.4 and 31 protect the right to housing. When providing housing, Member States are under an obligation to ensure equal treatment for vulnerable groups.[271] In particular, the ECSR has held that Article 31 guarantees a right to shelter for all migrants, regardless of their status.[272] For the purposes of Article 31(1), adequate housing means:

1. a dwelling which is safe from a sanitary and health point of view, ie, possesses all basic amenities, such as water, heating, waste disposal, sanitation facilities, electricity etc; and where specific dangers such as the presence of lead or asbestos are under control;
2. a dwelling which is not over-crowded, that the size of the dwelling must be suitable in light of the number of persons and the composition of the household in residence;
3. a dwelling with secure tenure supported by the law.[273]

Article 31(2) places an obligation upon Member States to provide emergency and longer-term housing, with a view to reducing and eliminating homelessness within the state. States must ensure that any accommodation, emergency or otherwise, affords the individual their human dignity and offers them the greatest attainable degree of autonomy and independence.[274] Ireland has, however, not yet ratified Article 31. Article 16, which ensures a right to housing of families, has been ratified but offers little protection to the majority of asylum seekers within the nation.

[270] *Ktiskakis, supra* note 261 at 48.
[271] ECSR, "Conclusion on Italy" (2003).
[272] *Defence for Children International (DCI) v. the Netherlands* (20 October 2009) ECSR No. 47/2008, merits at para 46-48. Note that when providing housing for undocumented migrants, States are not under the 'adequate housing standard' but the housing must "fulfil the demands for safety, health and hygiene, including basic amenities, i.e clean water, sufficient lighting and heating The basic requirements of temporary housing also include security of the immediate surroundings." at para 62. However, this refers to the temporary housing of undocumented migrants. It cannot be said that direct provision is temporary housing when the average stay is over 3 years in duration, therefore the limited right to privacy or family life allowed for temporary housing would not be permissible in situations such as direct provision. See also: *Ktiskakis, supra* note 261.
[273] *ERRC v Bulgaria* (18 October 2005) ECSR No. 31/2005, merits at para 34.
[274] *Trinity FLAC, supra* note 267 at 184.

Article 11 guarantees the right to protection of health. The ECSR has found that the right to health is "inextricably linked" to Articles 2 and 3 ECHR, [275] and a "prerequisite for the preservation of human dignity."[276] The right to health requires states to ensure the highest possible standard of health, which includes both physical and mental well-being.[277] States must not merely prevent avoidable risks to health, but must also ensure effective access to health care. Once again, the ECSR has held that, in protecting this right, there should be no distinction drawn between nationals and non-nationals.[278] In particular, states should ensure that disadvantaged groups have access to their rights.

Article 1 protects the right to work, in particular state's must act with a view to achieving full employment, ensure that individuals may earn their living in an occupation freely entered into, and to provide appropriate vocational training. However, Article 1 is limited in its scope. According to the appendices, the right to work is only extended to migrants lawfully resident and nationals of other contracting states,[279] or where an interference with the right would violate an individual's right to life or dignity.[280] Asylum seekers unable to satisfy these conditions may have a case under the prohibition against discrimination contained within Article E.[281]

[275] CSR 2008, interpretation of Article 11 ESC(r), p. 83.
[276] ECSR, *International Federation of Human Rights Leagues (FIDH) v. France*, op. cit. at para 31.
[277] *Ktiskakis, supra* note 261 at 55.
[278] ECSR, "Conclusions 2004", "General introduction" at 10.
[279] *Ktiskakis, supra* note 261 at 63.
[280] *COHRE v. Italy* (25 June 2010) ECSR No. 58/2009, merits at para 3; and *Ktiskakis, supra* note 261 at 63.
[281] *Ktiskakis, supra* note 261 at 64. However note that "the legitimate aims that can justify restrictions to the prohibition of discrimination and allow a difference in treatment between persons in comparable situations are listed un- der Article G of the ESC(r). These are "the protection of the rights and freedoms of others or for the protection of public interest, national security, public health, or morals", provided that the measures taken are proportionate and necessary in a democratic society. States may therefore legitimately restrict the right to work of non-nationals or certain categories of persons, such as asylum seekers, as long as this limitation is justiciable and not simply based on grounds of ethnicity, race, sex, etc."

ii. International Human Rights Law

a. The Refugee Convention

In practice, the Refugee Convention provides little protection for asylum seekers. Although states are obliged to assume all individuals claiming asylum are refugees until a contrary determination is made, in practice states have not afforded the same rights protections to those awaiting determination as to recognised refugees. As outlined early in this case study, Ireland has found innovative ways to exempt asylum seekers from their entitlements under the Refugee Convention. The choice of the Irish government to deny asylum seekers from qualifying as 'habitually resident' has capitalised on the use of the wording "lawfully resident" within the convention. However, under the convention, refugees are entitled to a number of second generation rights including:

1. Employment (Article 17, 18 &19): Article 17 of the convention provides that states "shall accord to refuges lawfully staying in their territory the most favourable treatment accorded to nationals of a foreign country in the same circumstances." Although the Convention recognises the need for restrictive measures on aliens to protect the market, these restrictions should not be applicable to those who have completed three years' residence in the country.
2. Housing (Article 21): Refugees must be treated as favourably as possible in housing matters, where housing is regulated and controlled by the public authorities.
3. Education (Article 22): States must extend to refugees the same elementary educational opportunities as nationals.
4. Public Relief (Article 23): States are required to extend to refugees the same treatment with respect to public relief and assistance as is accorded to their nationals.

It should also be noted, that the Convention does, however, emphasise that the rights and duties recognised within have been supplemented by international human rights law, and are underpinned by the fundamental principles of non-discrimination, non-penalization and non-refoulement.[282]

b. The International Covenant on Economic, Social and Cultural Rights

The Vienna Declaration and Programme of Action 1993 confirmed that "all human rights are universal, indivisible and interdependent and interrelated."[283] The universality of human rights law, although theoretically contestable, supports the contention that certain rights inhere in individuals regardless of their status. Therefore, asylum seekers regardless of their nationality or location have naturally occurring rights, which they carry with them, and which must be protected by their host nation. This universality is further protected within the various human rights instruments by certain foundational principles, including the non-discrimination principle, which prohibits discrimination between citizens and non-citizens. Although, in dualist systems such as Ireland, international treaties are not directly justiciable before the national courts without implementing legislation, the parties to these treaties have made a binding commitment to uphold the obligations contained therein.[284]

The International Covenant on Economic Social and Cultural Rights (ICESCR) operates "without discrimination of any kind as to race, colour, religion, political or other opinion, national or social origin, property birth or other status."[285] The rights contained within the

[282] The Refugee Convention, 28 July 1951, 189 UNTS at 137 (entered into force 22 April 1954) at Preamble.
[283] UN General Assembly, *Vienna Declaration and Programme of Action* (12 July 1993) A/CONF.157/123.
[284] Liam Thornton "The Rights Of Others: Asylum Seekers and Direct Provision in Ireland" (2014) 3:2 Irish Community Development Law Journal 22 at 34.
[285] Article 2(2) *International Covenant on Economic, Social, and Cultural Rights*, 16 December 1966, UNTS vol. 993 at 3 (entered into force 3 January 1976).

ICESCR inhere in "everyone,"[286] with some exceptions made for developing nations. Where states do make limitations, under Article 4 ICESCR states may only makes such limitations that "are determined by law only in so far as this may be compatible with the nature of these rights and solely for the purpose of promoting the general welfare in a democratic society."

The ICESCR envisages the progressive realization of the rights contained within, to the maximum of a nation's available resources. Reference to progressive realisation in Article 2(1) of the Covenant restricts states from taking retrogressive actions that would diminishing the rights protections already afforded to individuals under their own national laws. Cholowenski, quoting the Committee notes that:

> deliberately retrogressive measures, such as, for example, the reduction of social assistance payments to asylum seekers and refugees, or a move away from cash support to support in kind, would need to be fully justified by reference to the totality of the rights provided for in the Covenant and in the context of the full use of the maximum available resources.[287]

Furthermore, the Committee has confirmed that states are under a duty to take immediate steps to secure the core content of the rights contained within the ICESCR.[288] These rights include: the right to work (article 7); the right to an adequate standard of living, including food, water, clothing and housing, and to continuous improvement of living conditions (article 11); the right of everyone to the enjoyment of the highest attainable standard of physical and mental health (article 12), and; the right to primary education (article 13). Notably, article 13 also states that "higher education shall be made *equally accessible to all*, on the basis of capacity, by every appropriate means, and in particular by the progressive introduction of free education"

[286] Article 7, 8, 9, 11, 12, 13, 15 *International Covenant on Economic, Social, and Cultural Rights*, 16 December 1966, UNTS vol. 993 at 3 (entered into force 3 January 1976).
[287] *Cholewinski, supra* note 87.
[288] *Ibid.*

(emphasis added). These rights are also reflected in the Universal Declaration on Human Rights,[289] which contains the same non-discrimination clause.

In March of this year, the Committee adopted a statement on the "Duties of States towards refugees and migrants under the International Covenant on Economic, Social and Cultural Rights." The Committee states that all obligations and duties under the convention extend "to all people under the effective control of the State, without exception."[290] The statement reiterates the Committee's stance in General Comment No.20, which states that "differences of treatment in the enjoyment of socio-economic rights may be justified where these differences are *reasonable, objective and proportionate.*"[291] Furthermore, any differential treatment must be made "in accordance with the law, pursue a legitimate aim and remain proportionate to the aim pursued."[292] The Committee goes on to state that in accordance with General Comment No.20 (2009) "a lack of available resources cannot be considered as an objective and reasonable justification for difference in treatment unless every effort has been made to use all resources that are at the State party's disposition in an effort to address and eliminate the discrimination, as a matter of priority."[293] Therefore asylum seekers must enjoy equal access to non-contributory social security schemes, health care and employment.[294]

The committee takes a strong stance on the permissible forms of derogation from the non-discrimination principle, emphasising that the only permissible derogation from the non-discrimination principle under the Convention applied to "developing countries and it only

[289] see articles 22, 23, 25 & 26 *Universal Declaration on Human Rights*, 10 December 1948, 217 A (III).
[290] Committee on Economic, Social and Cultural Rights, "Duties of States towards Refugees and Migrants under the International Covenant on Economic, Social and Cultural Rights" (13 March 2017) E/C. 12/2017/1 at para 9.
[291] General Comment No.20, ICESCR, Non-Discrimination in economic, Social and Cultural Rights (Art.2(2)), UN Doc. E/C 12GC/20 (2 July 2009), para 13.
[292] Committee on Economic, Social and Cultural Rights, "Duties of States towards Refugees and Migrants under the International Covenant on Economic, Social and Cultural Rights" (13 March 2017) E/C. 12/2017/1 at para 5.
[293] Committee on Economic, Social and Cultural Rights, "Duties of States towards Refugees and Migrants under the International Covenant on Economic, Social and Cultural Rights" (13 March 2017) E/C. 12/2017/1 para 5 and General Comment No.20, ICESCR, Non-Discrimination in economic, Social and Cultural Rights (Art.2(2)), UN Doc. E/C 12GC/20 (2 July 2009) at para 13.
[294] Concluding Observations, ICESCR, Germany, UN Doc. E/C.12/DEU/CO/5 at para. 13 (20 May 2011)

concerns economic rights, in particular access to employment."[295] Even in instances of unexpected and unprecedented migration flows the Convention remains non-derogable as per the Committee's 2001 statement on poverty (E/C.12/2001/10).[296] Furthermore, the committee states that it has "made it clear that protection from discrimination cannot be made conditional upon an individual having a regular status in the host country."[297] Those asylum seekers, whose application is pending, should be given temporary status such that they may access, employment, social housing, education, and health care.[298]

Thornton questions whether the differential treatment by Ireland of asylum seekers based on their status could be justified as reasonable, objective and proportionate.[299] Given the Committee's comments on the potential harm caused to asylum seekers by restrictive reception conditions, it seems unlikely that Ireland would be found to have acted reasonably, objectively and proportionately when introducing direct provision.[300] In Thornton's own words, "the inability of human rights instruments to fully pierce the veil of State sovereignty within the field of socio-economic rights continues to have a profound effect for those seeking asylum."[301] Furthermore, the retrogressive actions taken by the state when enacting direct provision, do not appear to satisfy the strict and explicit restrictions against such actions.

In relation to access to employment and education the Committee emphasises the requirements for difference in treatment to be in accordance with those set out within the statement, and

[295] Committee on Economic, Social and Cultural Rights, "Duties of States towards Refugees and Migrants under the International Covenant on Economic, Social and Cultural Rights" (13 March 2017) E/C. 12/2017/1 at para 8
[296] *Ibid* at para 10.
[297] *Ibid* at para 6.
[298] *Ibid* at para 11 they go so far as to say the current situation cannot be tolerated.
[299] *Thornton, supra* note 284 at 13.
[300] *Ibid*. Thorton notes that: "social security systems should not infringe on the right to an adequate standard of living for immigrants, including asylum seekers, and has raised concerns about the living conditions of asylums seekers in reception centres, and their exposure to racial discrimination." See further: Concluding Observations, ICESCR, Australia, UN Doc. E/2001/22 (2000) 66 at para. 397 and Concluding Observations, ICESCR, Switzerland, UN Doc. E/C.12/CHE/CO/2-3 (26 November 2010) at para. 18; Concluding Observations, ICESCR, The Netherlands, UN Doc. E/1999/22 (1998) 37 at para. 184; Concluding Observations, ICESCR, Spain, UN Doc. E./1997/2 (1996) 27 at para. 104.
[301] *Thornton, supra* note 284 at 14.

notes that education and employment are "important channels for integration," which will "reduce the dependence of refugees or migrants on public support or private charity."[302] The Committee further noted that asylum seekers with access to employment are more capable of contributing to the domestic economy, in the alternative asylum seekers remain reliant on the support of the State through social welfare.[303] The reference to "everyone" in article 6(1), guaranteeing the right to work, ensures that this right applies equally to citizens and non-citizens. Choloweski states that although there is some leeway within the convention to draw distinctions between citizens and non-citizens in order to protect the labour market for citizens, "such discrimination is less justifiable in developed countries, particularly as only developing nations have been expressly permitted by the ICESCR to limit the economic rights of non-nationals."[304] It should be noted that Ireland has not submitted any reservations relating to article 6 that reflects its discriminatory policies towards asylum seekers, unlike the United Kingdom and France who have made explicit reference in their reservations to reserving the right to make distinctions between nationals and aliens under article 6.[305]

Speaking on the right to housing, the Committee found that migrants were repeatedly housed in "substandard conditions" which were often located in "geographically segregated areas."[306]

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[302] Committee on Economic, Social and Cultural Rights, "Duties of States towards Refugees and Migrants under the International Covenant on Economic, Social and Cultural Rights" (13 March 2017) E/C. 12/2017/1 at para 6.
[303] Committee on Economic, Social and Cultural Rights, "Duties of States towards Refugees and Migrants under the International Covenant on Economic, Social and Cultural Rights" (13 March 2017) E/C. 12/2017/1 at para 8.
[304] *Cholewinski, supra* note 87 at 729.
[305] https://treaties.un.org/pages/viewdetails.aspx?chapter=4&lang=en&mtdsg_no=iv-3&src=treaty#EndDec France: Declarations (2): "The Government of the Republic declares that articles 6, 9, 11 and 13 are not to be interpreted as derogating from provisions governing the access of aliens to employment or as establishing residence requirements for the allocation of certain social benefits." United Kingdom: "The Government of the United Kingdom reserve the right to interpret article 6 as not precluding the imposition of restrictions, based on place of birth or residence qualifications, on the taking of employment in any particular region or territory for the purpose of safeguarding the employment opportunities of workers in that region or territory."
[306] Committee on Economic, Social and Cultural Rights, "Duties of States towards Refugees and Migrants under the International Covenant on Economic, Social and Cultural Rights" (13 March 2017) E/C. 12/2017/1 at para 14 – The Committee referred to Committee on the Elimination of Racial Discrimination's general recommendation No. 30 (2003) on discrimination against non-citizens, which urged States parties to "remove obstacles that prevent the enjoyment of economic, social and cultural rights by by non-citizens, notably in ... housing" (para. 29) and to "guarantee the equal enjoyment of the right to adequate housing for citizens and non-citizens, especially by avoiding segregation in housing and ensuring that housing agencies refrain from engaging in discriminatory practices" (para. 32) at para 14.

General Comment No.4 states that this right must be broadly construed and ensure that everyone, "regardless of age, economic status, group or other affiliation or status and other such factors" has "the right to live somewhere in security, peace and dignity."[307] In their concluding observation on Belgium, the Committee stated that governments must "ensure that persons belonging to ethnic minorities, refugees and asylum seekers are fully protected from any acts or laws which in any way result in discriminatory treatment within the housing sector."[308]

In the Committee's most recent report on Ireland, the treatment of asylum seekers was included in the Committee's principle subjects of concern. The Committee noted, with concern, that the system of direct provision failed to meet the minimum core obligations of the State under the convention. It appears that the Committee was eager for Ireland to introduce the 2015 Act, which would create a single determination procedure, considerably reducing the amount of time it would take for an applicant to receive a determination on their status. Although it was believed that the Bill would reform the direct provision system, any reference to reception conditions was left out of the final draft. The Bill is now in place, and although it is a welcome improvement, it fails to address reception conditions.

3.5 ASSESSMENT OF DIRECT PROVISION

Geoffrey Shannon, the Special Rapporteur for Child Protection, described the system of direct provision as "institutionalised poverty."[309] This statement goes to the very root of the problem;

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[307] General Comment 4, The right to adequate housing (Art. 11(1) of the Covenant), U.N. ESCOR, 6th Sess., U.N. Doc. E/1992/23 (1991).
[308] Concluding Observations of the Committee on Economic, Social and Cultural Rights: Belgium, U.N. ESCOR, 10th Sess., 27th mtg. at para. 14, U.N. Doc. E/C.12/1994/7 (1994).
[309] *Irish Refugee Council, supra* note 175 at 21. For more on the rights of children in Direct Provision see; Samantha Arnold, *State Sanctioned Child Poverty and Exclusion: The Case of Children in State Accommodation for Asylum Seekers* (Irish Refugee Council, 2012); Liam Thornton "Direct Provision and the Rights of the Child in Ireland (2014) 76:3 Irish Journal of Family Law 68; Bryan Fanning & Angela Veale,

institutions are not necessarily capable of doing good in all circumstances. Although Ireland displays an institutional framework which is undoubtedly committed to the rule of law, the realised actuality which goes beyond this framework paints a disturbing picture. The presence of an independent judiciary, a strong commitment to the separation of powers, and democracy, alongside a constitutionally protected equality guarantee, has provided little comfort to the thousands of asylum seekers awaiting determination on their status.

This case study highlights that, although institutions provide a foundation upon which human freedoms may be supported and advanced, the mere presence of so-called "perfect institutions" is not a reliable indication of the actual presence of the rule of law. For this reason, the author follows Sen's accomplishment based theory of justice, by advocating for an accomplishment based theory of rule of law. Rule of law reform has consistently taken a transcendental institutionalist approach, aimed at getting institutions 'right.' Indeed, this approach has supported many damaging projects which transplanted Western institutions into societies in wholly incompatible and unsustainable ways. Furthermore, it has supported developed nations in their ignorance towards the plight of marginalised groups within their own societies. The issue is that rather than changing the method of assessment, the approach has been to reform, once again, those failing institutions.

The following sub-sections consider the author's proposed additions to the rule of law in relation to the system of direct provision.

"Child Poverty as Public Policy: Direct Provision and Asylum Seeker Children in the Republic of Ireland" (2004) 10:3 Child Care Pract 241.

i. Open impartiality and plurality of reasons

The concept of 'open impartiality' is achieved by considering a plurality of voices that are external to the decision-makers positionality. By going beyond their objective positionality, the decision-maker can make a decision that may withstand trans-positional scrutiny. Direct provision cannot withstand such trans-positional scrutiny. The human rights guarantees which exist beyond Ireland's sovereign borders have played a limited, almost negligible role in both legal and political reasoning. The exclusion of external voices has perpetuated the parochialism that allowed the system of direct provision to come into existence in the first place.

Furthermore, 'closed impartiality' has acted as a legitimating tool for decision-makers, allowing the continued justification of direct provision as a sovereign act necessary to maintain peace and security within Ireland's territorial boundaries. This approach ignores the significant global repercussions of such hostile asylum procedures, particularly in the middle of a refugee crisis which has witnessed thousands of lives lost in the pursuit of refuge. 'Closed impartiality' has also allowed the judiciary to ignore an extensive human rights rhetoric which is active beyond Ireland's borders. As Sen notes, in his theory of justice, if decision makers do not overcome their positionality, they will only aid in entrenching injustices further into the core of their society.

ii. Deliberative democracy

Open public discussion was an integral ingredient of democracy in many ancient civilisations.[310] However, somewhere along the way this discursive element of democracy was lost, with electoral participation becoming the lowest common denominator amongst

[310] *Sen, supra* note 131 at 329.

democracies around the world. Although, it is generally agreed that democracy is the best we've got, by institutional design, contemporary 'ballot-box' democracy is an inefficient form of governance, as it solely perpetuates the interests of the majority. This has prompted a significant attempt by scholars to adapt democracy to represent the interests of the marginalised and disenfranchised. For Sen, this adaptation is termed 'government by discussion,' more colloquially known as 'deliberative democracy.' This practice of 'government by discussion' is intrinsically linked to the above principles of 'open impartiality' and plurality. Essentially, under this form of democracy, public balloting is supported by political participation, dialogue and public interaction. Dialogue includes not merely interaction between the government and the public, but the presence of a constructive dialogue between the separate arms of government.

One of Ireland's foremost scholars on public interest law, Gerry Whyte, has long been an advocate for the use of deliberative democracy as a bridge between marginalised and majority interests. He argues that where the government is guilty of the egregious neglect of minority rights, the judiciary may provide a platform for discussion between marginalised groups and the political system.[311] Whyte adopts a view similar to Sen's, which notes that if there exists a number of incommensurable ideals within a given society, then fairness can only be achieved by considering all sectional interests before coming to the best available solution, even if that is a partial solution. Furthermore, Whyte notes that "the promotion of this type of democratic politics will be impeded if the courts eschew any role in reviewing the failure of the other branches of government, especially the executive, to protect adequately the needs of groups traditionally ignored by the political process."[312] Therefore, a strong judicial role in amplifying marginalised voices within the political arena is an integral element of deliberative democracy,

[311] Gerry Whyte, "The Role of the Supreme Court in Our Democracy: A Response to Mr Justice Hardiman" (2006) 23 DULJ 1 at 14.
[312] *Ibid* at 14.

and any such act would be inherently democratic as a result. Indeed these desires are supported by the Irish President, Michael D. Higgins, who stated that:

> I think those who wanted Ireland to be independent would have envisaged a country in which there would be far greater distribution of power, that it would not be confined solely to the exercise of parliamentary democracy.[313]

The chief executive of the Irish Refugee Council argued that systematically excluding a group from participating in society was one of the core ingredients of poverty, a concept which went beyond merely the deprivation or lowliness of income.[314] Nussbaum further notes that, virtually all modern democracies recognise judicial review as an essential form of democratic deliberation.[315] However, in the case of *C.A and T.A v Minister for Justice Equality and Law Reform,* MacEochaifh J specifically stated that the political arena and not the courts was the proper forum to agitate for socio-economic rights protections which involve an issue of public expenditure. In denying the plaintiff a platform for their voice, the judiciary are violating the discursive function of democracy, which this author argues is a central tenet of the rule of law.

However, it is not simply the responsibility of the judiciary to ensure a climate of open discussion resonates throughout democratic institutions. The political arms and the media, alongside the public in general each have a special function in promoting government by discussion. A free and independent media has four main roles in deliberative democracy: direct contribution to free speech; an informational role in disseminating knowledge and allowing critical scrutiny; a protective function in giving a voice to the neglected and the disadvantaged, and; contributing indirectly to the informed and unregimented formation of values in society.[316] Therefore, the media does not simply have a role independent from government, it is a part of a complex network that combines to create a functioning deliberative democracy. The integrity

[313] cited by: *O'Reilly, supra* note 170 at 136.
[314] *Ibid* at 134.
[315] *Nussbaum, supra* note 57 at 75.
[316] *Sen, supra* note 131 at 335-337.

of the media is, therefore, central to ensuring effective public reasoning, which in turn feeds into both judicial and political reasoning, if 'open impartiality' is embraced. The biased information provided by the media during the immigration crisis is representative of the damage that may be inflicted by the partisan portrayal of disenfranchised individuals. For these individuals, the media plays a crucial role in amplifying their voice so it may be heard within the political arena, from which they are removed.

Finally, Sen notes, in his theory of justice, that deliberative democracy can only work where there is a climate of mutual tolerance.[317] There must exist space for public reasoning on different points of view. In order for a democracy to be truly deliberative, politically engaged citizens must be open to advocating on behalf of the disenfranchised. As Sen notes, powerfully:

> The success of democracy is not merely a matter of having the most perfect institutional environment that we can think of. It depends inescapably on our actual behaviour patterns and the working of political and social interactions. There is no chance of resting the matter in the 'safe' hands of purely institutional virtuosity. The working of democratic institutions, like that of all other institutions depends on the activities of human agents in utilizing opportunities for reasonable realisation.[318]

Speaking on direct provision, Thornton expressed a similar sentiment, stating that:

> The solution to [direct provision] lies neither in law nor in strategic litigation. While these are important in achieving broader aims and seeking to use law to promote human rights; only a fundamental re-evaluation of society's approach to asylum seekers in Ireland will result in the recognition of, what Ardent terms the right to have rights.[319]

Concurring with both Sen and Thornton, the author's 'augmented rule of law' envisages a greater societal role in perpetuating an inclusive dialogue around rights. Therefore, each individual has a responsibility to engage in open public discussion, in looking beyond their positional objectivity and including all voices. With the addition of this element to the rule of law, it is clear that rule of law reform extends beyond the institutional framework to

[317] *Ibid* at 333.
[318] *Ibid* at 354.
[319] *Thornton, supra* note 284 at 27.

incorporate the totality of a nation's population. Further, each individual is entitled to participate based on the enlightenment potential of their participation above their membership entitlement. The judiciary, the media, the people and their political representation must all strive towards a more inclusive democracy, if the rule of law is to be satisfied. It is clear from the realised actuality of asylum seekers that this form of justice, democracy, development and now rule of law has failed to be achieved in Irish society.

iii. Second generation rights

Sen thoroughly rejects the 'legally parasitic' view of human rights, which considers rights legitimacy as contingent on legislative authority. Conversely, rights are ethical tenets which gain legitimacy through open public reasoning. Once a right can be said to withstand open and informed scrutiny, it becomes a valid and authoritative articulation of social ethics. Therefore, rights protection is intrinsically linked to 'open impartiality' and 'government by reasoning.' Those with the authority to make judgements or rulings over rights must consider that the foundation of these rights may lie outside a legislative framework. If rights gain their legitimacy from being capable of withstanding open scrutiny, it appears that rights may emanate from a multitude of sources, including international fora and the social sphere.

In recent years, the rule of law has sought to include rights, however such rhetoric has focused predominantly on legal rights, be they constitutional or legislative. Furthermore, a strong distinction has been drawn between first and second generation rights, mirroring the constitutional order of most nations. As the author has utilized Sen's reasoning to dissolve this arbitrary distinction in rule of law reform, it appears that not only must the guardians of rights look beyond their positional objectivity and a legislative framework for rights existence, they must also consider both first and second generation rights. It is clear from the case law on direct

provision that the Irish judiciary, the constitutionally declared guardian of rights, has chosen to do neither.

Although the case of *N.V.H v Minister for Justice Equality and Law Reform* was a substantial victory for asylum seekers, it reaffirmed the court's unwillingness to look beyond the explicit rights within the constitution. This is problematic in the proposed rule of law paradigm. If the courts are obliged to engage in 'open impartiality' and look beyond their borders to consider a plurality of voices, the staunch adherence to sovereign pronunciations of human rights, undermines these core tenets. The extensive jurisprudence, comments and scholarly writings on human rights emanating from the European and international sphere highlight that there are certain human rights which have withstood the test of open scrutiny. Indeed, these rights are enshrined in the legislative framework of key international organisations, of which Ireland is a member.

However, parochialism has a strong hold on the Irish judiciary who are hesitant to engage in an alternative form of judicial reasoning that will release them from the 'legally parasitic' approach. It is submitted that the current rule of law paradigm which exists, not only in Ireland, but all nations is insufficient to protect human capabilities. The presence of an independent judiciary, alongside first generation rights protections, has offered minimal protection to marginalised individuals, as evidenced by this case study. However, were nations to adopt the proposed rule of law, it could have transformative potential not only for marginalised groups, but society as a whole.

CHAPTER 4 – CONCLUSION AND RECOMMENDATIONS

This thesis has reconstructed the rule of law in line with the recent changes in law and development doctrine. The author began her investigation by outlining the relationship between law and development, noting the dramatic change in this dynamic relationship over the past two decades. Since the turn of the century, the development project has de-emphasised the role of the economy. In its stead, the removal of un-freedoms and the enhancement of human capabilities became the principle means and ends of development. While economic growth remains a key objective of development, it is now augmented by equally vital social and cultural determinants. This approach has injected a measure of pluralism into the development project, requiring each nation to tackle persistent inequality within their own societies, in a way that reflects their economic, social, and cultural needs.

However, with pluralism has come indeterminacy, with many scholars contending that pluralism has left reform projects void of grounding principles. For many, the institutional reforms which have been rolled out since the third movement have been insufficient to combat the suffering of marginalised groups. In many regards, reforms remain embedded in the market fundamentalism of the second movement. Due to this disconnect between rhetoric and reality, there has been a call to rethink the relationship between law and development, and align law reform with the 21st century development program. In order to do this, central tenets which underpin law reform projects must be reconceived in line with third movement ideals. This thesis considered, perhaps the most central of those tenets, the rule of law.

Although a unanimously endorsed concept, the rule of law, has been moulded and manipulated to suit the occasion. While nearly all states claim to abide by the rule of law as they conceive it, this has provided little comfort to the many individuals who continue to face persistent inequality and deprivation on a daily basis. The current rule of law paradigm is insufficient to

combat global poverty. Both the formal and substantive conceptions of the rule of law, to differing degrees, neglect the disenfranchised and marginalised, and fail to satisfy the foundational concept of the third movement; the removal of un-freedoms. In order to formulate a rule of law, which provides respite for those on the fringes, the author conducted an in-depth analysis of Amartya Sen's seminal texts on development and justice. From these texts, the author drew three principles: open impartiality, deliberative democracy, and second generation rights. The incorporation of these three principles into the rule of law, augments the current paradigm in its broadest conceptions. By injecting open impartiality, deliberative democracy and second generation rights into the rule of law, the author submits that the rule of law may now act as a platform for the marginalised and disenfranchised.

The concept of open impartiality requires decision makers to go beyond their positionality and consider a plurality of voices which enlighten the debate. Decision makers must now consider whether their judgements can withstand trans-positional scrutiny, scrutiny from within their borders and without. The incorporation of deliberative democracy, requires greater participation by all members of society. The author submits that this requires the active engagement of government with marginalised individuals, not merely the separate arms of government, but also the media and civil society. Finally, the inclusion of second generation rights is intrinsically linked to the first two principles, rights gain their legitimacy through public scrutiny and open debate. Where rights have withstood trans-positional scrutiny, they become legitimate ethical tenets, which may be used in public, judicial and political reasoning.

The author considered the practical application of her theory through a case study on the reception services of asylum seekers in Ireland. The case of direct provision provided a poignant and compelling example of the continued failure of institutional reforms for marginalised groups. Asylum seekers in direct provision are deprived of their basic human rights, their voices are silenced in the political arena, and legal avenues have provided little

relief. Through an assessment of the system the author concludes that marginalised groups would benefit significantly from the incorporation of her proposed elements into the rule of law.

As a result of this conclusion the author recommends that the rule of law include the following principles: open impartiality, deliberative democracy, and second generation rights. The inclusion of these principles will realign rule of law reform with the third movement's vision of development as freedom. In particular, these principles correspond with both the need for guiding principles whilst allowing room for pluralism within the application of the rule of law. Finally, the author recommends that an accomplishment based assessment should be used to measure rule of law reform projects, rather than the traditional evaluation method that focuses on institutional form.

BIBLIOGRAPHY

Jurisprudence

Irish jurisprudence

C.A. & anor v Minister for Justice Equality and Law Reform and ors [2014] IEHC 532.

Cafolla v. O'Malley [1985] 1 I.R. 486.

Kinsella v Governor of Mountjoy [2011] IEHC 235.

Landers v. The Attorney General (1975) 109 I.L.T.R. 1.

Murphy v. Stewart [1973] I.R. 97.

Murtagh Properties v. Cleary [1972] I.R. 330.

N.V.H v Minister for Justice & Equality and ors [2017] IESC 35.

OT v B [1998] 2 IR 321.

Ryan v Attorney General [1965] IR 294.

Sinnott v. Minister for Education, High Court, 4 October 2000; Supreme Court, 12 July 2001; [2001] 2 IR 545.

T.D. v. Minister for Education, High Court, 25 February 2000; [2000] 3 IR 62; [2000] 2 ILRM 321; Supreme Court, 17 December 2001; [2001] 4 IR 259.

European Jurisprudence

Buckley v United Kingdom (25 September 1996) Reports of Judgements and Decisions 1996-IV.

Calvelli and Ciglio v. Italy (17 January 2002) ECHR no. 32967/96 (GC).

Chapman v. the United Kingdom (18 January 2001) ECHR no.2738/95 (GC).

COHRE v. Italy (25 June 2010) ECSR No. 58/2009, merits.

Cyprus v. Turkey (10 May 2001) ECHR no. 25781/94 (GC).

Defence for Children International (DCI) v. the Netherlands (20 October 2009) ECSR No. 47/2008.

Dogan &Ors v Turkey (24 June 2004) ECHR no.8803-8811/02, 8813/02 and 8815-8819/02 (GC).

Erikson v. Italy (26 October 1999) ECHR no. 37900/97.

ERRC v Bulgaria (18 October 2005) ECSR No. 31/2005, merits at para 34.

Gillow v. the United Kingdom (24 November 1986) ECHR Series A no.109.

International Federation of Human Rights Leagues v. France, Complaint (3 November 2004) ECSR No. 14/2003, merits, 3.

López Ostra v. Spain (9 December 1994) ECHR Series A no. 303-C.

M.S.S. v. Belgium and Greece (January 2011) ECHR no. 30696/09 (GC).

Nitecki v. Poland (21 March 2002) ECHR no. 65653/01.

Öneryildiz v. Turkey (30 November 2004) ECHR no. 48939/99.

Pentiacova and Others v. Moldova (4 January 2005) ECHR no. 14462/03.

Powell v. the United Kingdom (4 May 2000) ECHR no. 45305/99.

Sentges v. the Netherlands (8 July 2003) ECHR no. 27677/02.

Legislation and Treaties

Social Welfare (Consolidation) Act 1993.

European Council Directive 2003/9/EC (27 January 2003), *Laying Down Minimum Standards for the Reception of Asylum Seekers in Member States.*

International Covenant on Civil and Political Rights, 16 December 1966, UNTS vol. 999 at 171 (entered into force on 23 March 1976).

International Covenant on Economic, Social, and Cultural Rights, 16 December 1966, UNTS vol. 993 at 3 (entered into force 3 January 1976).

European Convention for the Protection of Human Rights and Fundamental Freedoms, *as amended by Protocols Nos. 11 and 14*, November 1950, ETS 5 (entered into force on 3 September 1953).

European Social Charter (Revised), 3 May 1996, ETS 163 (entered into force on 1 July 1999).

Charter of Fundamental Rights of the European Union, 26 October 2012, 2012/C 326/02 (entered into force immediately by virtue of the Treaty of Lisbon).

Refugee Convention, 28 July 1951, 189 UNTS at 137 (entered into force 22 April 1954).

Consolidated version of the Treaty on the Functioning of the European Union, 13 December 2007, 2008/C 115/01 (entered into force on 1 December 2009).

Universal Declaration on Human Rights, 10 December 1948, 217 A (III).

Secondary Materials

Books

Acemoglu, Daron & Robinson, James A. *Why Nations Fail: The Origins Of Power, Prosperity, and Poverty* (New York: Crown Business, 2012).

Allan, Trevor R.S. *Law, Liberty and Justice: The Legal Foundations of British Constitutionalism* (Oxford: Clarendon Press, 1993).

Aristotle. *The Nicomachean Ethics* (Oxford; New York: Oxford University Press, 1984).

Aristotle. *Politics* edited by Stephen Everson (Cambridge: Cambridge University Press, 1998).

Carothers, Thomas. *Promoting the Rule of Law Abroad: In Search of Knowledge* (Washington, D.C.: Carnegie Endowment for International Peace, 2006).

Dicey, Albert V. *An Introduction to the Study of the Law of the Constitution* (London; New York: MacMillan, 1893).

Dicey, Albert V. *The Law of the Constitution* (Oxford: Oxford University Press, 2013).

Dworkin, Ronald. *A Matter of Principle* (Cambridge, Massachusetts: Harvard University Press, 1985).

Dworkin, Ronald. *Law's Empire* (Oxford: Hart Publishing, 1986).

Eade, Deborah. *Development and Rights: Selected Essays from Development in Practice* (Oxford: Oxfam GB, 1998).

Faúndez, Julio. *Law and Development: Critical Concepts in Law* (London: Routledge, 2012).

Fuller, Lon L. *The Morality of Law* (New Haven: Yale University Press, 1977).

Goodwin-Gill, Guy S. & McAdam, Jane. *The Refugee in International Law* (Oxford: Oxford University Press, 2007).

Hatchard, John; Perry-Kessaris, Amanda & Slinn, Peter. *Law and Development: Facing Complexity in the 21st Century* (London: Cavendish, 2003).

Klein, Naomi. *The Shock Doctrine: The Rise of Disaster Capitalism* (Toronto: Vintage Canada, 2008).

Kneebone, Susan. *Refugees, Asylum Seekers and the Rule of Law: Comparative Perspectives* (Cambridge: Cambridge University Press, 2009).

North, Douglass. *Institutions, Institutional Change and Economic Performanc*e (Cambridge: Cambridge University Press, 1990).

Raz, Joseph, *The Authority of Law: Essays on Law and Morality* (Oxford: Oxford University Press, 2009).

Sen, Amartya. *Development as Freedom* (New York: Anchor Books, 2000).

Sen, Amartya. *The Idea of Justice* (Cambridge, Massachusetts: The Belknap Press of Harvard University, 2011).

Tamanaha, Brian Z. *On the Rule of Law: History, Politics, Theory* , (Cambridge; New York: Cambridge University press, 2004).

Trubek David M. & Santos, Alvaro. *The New Law and Economic Development: A Critical Appraisal* (Cambridge: Cambridge University Press, 2006).

Twinning, William. *General Jurisprudence: Understanding Law from a Global Perspective* (Cambridge: Cambridge University Press, 2009).

Walker, Geoffrey de Q. *The Rule of Law: Foundation of Constitutional Democracy* (Melbourne: Melbourne University Press, 1988).

Book Chapters

Carothers, Thomas. "The Rule-of-Law Revival" in Thomas Carothers, ed, *Promoting the Rule of Law Abroad: In Search of Knowledge* (Washington, D.C.: Carnegie Endowment for International Peace, 2006).

Hayek, Freidrich. "Planning and the Rule of Law" in Julio Faúndez ed, *Law and Development: Critical Concepts in Law* (London: Routledge, 2012).

Kennedy, David. "Law and Developments" in John Hatchard, Amanda Perry-Kessaris & Peter Slinn, eds, *Law and Development: Facing Complexity in the 21st Century* (London: Cavendish, 2003).

Kleinfeld, Rachel. "Competing Definitions of the Rule of Law" in Thomas Carothers, ed, *Promoting the Rule of Law Abroad: In Search of Knowledge* (Washington, D.C.: Carnegie Endowment for International Peace, 2006).

Manji, Firoze. "The Depoliticisation of Poverty" in Deborah Eade, ed, *Development and Rights: Selected Essays from Development in Practice* (Oxford: Oxfam GB, 1998).

Merryman, John H. "Comparative Law and Social Change: on the Origins, Style, Decline & Revival of the Law and Development Movement" in Julio Faúndez ed, *Law and Development: Critical Concepts in Law* (London: Routledge, 2012).

O'Donnell, Guillermo. "Why the Rule of Law Matters" in Julio Faúndez ed, *Law and Development: Critical Concepts in Law* (London: Routledge, 2012).

Rittich, Kerry. “The Future of Law and Development: Second-Generation Reforms and the Incorporation of the Social” in David M. Trubek & Alvaro Santos, eds, *The New Law and Economic Development: A Critical Appraisal* (Cambridge: Cambridge University Press, 2006).

Roland, Gérard. “Fast-Moving and Slow-Moving Institutions” in János Kornai, László Mátyás & Gérard Roland, eds, *Institutional Change and Economic Behaviour* (Houndmills; Basingstoke; Hampshire; New York: Palgrave MacMillan, 2008).

Santos, Alvaro. “The World Bank’s uses of the ‘Rule of Law’ Promise in Economic Development” in David M. Trubek & Alvaro Santos, eds, *The New Law and Economic Development: A Critical Appraisal* (Cambridge: Cambridge University Press, 2006)

Smith, Angèle. “Neoliberal Landscapes of Migration in Ireland” in Diane Sabenacio Nitiham & Rebecca Boyd, *Heritage, Diaspora and the Consumption of Culture: Movements in Irish Landscape* (Surrey; Burlington: Ashgate, 2014).

Trubek, David M. & Santos, Alvaro. “An Introduction: The Third Moment in Law and Development Theory and the Emergence of a New Critical Practice” in David M. Trubek & Alvaro Santos, eds, *The New Law and Economic Development: A Critical Appraisal* (Cambridge: Cambridge University Press, 2006).

Trubek, David M. “Max Weber on Law and the Rise of Capitalism” in Julio Faúndez ed, *Law and Development: Critical Concepts in Law* (London: Routledge, 2012).

Articles

Boetkke, Peter & Subrick, Robert. “Rule of Law, Development, and Human Capabilities” (2003) 10 Supreme Court Economic Review 109.

Breathnach, Proinnsias. “From Spatial Keynesianism to Post-Fordist Neoliberalism: Emerging Contradictions in the Spatiality of the Irish State” (2010) 42:5 Antipodes 1180.

Breen, Claire. , “The Policy of Direct Provision in Ireland: A Violation of Asylum Seekers’ Right to an Adequate Standard of Housing” (2008) 20:4 International Journal of Refugee Law 611.

Burg, Elliot. “Law and Development: A Review of the Literature and a Critique of ‘Scholar in Self-Estrangement’” (1977) 25 Am J Comp L 492.

Cholewinski, Ryszard. “Economic and Social Rights of Refugees and Asylum Seekers in Europe” (1999) 14 Geo Immigr LJ 709.

Chukeumerige, Okezie. “Rhetoric Versus Reality: The Link Between the Rule of Law and Development” (2009) 23 Emory Intl Rev 383.

Cornwall, Andrea & Nyamu-Musembi, Celestine. “Putting the ‘Rights-Based Approach’ to Development into Perspective” (2004) 25:8 Third World Quarterly 1415.

Craig, Paul. “Formal and Substantive Conceptions of the Rule of Law,” (1997) Public Law 467.

Darling, Johnathan. “Privatising Asylum: Neoliberalisation, Depoliticisation and the Governance of Forced Migration” (2016) 41:3 TOC 230.

Dworkin, Ronald. “The Supreme Court Phalanx: An Exchange” (2007) 54 New York Review Books 19.

Fanning, Bryan & Veale, Angela. “Child Poverty as Public Policy: Direct Provision and Asylum Seeker Children in the Republic of Ireland” (2004) 10:3 Child Care Pract 241.

Fox-Decent, Evan. “Is the Rule of Law Really Indifferent to Human Rights?” (2008) 6:27 Law and Philosophy 533.

Kitchin, Rob; O’Callaghan, Cian & Boyle, Mark. “Placing Neoliberalis: The Rise and Fall of Ireland’s Celtic Tiger” (2012) 44:6 Environmental and Planning A 1302.

Kolmos, John & Coclanis Peter. “On the Puzzling Cycle in the Biological Stadard of Living: The Case of Antebellum Georgian” (1997) 34 Explorations in Econ Hist 433.

O’Reilly, Emily. “Asylum Seekers in Our Republic: Why Have we Gone Wrong? (2013) 102:406 Irish Quarterly Review 131.

Newell, Willaim H & Green, William J. Defining and Teaching Interdisciplinary Studies” (1982) 30:1 Improving College and University Teaching 23.

Ramanujam, Nandini & Caivano, Nicholas. “The BRIC Nations and the Anatomy of Economic Development: The Core Tenets of Rule of Law” (2016) 9:2 Law Dev Rev 269.

Raz, Joseph. “The Rule of Law and its Virtue” (1977) 93 L.Q.R. 195.

Rodrik, Dani & Subramanian, Arvind. “The Primacy of Institutions” (2003) 40:2 Finance Dev 31.

Sala-i-Martin, Xavier. “I just Ran Two Million Regression” (1997) 87:2 AM Econ Rev 178.

Sen, Amartya. “Human Rights and The Limits of Law” (2005) 27 Cardozo L Rev 2913.

Sill, David J. “Integrative Thinking, Synthesis and Creativity in Interdisciplinary Studies” (1996) 45:2 The Journal of General Education 129.

Summers, Robert S. “A Formal Theory of the Rule of Law,” (1993) 127:6 Ratio Juris 135.

Tamanaha, Brian Z. “The Lessons of Law-and-Development Studies” (1995) 89:2 AJIL 470.

Thornton, Liam. "'Upon the Limits of Rights Regimes': Reception Conditions of Asylum Seekers in the Republic of Ireland" (2007) 24:2 Refuge Canadian Periodical on Refugees 86.

Thornton, Liam. "The Rights of Others: Asylum Seekers and Direct Provision in Ireland" (2014) 3:2 Irish Community Development Law Journal 22.

Thornton, Liam. "Direct Provision and the Rights of the Child in Ireland (2014) 76:3 Irish Journal of Family Law 68.

Trubek, David & Galanter, Marc. "Scholars in Self- Estrangement: Some Reflections on the Crisis in Law and Development Studies in the United States" (1974) 4 Wis L Rev 1062.

Uvin, Peter. "From the Right to Development to the Rights-Based Approach: How 'Human Rights' entered Development (2007) 17:4-5 Dev Pract 597.

Ward, Eilís. "A Big Show-Off to Show What We Could Do: Ireland and the Hungarian Refugee Crisis of 1956" (1996) 7 Irish Studies in International Affairs at 131.

Other

International

Committee on Economic, Social and Cultural Rights, "Duties of States towards Refugees and Migrants under the International Covenant on Economic, Social and Cultural Rights" (13 March 2017) E/C. 12/2017/1.

Concluding Observations, ICESCR, Germany, UN Doc. E/C.12/DEU/CO/5 (20 May 2011).

Concluding Observations, ICESCR, Australia, UN Doc. E/2001/22 (2000) 66.

Concluding Observations, ICESCR, Switzerland, UN Doc. E/C.12/CHE/CO/2-3 (26 November 2010).

Concluding Observations, ICESCR, The Netherlands, UN Doc. E/1999/22 (1998) 37.

Concluding Observations, ICESCR, Spain, UN Doc. E./1997/2 (1996) 27.

Concluding Observations, ICESCR: Belgium, U.N. ESCOR, 10th Sess., 27th mtg. at para. 14, U.N. Doc. E/C.12/1994/7 (1994).

Declaration on the Right to Development A/RES/41/12 (4 December 1986).

General Comment 4, The right to adequate housing (Art. 11(1) of the Covenant), U.N. ESCOR, 6th Sess., U.N. Doc. E/1992/23 (1991).

General Comment No.20, ICESCR, Non-Discrimination in economic, Social and Cultural Rights (Art.2(2)), UN Doc. E/C 12GC/20 (2 July 2009).

UN General Assembly, *Vienna Declaration and Programme of Action* (12 July 1993) A/CONF.157/123.

Online

Council of Europe, "Collective Complaints Brochure (2013) online: http://www.coe.int/t/dghl/monitoring/socialcharter/Presentation/CollectiveComplaintsBrochure2013_en.pdf

Department of Foreign Affairs, "The Global Island: Ireland's Foreign Policy for a Changing World" (2015) online: https://www.dfa.ie/media/dfa/alldfawebsitemedia/ourrolesandpolicies/ourwork/global-island/the-global-island-irelands-foreign-policy.pdf

Department of Social Protection, "HRC – Guidelines for Deciding Officers on the Determination of Habitual Residence" (2016) online: https://www.welfare.ie/en/Pages/Habitual-Residence-Condition--Guidelines-for-Deciding-Offic.aspx#sect6

Free Legal Advice Centre, "Direct Discrimination? An Analysis of the System of Direct Provision in Ireland" (July 2003) online: https://www.flac.ie/publications/direct-discrimination/

Free Legal Advice Centre, "One Size Doesn't Fit All: A Legal Analysis of the Direct Provision and Dispersal System in Ireland, 10 years on" (November 2009) online: https://www.flac.ie/download/pdf/one_size_doesnt_fit_all_full_report_final.pdf

Ktiskakis, Yannis. "Protecting Migrants under the European Convention on Human Rights and the European Social Charter" (February 2013) Council of Europe online: https://rm.coe.int/168007ff59

Khan, Irene. "Statement on the Rule of Law, Peace and Security, Human Rights and Development" (27 February 2014) online: http://www.idlo.int/news/events/statement-rule-law-peace-and-security-human-rights-and-development

General Assembly Resolution, "The Rule of Law at the National and International Level, A/RES/68/116 (18 December 2013) available at http://www.un.org/en/ga/search/view_doc.asp?symbol=A/RES/68/116

General Assembly Resolution, "Strengthening and Coordinating United Nations Rule of Law Activities" (20 July 2016) A/71/169 available at https://www.un.org/ruleoflaw/wp-content/uploads/2017/05/2016-SG-report-on-RoL-activities-A-71-169.pdf

International Commission of Jurists, "The Rule of Law in a Free Society: A Report of the International Congress of Jurists" (5-10 January 1959) online: https://www.icj.org/rule-of-law-

in-a-free-society-a-report-on-the-international-congress-of-jurists-new-delhi-india-january-5-10-1959/

Irish Refugee Council, "Direct Provision: Framing an Alternative Reception System for People Seeking International Protection" (2012) online: http://www.irishrefugeecouncil.ie/news-media/direct-provision-framing-an-alternative-reception-system-for-people-seeking-international-protection

O'Brien, Carl et al, "Lives in Limbo" (2014) The Irish Times, online: http://www.irishtimes.com/news/lives-in-limbo

Organization for Security and Co-Operation in Europe, "Document of the Copenhagen Meeting of the Conference on the Human Dimension of the CSCE" (29 January 1990) online: http://www.osce.org/odihr/elections/14304?download=true

Reception and Integration Authority, "Direct Provision Reception and Accommodation Centres: House Rules and Procedures" (2015) online: http://www.ria.gov.ie/en/RIA/House%20Rules%20Revised%202015%20English.pdf/Files/House%20Rules%20Revised%202015%20English.pdf

United Nations Sustainable Development Goals, online: http://www.un.org/sustainabledevelopment/sustainable-development-goals/

United Nations Development Programme, "Human Development Reports" (2016) online: http://hdr.undp.org/en/countries

United States Agency for International Development, "Guide to Rule of Law Country Analysis: The Rule of Law Strategy Framework: A Guide for USAID Democracy and Governance Officers" (August 2008) online: http://pdf.usaid.gov/pdf_docs/Pnadm700.pdf

Dissertations

Patterson, Maria. *Representations of Refugees and Asylum Seekers in the Irish Print* Media (MA Thesis, National University of Ireland, Maynooth, Faculty of Arts, 2001) [unpublished].

Reports, Working Papers & Other

Samantha, Arnold. "State Sanctioned Child Poverty and Exclusion: The Case of Children in State Accommodation for Asylum Seekers" (Irish Refugee Council, 2012).

Braunfels, Elias. "Further Unbundling Institutions" (2016) Norwegian School of Economics, Working Paper No. SAM 13.

Barro, Robert J "Determinants of Economic Growth: A Cross Country Empirical Study" (1996) The National Bureau of Economic Research NBER Working Paper No. 5698.

Kaufmann, Daniel; Kraay, Aart & Ziodo-Laboton, Pablo. “Governance matters” (1999) World Bank, World Bank Policy Research Paper No. 2196.

Waldron, Jeremy. “The Rule of Law and the Importance of Procedure” (2010) NYU School of law, Public Research Paper No. 10-73.

Meeting of Minister of Justice, Equality and Law Reform with the Secretary General (Monday 8 November, 1999).

Minutes of reconvened Interdepartmental Committee on Immigration, Asylum and Related Issues (Monday 8 November 1999).

Trinity Free Legal Advice Centre. “A Guide to the Revised European Social Charter” (FLAC, Dublin: 2016).