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# Participatory Constitutionalism and the Agenda for Change: Socio-economic Issues in Irish Constitutional Debates

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## ABSTRACT

Processes of constitution making and change increasingly involve popular participation and deliberation. Though constitutional theory assumes positive outcomes of participation, we know relatively little about the role of citizens in shaping the constitutional process. This article investigates how

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the participation of grassroots communities can shape the constitutional agenda, widening debate beyond institutional models to include everyday issues of importance to citizens. In parallel research projects in Northern Ireland and the Republic of Ireland, we explored how diverse communities (women's groups, ethnic minority communities and youth) approach the constitutional question. Participants expressed a desire to participate and a clear intention to change the questions away from contentious high-constitutional issues of sovereignty and borders towards 'bread and butter' socio-economic issues. We discuss the ways in which socio-economic issues may be of constitutional significance, we draw lessons from comparative experience, and we propose ways to advance the research agenda on participatory constitutionalism.

## INTRODUCTION

Recent developments in constitutional theory have focused on participatory and deliberative constitutionalism. Popular participation in constitutional discussion is at once a normative commitment, a practical policy and a legal right. This article contributes to analysis of the impact of participation, bringing to bear the findings of our recent research projects and developing an agenda for further participatory research.

While there has been considerable theoretical discussion of the value of participation in constitutional discussions, much remains unclear. There has been some work on the impact of participation in making constitutional outcomes more legitimate and—although this remains uncertain—perhaps more consensual. But more research needs to be done, not least in differentiating the impact of different forms of participation and deliberation. The more radical forms of participation, concerned to set the constitutional agenda and not simply to voice preferences on pre-set choices, sharply raise questions of what can and should be included on that agenda. Of particular importance to this article is the role of socio-economic issues in constitutional debates.

The 'constitutional question' in Irish politics promises insight into these issues.[1] Participation of different groups in a deeply divided and increasingly

[1] Here the ARINS project is an important resource. See John Doyle, Cathy Gormley-Heenan and Patrick Griffin, 'Editorial: Introducing ARINS—Analysing and Researching Ireland, North and South', *Irish Studies in International Affairs* 32 (2) (2021), vii–xvii.

culturally diverse island impacts the outcome: *who* participates in discussion impacts on *what* is decided. Moreover, the constitutional agenda itself is in dispute: should one prioritise unionist and nationalist group interests, or public interests in overcoming group division? Should one focus on minority rights, socio-economic consequences and/or majority will? We know little about how diverse populations might prioritise these issues.[2]

For long the British and Irish governments wanted to keep contentious and potentially destabilising constitutional issues off the political agenda. In the 1990s, a new phase of constitutional discussion began, but participation was strictly controlled. The agenda was set by the governments and amended by the parties, with limited wider participation.[3] The outcome, the Good Friday Agreement (GFA) of 1998, was widely accepted as a frame for politics on the island, and it led to public disengagement from the constitutional question for the best part of two decades. Brexit has put a united Ireland squarely back on the political agenda, but now in a context of increasingly diverse populations.[4] Despite continuing political polarisation in the North, and rising support for Sinn Féin in the South, large segments of the population—including voters for the dominant parties—are increasingly disengaged from traditional nationalisms and unionisms. Should referendums be called, these diverse voices will be decisive to the outcome: yet we know little about their views.[5]

In recent research, we engaged with these diverse voices, in Northern Ireland and the Republic of Ireland, in focus groups with grassroots community participants and interviews with community activists and politicians of almost all parties.[6] We invited strong participation, with open-ended questions that encouraged participants to define the issues in debate. Their answers speak directly to questions in constitutional theory about the impact of participation. Our research shows a very strong interest in 'bread and

[2] For discussion of some of these issues, see Jane Suiter, 'A modest proposal: building a deliberative system in Northern Ireland', *Irish Studies in International Affairs* 32 (2) (2021), 247–70.

[3] John Coakley and Jennifer Todd, *Negotiating a settlement in Northern Ireland* (Oxford, 2020), 339–48.

[4] On Brexit, see Coakley and Todd, *Negotiating a settlement in Northern Ireland*, 535–8. On diversity of the populations, see John Coakley, 'Is a middle force emerging in Northern Ireland?', *Irish Political Studies* 36 (1) (2021), 29–51.

[5] For discussion of the referendum process see Brendan O'Leary, 'Getting ready: the need to prepare for a referendum on reunification', *Irish Studies in International Affairs* 32 (2) (2021), 1–38; Colin Harvey, 'Let "the people" decide: reflections on constitutional change and "concurrent consent"', *Irish Studies in International Affairs* 32 (2) (2021), 382–405.

[6] We engaged with all the main political parties on the island except for the DUP, which did not respond to our invitation.

butter' socio-economic and rights issues, and a surprisingly low concern with issues of institutional form, e.g. an integrated or devolved united Ireland. This was the case across Northern Ireland—Protestant, Catholic and other—and in the Irish republic. Our respondents wanted to participate in constitutional discussion, but they also wanted to change the questions. This in itself is an important conclusion with direct relevance to current debates within constitutional theory.

The article is structured in two parts. In 'Participatory constitutionalism and research findings', we begin by reviewing key questions within contemporary constitutional theory relating to the process of constitutional debate, popular participation and agenda-setting. We then discuss our main research findings, highlighting the unexpected answers and setting out the findings' theoretical significance. In 'The role of socio-economic issues in constitutional debate: context, comparison and future research design', we move to explore the place of socio-economic issues in constitutional debate. We discuss how the different institutional traditions, divisions and political cultures in the two Irish jurisdictions have shaped different approaches to socio-economic rights. We then consider comparative lessons from other places, reviewing the different ways of codifying socio-economic rights in the illustrative cases of South Africa and India. This analysis highlights future constitutional choices, and we propose a schema by which grassroots participation can input into these choices. To conclude, we return to the agenda for participatory constitutionalism and propose several potentially fruitful ways to take forward that agenda in future research.

In short, our article contributes to discussions of constitutional change in three respects:

1. It adds to knowledge of the impact of participation on the constitutional agenda and process of constitutional debate.
2. It does so by exploring grassroots views in each part of Ireland and shows how these participants think constitutional discussion should proceed. This is one of the first comparative North–South explorations of the considered views and arguments of grassroots and disengaged communities, and its results are unexpected.
3. It considers argument and evidence for codifying socio-economic rights in a future constitution, and shows how this can usefully feed into future constitutional deliberation.

## PARTICIPATORY CONSTITUTIONALISM AND RESEARCH FINDINGS

### *Constitutional theory: process and agenda*

Constitutional theory has shifted towards a focus on participatory and deliberative constitutionalism. This attention reflects the expansion of constitution-making practice over the past few decades, where questions of how to bring citizens into the process have been paramount. Popular participation in constitution making and processes of constitutional change is both an international norm and a widespread practice. It is also considered a legal right as embedded in the UN Declaration on Human Rights and the International Covenant on Civil and Political Rights.[7] These developments in participatory and deliberative constitutionalism draw from a wider normative commitment to inclusion in democratic decision-making. Democratic decisions are considered more legitimate when 'those affected by it have been included in the decision-making process and have had the opportunity to influence the outcomes'.[8] A normative commitment to inclusion therefore means that the voices of different people or communities should be welcomed in the foundational act of constitution-making and that these diverse perspectives can articulate their interests and aspirations and help shape a new constitutional order.

Yet much remains unknown about the dynamics and effects of participatory and deliberative constitutionalism. An ongoing debate explores whether 'widespread public involvement sustains, subverts, or is inconsequential for democratic politics'.[9] Certainly, there is a robust, optimistic view about the benefits of popular participation in constitutional discussion. As Sujit Choudhry and Mark Tushnet note, popular participation in constitution-making is regarded as 'highly desirable' for several reasons: for enhancing legitimacy, for educating people in the practice of democratic self-government, and for building a shared political identity in situations of communal division.[10]

[7] Vivien Hart, 'Constitution making and the right to take part in a public affair', in Laurel E. Millerand and Louis Aucoin (eds), *Framing the state in times of transition: case studies in constitution making* (Washington, DC, 2010).
[8] Iris Marion Young, *Inclusion and democracy* (Oxford, 2002), 5–6.
[9] Devra C. Moehler, *Distrusting democrats: outcomes of participatory constitution making* (Ann Arbor, 2008), 13.
[10] Sujit Choudhry and Mark Tushnet, 'Participatory constitution-making: introduction', *International Journal of Constitutional Law* 18 (1) (2020), 173–87: 173.

Another suggested benefit is that an elite-focused process can restrict the topics for discussion and 'can cause drafters to miss out on effective substantive governance solutions'.[11] As citizens have a wealth of knowledge, experience and ideas, the public becomes an important resource whose participation may result in positive outcomes.[12] Participation is thus accepted as a central aspect of constitution-making and constitutional change.[13]

A more sceptical view points to the potential challenges and drawbacks of participatory constitution-making. Choudhry and Tushnet note that while popular participation can 'enhance the role of traditionally disadvantaged groups' in the constitution-making process, 'we should be alert to the collective action problems that are a reason why those groups cannot influence democratic decision-making'.[14] They mention unequal access to the internet and social media as an important obstacle, and the powerful role of political parties in the process. An issue of internal exclusion might arise, whereby citizens can participate but have minimal influence in shaping the outcome (the problem of participation without power).[15] The Icelandic experience of extensive popular participation highlights the important relationship between the various actors, between citizens and politicians. If an intensive public-led process fails to keep elites on board, there is a danger that the draft constitution will not be implemented.[16] Jill Cottrell and Yash Ghai warn of potential 'subversion of the process' by politicians: that a participatory process can be manipulated by governmental obstruction.[17] As Hart puts it, 'after all, constitution making is about the pursuit of power and constitutions are always instruments of domination'.[18]

Arguably, deliberative constitution-making holds much promise for the inclusion, articulation and prioritisation of citizens' interests. As Simone Chambers writes, the shift from voting-centric democratic theory to 'talk-centric democratic theory' means that 'voice rather than votes is the

[11] Angela M. Banks, 'Expanding participation in constitution making: challenges and opportunities', *William and Mary Law Review* 49 (4) (2008), 1043–70: 1050.

[12] Banks, 'Expanding participation'; Helene Landemore, 'When public participation matters: the 2010–2013 Icelandic constitutional process', *International Journal of Constitutional Law* 18 (1) (2020), 179–205.

[13] Harvey, 'Let "the people" decide'.

[14] Choudhry and Tushnet, 'Participatory constitution-making', 176.

[15] Banks, 'Expanding participation'.

[16] Landemore, 'When public participation matters'.

[17] Jill Cottrell and Yash Ghai, 'Constitution making and democratization in Kenya (2000–2005)', *Democratisation* 14 (1) (2007), 1–25: 17.

[18] Hart, 'Constitution making', 40.

new vehicle of empowerment'.[19] The expected outcome is an opening up of the frames of debate. Jane Suiter and Min Reuchamps suggest that constitutional deliberative democracy 'deals with issues that might, potentially, lead to a transformation of the polity'.[20] So how then can participatory and deliberative processes realise such an aim? Some scholars highlight agenda-setting as an important stage of constitution-making where citizens have an opportunity to influence the direction of the process. Yet we do not know much about how the issues deemed important to citizens get on the agenda, how these issues are incorporated into deliberative fora and what happens afterwards. Choudhry and Tushnet refer to this challenge as one of 'constitutional implementation', questioning whether public officials take on board citizens' demands and embed them in 'concrete guarantees, effective and accountable institutions, and constitutionally mandated public policies'.[21]

So what does agenda-setting look like in participatory constitution-making? Suiter and Reuchamps note the various mechanisms for agenda-setting.[22] There can be an open agenda in a fully inclusive, open-ended process or a closed agenda dictated by formal institutions/elites. There is also potential for something of a halfway house: if the agenda is relatively fixed, citizens might have the opportunity 'to introduce adjacent issues and question whether pre-chosen issues should be on the agenda at all'. Exploring the Kenyan case, Cottrell and Ghai note the potential for a wide-ranging reform agenda in participatory constitution-making; an inclusive, participatory process can refine the issues for discussion as different groups put forward their claims, including socio-economic issues.[23] Notably, the process needs to be designed in such a way as to purposefully provide opportunities for the public to set or influence the agenda. Vivien Hart suggests that an inclusive, bottom-up process 'requires openness to genuine and undirected input by the public, enabling them to create their own agenda, which will not necessarily replicate that of the experts'.[24] Hart goes further to suggest that because the interests of

[19] Simone Chambers, *Constitutional referendums and democratic deliberation* (London, 2001).
[20] Jane Suiter and Min Reuchamps, 'A constitutional turn for deliberative democracy in Europe?', in Min Reuchamps and Jane Suiter (eds), *Constitutional deliberative democracy in Europe* (Colchester, 2016), 4.
[21] Choudhry and Tushnet, 'Participatory constitution-making', 175.
[22] Suiter and Reuchamps, 'A constitutional turn for deliberative democracy in Europe?', 7. See also Cheryl Saunders, 'Constitution-making in the 21st century', *International Review of Law* 1 (4) (2012), 1–10. For the Irish case, see Suiter, 'A modest proposal'.
[23] Cottrell and Ghai, 'Constitution making'.
[24] Hart, 'Constitution making', 38.

underrepresented, marginalised groups may not be a priority for elites, 'opening up the process is an obligation for democrats'.[25]

If participatory constitution-making is understood as 'a discussion of problems, conflicts, interests, preferences, and claims of need', we need to know more about how citizens' demands can find space in the process and how this affects constitutional outcomes.[26] According to Blount, Elkins and Ginsburg, the key questions about the process concern *who* is to be involved; *when* participation takes place; and *how* actors draw up, debate and ratify a constitutional text.[27] An important, yet missing, part of the picture is the *what* of participation and deliberation. Beyond the debates on the pros and cons of participatory constitutionalism, we know less about the priorities for citizens who engage in the process. What, in their view, are the key issues to be tackled in any process of constitutional debate and potential change? Once articulated, how can these issues inform the process and constitutional outcome? And what are the limits of constitutionalism: are some citizen interests and concerns simply matters for political bargaining, inappropriate for the constitutional agenda? Questions thus remain about whether and how participation opens up the possibility for debate and discussion on a wide-ranging menu of issues and topics and whether and when public demands are incorporated into new constitutional texts.

These questions become more urgent in situations of deep conflict where citizens' interests, identities and state loyalties are themselves divided and state sovereignty and territorial boundaries come into question. Such issues of sovereignty and boundary change have dominated nationalist politics, and tend to produce zero-sum conflict between existing groups. Conflicting socio-economic interests often intensify conflict: territorial boundaries distribute resources unevenly to different populations, constituting demographic majorities and minorities, making possible or impossible potential political alliances, opening up or closing access to economic resources, and affecting minorities' cultural interests and the value of their cultural and linguistic capital.[28] How such conflicts should be regulated institutionally and constitutionally has been much debated: how far existing interests and identities are

[25] Hart, 'Constitution making', 40.
[26] Banks, 'Expanding participation'.
[27] Justin Blount, Zachary Elkins and Tom Ginsburg. 'Does the process of constitution-making matter?', in Tom Ginsburg (ed.), *Comparative constitutional design* (Cambridge, 2012).
[28] Ian S. Lustick, 'Thresholds of opportunity and barriers to change in the right-sizing of states', in B. O'Leary, Ian S. Lustick and Thomas Callaghy (eds), *Right-sizing the state: the politics of moving borders* (Oxford, 2001).

key factors, and how far the impact of constitutions in forming politics and conceptions of peoplehood into the future must be included in discussion.[29] If constitutional deliberation is possible at all in cases of contention over sovereignty and boundaries, it is fraught with difficulty.

There is thus a particularly urgent question as to whether and how participatory constitution-making can work in deeply divided places. Can constitutional participation and deliberation over territorial boundaries come to focus on general norms and public goods beyond oppositional group interests and identities? In principle the potential is there: for example, different possible territorial boundaries might be assessed in terms of their restrictions on access to resources, facilitation of economies of scale and resource complementarity, and their incentivisation of group formation and solidarity in oppositional or more permeable forms. In practice, the evidence is incomplete. Some research suggests that deliberative democracy can 'bridge differences between identity groups' and even forge a new sense of political community, and some recommend a gradual, incremental approach.[30] Important questions thus remain about the extent to which issues of common interest, general rights and the public good can form the basis for constitutional deliberation even in divided places, and how they connect with the 'constitutional' questions of territorial boundaries and the form of a state.

### *Research context, design and method*

After the Good Friday Agreement of 1998, the Irish constitutional question—whether Northern Ireland should remain part of the United Kingdom or become a part of a united Ireland—became much less urgent. Nationalists found the new institutions in Northern Ireland acceptable, while unionists found the cross-border arrangements and equality agenda less problematic than they had feared. Brexit has changed this. Constitutional change is increasingly being discussed, in a context of increasingly diverse populations.[31] This serves as a good case study of the impact of participatory constitutionalism in a situation of deep conflict. Can participation help reframe the constitutional

[29] Sujit Choudhry (ed.), *Constitutional design for divided societies: integration or accommodation?* (Oxford, 2008).

[30] Helen Lerner, 'Constitution-writing in deeply divided societies: the incrementalist approach', *Nations and Nationalism* 16 (1) (2010), 68–88; Helen Lerner and David Landau, 'Introduction to comparative constitution making: the state of the field', in David Landau and Helen Lerner (eds), *Comparative constitution making* (Cheltenham, 2019); Suiter, 'A modest proposal'.

[31] O'Leary, 'Getting ready'; Harvey, 'Let "the people" decide'.

discussion away from zero-sum conflict? And, if so, how do the public's convergent concerns intersect with the questions of boundaries, sovereignty and state form? Can deliberation allow a change of deep-set views and make zero-sum conflict negotiable?

Very little research has been done on these questions. Interview research shows considerable, although uneven, grassroots reflexivity and capacity to negotiate contentious issues with those who disagree.[32] Only two citizens' assemblies have been undertaken on the constitutional question, one in Northern Ireland and the other in the Republic of Ireland.[33] They show clearly that ordinary citizens in each jurisdiction are able and willing to discuss constitutional issues, and to change their opinions in light of new information. But the format, while deliberative, was not highly participatory: the agenda was set in advance, and the participants were invited to discuss different constitutional options, not to question the range of options.[34]

Our participatory research took a very different approach. It explored how ordinary people define and engage with constitutional issues and mapped the range of diverse voices and concerns beyond unionism and nationalism. Interviews and focus groups were minimally structured around ideas of 'constitutional change' and 'North–South relations', and our main questions were exploratory: were our respondents interested in participating in constitutional discussion and what prevented their participation? How would they like the process to proceed? And how would they design the agenda?

We worked with political representatives and community groups and attempted to access hard to reach and politically silent populations including: women, especially disadvantaged women; migrants; border communities; and

[32] Jennifer Todd, *Identity change after conflict* (Cham, 2018); Stephanie Dornschneider and Jennifer Todd, 'Everyday sentiment among unionists and nationalists in a Northern Irish town', *Irish Political Studies* 36 (2) (2021), 185–213. James Wilson conducted focus groups with a different demographic—organised Protestant ex-servicemen and loyalists—whose resistance to a united Ireland was non-negotiable. See James Wilson, 'Brexit and the future of Ireland: the fears of Northern Protestants concerning unity', in Mark Daly, 'Unionist concerns and fears'(2019), available at: https://senatormarkdaly.files.wordpress.com/2019/07/unionist-concerns-fears-of-a-united-ireland-the-need-to-protect-the-peace-process-build-a-vision-for-a-shared-island-and-a-united-people.pdf (29 November 2021).

[33] John Garry, Brendan O'Leary, John Coakley, James Pow and Lisa Whitten, 'Public attitudes to different possible models of a United Ireland: evidence from a citizens' assembly in Northern Ireland', *Irish Political Studies* 35 (3) (2020), 422–50; John Garry, Brendan O'Leary, Paul Gillespie and Roland Gjoni, 'Mini-Public Deliberative Forum on Constitutional Futures, held on April 24 2021', available at: https://www.ucd.ie/ibis/t4media/Executive_Summary_CFAB.pdf (24 January 2022).

[34] On different modes of deliberation see Nicole Curato, David Farrell, Brigitte Geissel, Kimmo Grönlund, Patricia Mockler, Jean-Benoit Pilet, Alan Renwick, Jonathan Rose, Maija Setälä and Jane Suiter, *Deliberative mini-publics: core design features* (Bristol, 2021).

youth. Parallel projects were undertaken in Northern Ireland and the Republic of Ireland, and a set of cross-border youth and women's focus groups were held. There was diversity in religion and/or in place of residence (Northern Ireland or the Republic of Ireland) in at least five of these focus groups; two were intentionally located in particular religiously weighted localities in the North. Representatives of the migrant community were interviewed and we held two focus groups with migrants in the North. Overall, ten focus groups were held and we also undertook semi-structured interviews with representatives of most main political parties, making an effort to include 'others', including socialists, ecologists and the Alliance Party.[35] We conducted all the interviews and focus groups through Zoom. They were recorded, transcribed, anonymised, coded in NVivo and analysed. Covid-19 has made the interviewing process both harder (in that face-to-face contact has been impossible) and easier (in that multiple small focus groups involving people at significant distance from one another can be organised). We engaged with more than 65 people, slightly more in the North than in the South, and within the North Catholics were slightly overrepresented.

*Research findings: themes of discussion and issues for the agenda*

There was agreement among our research participants that an increased focus on the constitutional question has arisen due to Brexit. There was much variation, however, in their willingness to engage in the ongoing constitutional debates. A nationalist politician spoke of the importance of a rolling process of consultation with a wide range of groups on potential constitutional change and ultimate removal of the border.[36] Another left-leaning politician spoke of the rationale for Irish unity as the means for creating 'a radically different island and society'.[37] Unionist politicians and commentators were generally reluctant to engage or opposed to engaging in debate on Northern Ireland's constitutional status. Surprisingly few of those interviewed, even those most engaged in debate, talked much about the political institutional arrangements that might result from any constitutional change.

The community groups who participated in our focus groups and interviews were much less inclined than politicians to engage with questions of

[35] As noted above, the DUP did not respond to our invitation.
[36] SDLP politician.
[37] People Before Profit politician.

constitutional structures. Indeed, the 'high politics' of constitutional debate on Northern Ireland was often described as distant from people's reality. Some were fearful of such a debate gaining prominence in the years ahead. For example, one participant expressed 'the fear and threat' of constitutional discussion, advising that 'there is huge fear in Northern Ireland and the border communities, north and south', largely due to Brexit.[38] Another suggested that heightened constitutional discussion is 'not a good thing … it's almost as if we're speaking about division again'.[39] An interviewee from an ethnic minority organisation similarly noted that constitutional discussion would likely be 'a very polarised question … a dreadfully polemical debate'.[40]

Many suggested that the terminology around constitutional debate is problematic and puts people off engaging on the topic. For example, one focus group participant said that 'united Ireland' and 'unification' 'are very loaded terms' that can cause a 'huge reaction in people, either pro or anti'.[41] Constitutional politics was seen as far removed from people's priorities. One focus group participant commented: 'when people talk about a united Ireland, there is no sense of what the reality or the practicality of the lived experience is like … or how those conversations about or those statements affect the lived reality of people in Northern Ireland and the border regions'.[42] In a Belfast-based women's focus group, one participant called for the need to talk in 'an exploratory way', and said that there is 'a need to dial down the rhetoric to facilitate conversations'.[43] Another participant echoed this call to shift away from a focus on the constitutional question, preferring the discussion to be 'broken down into bite-size chunks, to start having small, manageable conversations with the population across all the different sectors' and that it is likely that we will 'see a very strong commonality coming out for what people actually want'.[44]

But while many focus group participants disengaged from constitutional debate when it was framed as a choice of Irish unity or British sovereignty, there was widespread support for an inclusive process of discussion around

[38] Women's focus group (border areas).
[39] Women's focus group (border areas).
[40] Ethnic minority association (Northern Ireland).
[41] Women's focus group (border areas).
[42] Women's focus group (border areas).
[43] Women's focus group (Belfast).
[44] SDLP politician.

North–South relations. There was also a call for information to be filtered down to the grassroots level in accessible language in such a way as to enhance inclusion, engagement and participation.[45]

What then did participants want discussion to be about? They seldom discussed political institutions and did not prioritise political arrangements—for example, a devolved or unitary state—in their preferred agenda for discussion. Issues of identity and culture were raised by the interviewees and focus group participants, although for the most part as reflections on the concerns of others, not themselves. Diverse identities, including Northern Irish, border and migrant, were mentioned more often than unionist and nationalist identities, within which diversity was also noted. Only occasionally were identity-related concerns mentioned as important for the future political agenda. One Irish politician, however, noted that ensuring that all identities would be 'vindicated' after any constitutional change 'will require fundamental change from ourselves'.[46] Unionist politicians alluded to identity issues—'like when I open my curtains in the morning is the post box at the end of the street still red? Or is it green? Or is it some other colour? And does that matter to me?'[47] But for the most part unionists focused on social, political and economic issues as key to their support for the Union.

Participants and interviewees more frequently referred to the importance of including 'bread and butter' issues in dialogue about possible constitutional change. They explained their prioritisation of these issues by underlining the impact they have on ordinary people on a day-to-day basis. For example, one participant in a focus group argued that the provision of services such as health and childcare 'are all issues that affect grassroots'.[48] This reasoning was also adopted by politicians, with one interviewee noting that 'I knock on doors and most people basically think of the here and now, the bread and butter issues for their own family and their own wellbeing'.[49]

Though 'bread and butter' issues were often referred to generally, the provision of specific social services, in particular healthcare, was prioritised. Participants expressed concern about what constitutional change would mean for the provision of healthcare given the existence of two very different models currently operating on the island, and the lack of knowledge in each

[45] Women's focus group (border areas); women's focus group (Belfast).
[46] Labour politician.
[47] Unionist politician.
[48] Women's focus group (border areas).
[49] Labour politician.

jurisdiction of the processes in the other. Potential cost of healthcare at the point of access was a particular concern. Some participants voiced concern that any increased cost in accessing healthcare would negatively impact those on 'the poverty line'.[50] Rights issues, for example gender and reproductive rights, were also discussed in ways that linked experiential and personal issues to the constitutional question. Leftist politicians said that these issues, central for the young and for radicals, led to the creation of 'organic' links between activists North and South, generating real interest in constitutional discussion.

Other everyday policy issues, for example education, were discussed and framed in terms of constitutional change: one Irish politician commented that the policy of mandatory Irish-language learning would 'not [be] tenable, if we're going to have a 32-county unified country'.[51] A focus group of Belfast women discussed Irish state education policies critically, before concluding that they didn't know enough about how issues of language and religion were now organised in the South.

It was not that these participants failed to understand more general 'constitutional' ideas. Nor did they wish simply to avoid the issues: it was the language, not the ideas, that was put in question and even some unionist participants were willing to discuss constitutional issues if they were framed in an 'organic' way. We have no doubt that, had they so chosen, our participants could have participated fluently in a set-piece conversation about integrated and devolved models of a united Ireland in a citizens' assembly.[52] Why then was one highly reflective and educated focus group participant 'silenced' by our questions about 'constitutional change'? It was not because she was inarticulate but because she could not talk about these issues in her own words, or connect the choices with her own experience.[53]

Another participant said that conventional constitutional discussions are abstract and ideological and 'almost predetermine the outcome of an earlier and equally important process' that is a 'very, very deliberative, deep and evidence-based and value-based conversation across society'.[54] Moreover,

[50] Ethnic minority association (Northern Ireland).
[51] Fianna Fáil politician.
[52] As ordinary citizens did in citizens' assemblies described in Garry et al., 'Public attitudes to different possible models of a United Ireland'; and Garry et al., 'Mini-Public Deliberative Forum'.
[53] Gender focus group.
[54] Women's focus group (border areas).

participants interrelated their particular lived experience with more general social issues relevant to constitutional division. Their concern was not to reduce all issues to particular ones, but rather to generalise from everyday concerns to universal ones. One anticipated 'bringing down the walls' of class as well as religion and another highlighted the commonalities of women's experience of 'domestic violence and violence in general'. [55] This discussion emphasised the commonalities of mothers' experience in the North, where their sons got drawn into paramilitary groups, and in the South, where they got drawn into drug dealing.[56] One community-group interviewee wanted a 'viable government' that addressed issues of gender rights 'on both sides of the border'.[57]

### *Significance of the findings*

Our findings speak directly to some of the key questions in the literature on participatory constitutionalism. First, they show an interest in participation in constitutional discussion, even among the apparently disengaged. Second, in this case expanding participation changed the agenda of constitutional debate. It led to a prioritisation of issues of social and economic policy and gender and reproductive rights. This finding highlights the potential for inclusion and participation to shape the agenda beyond the 'high politics' of elite-led bargaining over institutional models to the issues prioritised by citizens. Participants viewed constitutional change as having the potential to fundamentally change how basic services are provided and everyday policy decisions made. Participants chose to focus on these issues as a natural and fundamental part of discussing constitutional matters, not a different and unrelated discussion. The finding has significance for policy, too; it speaks to the importance of any formal process of constitutional deliberation being designed in ways to provide opportunities for the public to set or influence the agenda and to create space for issues that may not sit with elites' preferred menu for debate.

Third, expanding participation revealed significant convergence across diverse groups from very different backgrounds. Northerners and Southerners, migrants and long-residents, converged in the emphasis on 'bread and butter'

[55] Women's focus group (border areas).
[56] Women's focus group (Irish republic).
[57] Interview with member of Northern Ireland gender-based organisation.

issues. This was particularly emphasised by community groups and their representatives, but also by politicians, and it was common to those of Protestant and Catholic background in Northern Ireland. In this sense, increased participation in debate bridged existing divisions, even in a divided island and in deeply divided Northern Ireland. It reformulated the constitutional agenda away from partisan issues, while highlighting issues of everyday concern as a common basis for dialogue. The alternative, they felt, was an abstract discussion where their sense of the problems and issues would be submerged in technical details and abstract analysis.

Fourth, our findings speak too to some key issues in the present Irish constitutional debates. It is clear that these disengaged participants were ready and willing to participate, but on terms that were 'organic' and connected to their own experience. They felt that the present debate on 'abstract' issues of sovereignty and forms of governance neglected issues that were most important to them and to their communities. While they were sharply aware of identity sensitivities, they felt they could be tackled if the conversation moved from the abstract to the concrete. They emphasised the socio-economic sphere not to stop constitutional discussion but to reframe it.

Some important questions remain unresolved. How these experiential 'bread and butter' priorities might interrelate with more conventional political–constitutional questions was seldom explicitly discussed. The important thing, for many of our participants, was to start from where people are, and work up from there, not to begin with abstract discussion. They were clear that choices have to be posed in a different way, beginning with the issues that concern them and those they work with. They were less certain on how exactly those choices are to be posed.

Three readings of their discussions are possible, which respectively place 'bread and butter' issues as an *alternative to* constitutional discussion, as a key part of the *process* of constitutional deliberation, and as a key part of the *outcome*, as provisions in a future constitution. The first reading of the discussions would suggest that participants wished only to discuss the practical politics of—for example—healthcare in their own society. The second reading of the discussions would emphasise the need for a 'pre-conversation' that can lead into a reformulated constitutional conversation about sovereignty and forms of governance. How exactly the two conversations might intersect is a key question for further exploration. The third reading of the discussions would emphasise their insistence on the importance of socio-economic issues in their own right, leading to socio-economic rights formulated in a new constitution.

If we take seriously the principles of participation and seek to engage ordinary citizens in discourse about potential constitutional change, we must accept what they view as important in these conversations, probe where issues of priority are unclear and offer information to help people better articulate, develop or change their preferences. In the next part of the article, we discuss the different expectations surrounding socio-economic claims in each part of the island, outline how we can glean comparative insights from other places and propose how we might take forward the research agenda on participatory constitutionalism.

## THE ROLE OF SOCIO-ECONOMIC ISSUES IN CONSTITUTIONAL DEBATE: CONTEXT, COMPARISON AND FUTURE RESEARCH DESIGN

In this part of the article, we address the implications of our findings and ask: in what ways are socio-economic issues of constitutional importance? In what ways does discussion of them lead into constitutional issues? What does comparative experience tell us about how socio-economic rights can be codified as part of constitutional change? And how might we draw on this comparative knowledge to sketch a frame for further participatory constitutional research that works from and speaks to everyday concerns?

### *Socio-economic rights and 'constitutional' practices in the two jurisdictions on the island*

Of course socio-economic issues are not of themselves of constitutional significance. But a comparative focus on the different socio-economic arrangements on each side of the Irish border, as our participants implied, leads us directly to properly constitutional issues—the foundations of social order, the basic assumptions about authority—while providing an entry point to discussion of the prerequisites, costs and benefits of unification.

Claims for socio-economic rights are treated differently in each jurisdiction on the island of Ireland. The GFA provided for harmonisation of rights and equality across both parts of the island, but this has not been fulfilled.[58]

[58] Colm O'Cinneide, 'A common floor of rights protection', in Cillian McGrattan and Elizabeth Meehan (eds), *Everyday life after the Northern Irish conflict* (Manchester, 2012), 135–49. See also Suzanne Egan, 'The road not (yet) taken: a charter of rights for the island of Ireland', *Irish Studies in International Affairs* 32 (2), 623–6.

Socio-economic issues are contentious because of conflicting class interests and political differences. They are constitutionally important in part because of the different levels of provision in each jurisdiction.[59] Even more importantly, they tap into the differences in legal practices, constitutional traditions and cultural expectations surrounding socio-economic claims in each jurisdiction.[60] Thus it is important to highlight these issues as part of the discussion of constitutional change.

There is a strong tradition in Northern Ireland of claiming socio-economic rights, exemplified in the Civil Rights Movement's demands for fair housing policy, and in fair employment legislation from 1989. The GFA provided for the formulation of a Bill of Rights for Northern Ireland, but successive proposals have been shelved in the context of political conflict, and unionist opposition. Nonetheless, a strong rights culture is pervasive. A recent survey in Northern Ireland shows that well over 80% of the population supported including rights to education (88%); an adequate standard of mental and physical health (88%); adequate accommodation (84%); an adequate standard of living (84%); food (86%); work (83%); and a safe, clean, healthy and sustainable environment (87%) in a bill of rights for Northern Ireland, and nearly 80% thought this should be enforceable by law. [61] Support is very strong among men and women, across all social classes and generations, and among Protestants and Catholics and nationalists and unionists. While of course there will be political debate about the standards of adequacy, the modes of enforcement and the trade-offs between reform and public expenditure, it is very significant that such a broad swathe of the population—of all classes, religious and political backgrounds—support the general principle.

That there is such widespread support for legally codifying and implementing socio-economic rights may reflect one of the major achievements of the past decades that contributed to the ending of conflict: the ending of the stubborn employment and unemployment inequality between Catholic and Protestant. This was achieved by law—not codification of rights—and it

[59] For example, see Ciara Fitzpatrick and Charles O'Sullivan, 'Comparing social security provision North and South of Ireland: past developments and future challenges, *Irish Studies in International Affairs* 32 (2) (2021), 283–313.

[60] See Brice Dickson, 'Implications for the protection of human rights in a united Ireland', *Irish Studies in International Affairs* 32 (2) (2021), 589–610. On the different administrative cultures, see Mary P. Murphy, 'A new welfare imaginary for the island of Ireland', *Irish Studies in International Affairs* 32 (2), 532–57.

[61] Colin Harvey, Anne Smith and Kevin Hanratty, *A bill of rights for Northern Ireland: polling results* (Belfast, 2021), available at: http://www.humanrightsconsortium.org/wp-content/uploads/2021/06/Bill-of-Rights-Poll-Results-Final-High-Res.pdf (8 November 2021).

required the targeting of a hidden cause of inequality—indirect discrimination. These measures were embedded and enforced through the yearly 'monitoring' of employers and 'mainstreaming' of equality across the public sector.[62] In effect, this made equality a trump card, a quasi-right, which can only be derogated from if other measures are put in place to compensate. It also won widespread community acceptance and, arguably, has created a public culture of trust that social and economic rights can effectively be ensured.

The practice in Ireland has been different. There is a strong constitutional tradition, although the constitution still shows signs of its early conservative Catholic ethos; there has been a consistent albeit minority argument that 'second-generation' social and economic rights and 'third-generation' gender and reproductive rights should be included in a radically updated constitution.[63] In 2014 the Convention on the Constitution recommended that 'there should be a constitutional provision that the State would progressively realise ESC [economic, social and cultural] rights, subject to maximum available resources, and that this duty would be cognisable by the court'. Yet a considerable minority of the participants (43%) voted that the issue be referred elsewhere so that the full implications of the recommendations could be considered rather than opting to support the immediate recommendation of such changes.[64] In the Oireachtas a private member's bill was debated on the issue in 2017 and 2021 but has not proceeded. Socio-economic issues—not least housing and health—are indeed very high on the political agenda. But there is considerable reluctance to put new substantive rights into the constitution, with the negative impact of the eighth amendment outlawing abortion often mentioned. There is also judicial reluctance to constitutionalise socio-economic rights or to open the socio-economic arena to judicial intervention

[62] Christopher McCrudden,. 'Equality and the Good Friday Agreement', in Joseph Ruane and Jennifer Todd (eds), *After the Good Friday Agreement: explaining change in Northern Ireland* (Dublin, 1999), 96–121; Christopher McCrudden, Raya Muttarak, Heather Hamill and Anthony Heath, 'Affirmative action without quotas in Northern Ireland', *Equal Rights Review* 4 (2009), 7–14; Joseph Ruane and Jennifer Todd, 'Path dependence in settlement processes: explaining settlement in Northern Ireland', *Political Studies* 55 (2) (2007), 442–58; Jennifer Todd and Joseph Ruane, 'Beyond inequality: assessing the impact of fair employment, affirmative action and equality measures on conflict in Northern Ireland', in Graham Brown, Arnim Langer and Frances Stewart (eds), *Affirmative action in plural societies: international experiences* (London, 2012), 182–208.
[63] Ivana Bacik, 'Future directions for the constitution', in Eoin Carolan and Oran Doyle, *The Irish constitution (governance and values)* (Dublin, 2008). See also Fiona de Londras, 'Nation-making and re-making: a response to Brice Dickson', *Irish Studies in International Affairs* 32 (2) (2021), 620–22.
[64] *Eighth Report of the Convention on the Constitution: Economic, Social and Cultural (ESC) Rights* (2014), available at: https://www.constitutionalconvention.ie/AttachmentDownload.ashx?mid=5333bbe7-a9b8-e311-a7ce-005056a32ee4 (25 January 2022).

(see below). So far in the Republic of Ireland, these issues have defined political battles between left and right, and have not been constitutionalised.

Thus the different institutional configurations, legal traditions, political conflicts and political cultures north and south of the Irish border have led to quite different perspectives on socio-economic provisions and rights, which may lead to serious contention in the event of constitutional change.[65] All of this gives compelling reason for thinking seriously about socio-economic claims of right in a possible united Ireland. While there is likely to be judicial reluctance to constitutionalise socio-economic rights in the Republic of Ireland, this might have to be rethought in context of a united Ireland, particularly if part of the argument for unity is its capacity to protect minority rights and equality better than a post-Brexit UK. Indeed, this would be crucial to unionist acceptance of unification. Although we cannot pursue the argument here, some of the successes in Northern Ireland might be learned from, in particular the embedding not simply of formal legal rules (against discrimination) but also of institutional processes of implementation (mainstreaming and monitoring).

In short, our participants' intuitions that socio-economic issues are constitutionally important are well founded, not least because of the radical differences in legal expectation and social practice on these issues of vital everyday importance. Those differences need to be understood and possible alternatives on an all-island basis considered before any decision on constitutional change. The fact, however, that so many of our participants converged on this emphasis on socio-economic issues suggests that these are issues that can fruitfully be deliberated upon.[66]

### *Comparative lessons*

In this section we examine how socio-economic rights may be included in constitutions. We focus on South Africa as it is a seminal example of the inclusion of socio-economic rights in national constitutions, while subjecting them to special qualifications. We also look at India, to show how it provides an alternative model of listing socio-economic rights as non-justiciable

[65] Several articles in the ARINS series have highlighted this point. See Dickson, 'Implications for the protection of human rights in a united Ireland' and responses, and Murphy, 'A new welfare imaginary for the island of Ireland' and responses. The different expectations about socio-economic issues after German reunification are also relevant and may provide useful lessons.
[66] See also Suiter, 'A modest proposal'.

principles of state policy. We ask to what extent socio-economic rights are included as justiciable, what qualifications are applied, and the effect of this—i.e. the role and challenges of judicial review in this area (see the appendix for a fuller discussion of the judicial review in these cases).

Chapter 2 of the South Africa constitution provides for a bill of rights. This includes a number of socio-economic rights, specifically those related to: freedom of trade, occupation and profession; labour relations; environment; property; housing; healthcare; food, water and social security; children; and education. The motivation for doing so can be attributed to the specific post-apartheid context and a deep-seated desire to radically transform South African society. As Budlender AJ wrote in judgment in the case of *Rates Action Group v. City of Cape Town*:

> Ours is a transformative constitution ... Whatever the position may be in the USA or other countries, that is not the purpose of our Constitution. Our Constitution provides a mandate, a framework and to some extent a blueprint for the transformation of our society from its racist and unequal past to a society in which all can live with dignity.[67]

However, even in this context, the socio-economic rights included are subject to special qualifications.[68] The qualifications provide that only 'access' to the social good in question needs to be provided, that this is to be done 'subject to available resources', and that only 'reasonable legislative and other measures' are to be taken towards the 'progressive realisation' of these rights. These qualifications are similar to those in article 2(1) of the International Covenant on Economic, Social and Cultural Rights (ICESCR).

An alternative approach can be found in the Indian constitution, which distinguishes between enforceable fundamental rights provided in Part III and the non-enforceable directive principles of state policy (DPSPs) set out in Part IV of the constitution. When the constitution was being drafted there

[67] *Rates Action Group v. City of Cape Town* 2004 12 BCLR 1328 (C) par 100.

[68] The only provisions for socio-economic rights included in the South African constitution that do not include such qualifications are those provided for under Article 28, 'Children'. However, even here *Government of the Republic of South Africa and Others v. Grootboom and Others* (CCT11/00) [2000] ZACC 19; 2001 (1) SA 46; 2000 (11) BCLR 1169 (4 October 2000) shows that the courts interpret these rights in light of the qualifications, arguing that 'The carefully constructed constitutional scheme for progressive realisation of socio-economic rights would make little sense if it could be trumped in every case by the rights of children to get shelter from the state on demand.'

was some disagreement between those who argued that DPSPs could not be justiciable and those who felt that the constitution must seriously address socio-economic issues.[69] A compromise position was set out in Article 37, which declares that the DPSPs 'shall not be enforceable by any court, but the principles therein laid down are nevertheless fundamental in the governance of the country and it shall be the duty of the state to apply these principles in making laws'.[70] This article clearly shows that the intent was not to make the socio-economic rights included in the DPSPs justiciable in the same way as the fundamental rights provide for in Part III of the constitution. This is directly comparable to Article 45 of the Irish constitution, which sets out a broad vision for Irish society, and social and economic policy, while also explicitly noting that:

> the principles of social policy set forth in this article are intended for the general guidance of the Oireachtas. The application of those principles in the making of laws shall be the care of the Oireachtas exclusively, and shall not be cognisable by any court under any of the provisions of this constitution.[71]

Despite the apparent intent of the drafters, the Indian courts have made direct reference to the need to be guided by DPSPs in adjudicating rights cases. Furthermore, a significant number of the rights in the ICESCR, including for example the right to health (Article 12), have been interpreted by the Indian supreme court to form part of the right to life under Article 21 of the constitution, thus making them directly justiciable. In addition, Indian courts have actually used DPSPs to uphold the constitutional validity of statutes that apparently impose restrictions on fundamental rights because the DPSPs are seen as aids to interpret the constitution, including as it relates to fundamental rights.[72] This shows that the distinction between choosing to list socio-economic rights as non-justiciable principles of state policy and including socio-economic rights as justiciable rights is not as sharp as may initially appear, and that the specific framing and judicial interpretation of the role

[69] Granville Austin, *The Indian constitution: cornerstone of a nation* (Oxford, 1966), 77–83.
[70] Indian constitution, Article 37.
[71] Irish constitution, Article 45.
[72] S. Muralidhar, 'India: The expectations and challenges of judicial enforcement of social rights', in M. Langford (ed.), *Social rights jurisprudence: emerging trends in comparative and international law* (Cambridge, 2008), 102–24: 106.

of 'principles' matters.[73] In India, however, the implementation of court decisions has been extremely slow, and access to the courts still very uneven, despite important reforms (see the appendix).

Meanwhile the South African case shows that the inclusion of socio-economic rights in a constitution may have limited effect. In key cases that developed South African jurisprudence around socio-economic rights, the South African Constitutional Court has been reluctant to assign a positive obligation on the state to provide access to a basic level of services. In *Grootboom* the constitutional court rejected the claim of an applicant in the final stages of renal failure for ongoing dialysis treatment: it stated that 'a court will be slow to interfere with rational decisions taken in good faith by the political organs and medical authorities whose responsibility it is to deal with such matters'.[74] Similarly, in the *Mazibuko* cases (against the introduction of payment for water through the use of water meters), the constitutional court rejected the idea that courts should set a minimum core for socio-economic rights, noting that 'it is not appropriate for a court to give a quantified content to what constitutes "sufficient water" because this is a matter best addressed in the first place by the government'.[75] These judgments provide a cautionary note for those who expect the inclusion of socio-economic rights to result in strong interventions by the courts that require government action.

Other cases do suggest that the courts are willing to provide a degree of oversight. For example, *Treatment Action Campaign (TAC)* involved a challenge to the limited measures introduced by the state to prevent mother-to-child transmission of HIV through administration of the antiretroviral drug Nevirapine. The constitutional court found the policy in 'breach of the State's obligations under section 27(2) of the Constitution read with section 27(l)(a)'. The constitutional court stated that, in order for the state's policy to be in line with the constitution, it must be reformulated to meet the 'constitutional requirement of providing reasonable measures within available resources for the progressive realization of the rights' of women and newborn children.[76]

[73] See for example Tanweer Fazal, '"Peace talks" as strategic deployment: the state, Maoists and political violence in India', *Irish Studies in International Affairs* 26 (2015), 39–51.

[74] See *Government of the Republic of South Africa and Others v. Grootboom and Others*; Sandra Liebenberg, 'South Africa: Adjudicating social rights under a transformative constitution', in Langford (ed.), *Social rights jurisprudence*, 75–101: 81.

[75] See *Mazibuko and Others v. City of Johannesburg and Others* (CCT 39/09) [2009] ZACC 28; 2010 (3) BCLR 239 (CC); 2010 (4) SA 1 (CC) (8 October 2009).

[76] See *Minister of Health and Others v. Treatment Action Campaign and Others* (No. 1) (CCT9/02) [2002] ZACC 16; 2002 (5) SA 703; 2002 (10) BCLR 1075 (5 July 2002).

On Sunstein's account, 'by requiring reasonable programs, with careful attention to limited budgets, the Constitutional Court has suggested the possibility of assessing claims of constitutional violations without at the same time requiring more than existing resources will allow'.[77] However, this flexible approach can impede implementation of court orders and make monitoring of court decisions more difficult. Issues around enforcement and implementation are linked to the general nature of many of the court's orders and its reluctance to exercise a supervisory jurisdiction over the implementation of these orders.[78]

Currently the approach to the inclusion of socio-economic rights in the Irish constitution has much in common with the Indian approach in terms of the use of directive principles. Article 45 of the constitution declares that the state shall 'strive to promote the welfare of the whole people by securing and protecting as effectively as it may a social order in which justice and charity shall inform all the institutions of the national life'. It goes on to provide more detail in relation to the right to earn a livelihood in Article 45(2)(i) and the responsibility of the state to support the economic interest of weaker sections of the community in Article 45(4). However, Article 45 notes that these directive principles of social policy are 'intended for the general guidance' and 'shall not be cognisable by any Court under any of the provisions of this Constitution'. Furthermore, while the general approach shares much with that adopted in the Indian constitution, the impact has been more limited.

Having been somewhat open to recognising rights not explicitly enshrined in the text of the constitution in the 1970s and 1980s, over time the courts in Ireland became increasingly reluctant to recognise unenumerated rights as being protected under the constitution, including socio-economic rights for example in *T.D. v. Minister for Education.*[79] This case involved a socio-economic right that was not expressly enshrined in the constitution as it currently stands, and as such cannot offer us a specific view of how the courts might behave if such rights were expressly protected in the constitution. Yet the concerns expressed by certain high-profile members of the judiciary that 'the courts should not assume the policy making role in relation to the multitude of social and economic issues which form the staple of public debate'[80]

[77] Cass R. Sunstein, 'Social and economic rights? Lessons from South Africa', *John M. Olin Program in Law and Economics Working Paper* 124 (2001).

[78] Liebenberg, 'South Africa: Adjudicating social rights under a transformative constitution', 99.

[79] *T.D. v. Minister for Education* [2001] 4 IR 259.

[80] *T.D. v. Minister for Education* [2001] 4 IR 259, at 361. Gerry Whyte has challenged many of the arguments raised by Mr Justice Hardiman, in his judgments and in his article 'The role of the Supreme Court in our democracy: a response to Mr Justice Hardiman', *Dublin University Law Journal* 28 (1) (2006).

raise questions as to how interventionist the courts would be should such rights be included as part of any constitutional change.

In a possible future united Ireland, however, policy-making would have to deal with deep differences of cultural expectation and experience of effective reform: whether and how judicial thinking might change in this context is an important question to which Northern Irish experience is relevant.

*Implications for participatory research design*

How then can grassroots concerns about socio-economic rights and interests become part of a constitutional dialogue, and how might they be related to more conventional constitutional issues of sovereignty and modes of governance? This is a question for deliberation, involving grassroots participants and legal and social scientific expertise. Grassroots participants cannot themselves answer complex legal questions of how rights can best be embedded in a polity. But grassroots deliberation can broaden the agenda of constitutional discussion while helping participants tease out their priorities and preferences, as well facilitating change in them.

We suggest the following schema, building on ongoing practices of deliberation with marginalised groups, to explore further the ambiguities found in our initial focus groups.[81]

1. *Community-based local deliberative events.* As in our previous research, working with community groups builds enough trust to allow discussion among a group of people who do not normally participate in constitutional debate. To maximise the prospect of deliberation, it is important to include people from diverse backgrounds (north and south of the border; Protestant, Catholic and other).

2. *A 'bread and butter' issue currently in contention.* Following the suggestions of the participants in our recent research, the conversation should begin with discussion of a 'bite-sized' issue likely to speak to everyday experience. As with all deliberative processes, it is appropriate to begin with an issue where there has been contention (in Northern Ireland and/or across the island). Since our wider interests are to probe the constitutional significance of the discussion, the issue should be one where practices currently differ on each side of the Irish border.

[81] We will use this schema as a frame for a new phase of research, funded by the Irish Research Council's New Foundations funding programme, 2021–2.

The issue should be chosen—in conjunction with local community groups—to permit discussion as to whether a better approach across the island is possible and desirable, what prevents this, and how the obstacles could be lessened. Possible issues include health, and in particular Covid-19 policy, climate policy, generational disadvantage in housing, and gender rights.

3. *The process of debate.* A central question is whether a focus on 'bread and butter' issues is the beginning of a process of constitutional deliberation or its outcome. By moderating and facilitating discussion and ensuring that different interests and priorities are heard, we assess whether, when and how the 'bread and butter' issue connects with wider political debates on more conventional constitutional issues.

In the discussion, it is valuable to have present some of the people from previous groups who suggested this sort of 'pre-conversation': networking between different localities allows a cumulative process of deliberation from one event to the next.

4. *Options and information.* As the issues broaden out in discussion, alternative options and information become relevant to the participants and are offered to them. As outlined above, it is relevant to ask if clear constitutional or legal rights (for example to health or housing) would be helpful, and if so how these might be implemented and enforced.

As it becomes relevant, new information would be at hand: for example, how such rights were implemented in South Africa and in India, or the evidence and arguments from each Irish jurisdiction. Some experts could attend in person, others could be available on Zoom, and there could be multiple information sheets on different options.[82]

5. *Relation to conventional constitutional questions.* What is the likelihood of an adequate resolution to these problems in either jurisdiction or in a new Ireland? What prevents a more effective policy that meets common interests?

[82] The ARINS series (*Irish Studies in International Affairs* 32 (2) (2021)) gives excellent accounts of many relevant socio-economic issues, and the shorter blog pieces might form the basis of information sheets. See https://www.ria.ie/arins.

Explicitly raising conventional constitutional questions allows an assessment of whether the discussion has made them more—or less—relevant, and how it changes the focus of these questions. To repeat, we are not suggesting that grassroots participants will come up with definitive answers to difficult legal and policy questions. We do suggest that a participatory deliberative approach can help them articulate and perhaps change their preferences and priorities. It can also help connect their priorities with the dominant constitutional debate, while, perhaps, also changing some of the terms of that debate and increasing the range and diversity of those engaged in it. This is the aim of participatory constitutionalism.

## CONCLUSION

Our research explored how different communities in Northern Ireland and the Republic of Ireland, those often excluded from mainstream political debate, think about the heightened constitutional debate post-Brexit. We found, first, that there is widespread support for a highly inclusive conversation about the island's future. There is little disengagement or lack of concern. A second key finding is that participation in constitutional debate can shape the agenda of debate. Our participants sought to shift the discussion from the 'high politics' of constitutional debate concerned with state structures and political institutions—'unification' and a 'united Ireland'—to a focus on everyday issues of concern to people. Though not denying the need to engage with potential future constitutional configurations, they stressed the need to explore more general concerns, 'the commonalities' that affect people's daily lives. Third, participants prioritised 'bread and butter' socio-economic issues, rights issues and public services provision as central to any inclusive process of discussion and deliberation on Ireland's future. Fourth, participants also sought to highlight these issues as a potential reformulation of the agenda away from partisan issues. Indeed, participants from different backgrounds and jurisdictions converged on this. Our research highlights the kind of issues that diverse voices, disengaged from the dominant debate, want to see on the agenda in the unfolding constitutional discussion. The parameters and details of that agenda and the extent of consensus on it need further exploration.

While we cannot generalise from the case study, it shows the potential of wider participation to change the constitutional agenda and provide new non-partisan approaches to it. Perhaps this should not be surprising. States

reach different sections of the population in different ways and show different faces to them: thus they generate very different perspectives on constitutional change, requiring wider dialogue and deliberation over the very issues on the agenda.

In the Irish case, there is a need to explore in greater depth how ordinary citizens would wish the constitutional discussion to unfold in the years ahead and how their priorities intersect with more conventional constitutional debates about sovereignty and boundaries. One direction for future research is to explore whether and how far deliberation on socio-economic concerns can allow greater consensus on constitutional issues. Future research should further investigate where such socio-economic issues fit on people's sets of priorities: are they held to be conditions of further discussion of a viable political system, or are they the main and only values to be realised? We suggested a schematic agenda for such research. This agenda allows us to explore in more depth the relation between constitutional process—beginning with grassroots concerns—and constitutional outcomes. It is crucially important to research these questions before constitutional choices become urgent.

## APPENDIX

### *Further discussion of role of judicial review in comparative cases*

Socio-economic rights can be considered under various headings: (1) rights to universal public services, for example education or healthcare; (2) rights supportive of decent living conditions—for example, specific rights to food, water or decent living conditions may be delivered through redistributive transfer payments in the form of welfare benefits, unemployment assistance, etc.; (3) rights of workers—for example, the right to form and join trade unions; (4) rights of particular social groups—for example, a constitution may specifically refer to the position of women; (5) rights to natural resources—for example, the right of access to clean water, to the natural environment and to the land.[83]

In order to explore one way in which socio-economic issues may be part of constitutional change, we examined how socio-economic rights may be

[83] Dawood Ahmed and Elliot Bulmer, *Socio-economic rights: IDEA constitution-building primer 9* (Stockholm, 2017).

included in constitutions. We focus on South Africa as it is a seminal example of the inclusion of socio-economic rights in national constitutions. We also look at India, to show how it provides an alternative model or approach. In examining these cases, issues around the role and challenges of judicial review in this area emerged.

The inclusion of socio-economic rights in national constitutions can take several forms, and the form chosen will be affected by the specific political and historical context and will have significant implications. Three broad approaches can be delineated: (1) listing socio-economic rights as non-justiciable principles of state policy; (2) including socio-economic rights but subjecting them to special qualifications; (3) the full recognition of socio-economic rights as justiciable rights without any special qualifications. To our knowledge, the final approach has not been adopted to date. The South African constitution adopted the second of these approaches. This approach, the inclusion of socio-economic rights as justiciable rights with some qualifications, was highly unusual and the extent to which such rights were included was unique.[84] An alternative approach can be found in the Indian constitution, which distinguishes between enforceable fundamental rights provided in Part III and the non-enforceable DPSPs set out in Part IV of the constitution.

### *Judicial review*

Given the general level at which socio-economic rights tend to be included in constitutions and the qualifications applied, courts play a key role in interpreting what their inclusion in constitutions will mean in practical terms.[85] As Stewart notes, the interpretation of socio-economic rights demands a careful balancing act. Courts must be careful not to infringe the capacities of the executive and legislature to formulate government policies and legislation respectively. Yet courts, and especially the constitutional courts, must give meaning to these rights.[86] The implementation of court decisions and access to the courts are also vital elements impacting how judicial review gives meaning to socio-economic rights included in constitutions.

[84] Christof Heyns and Danie Brand, 'Introduction to socio-economic rights in the South African constitution', *Journal of UWC Faculty of Law* 2 (2) (1998), 153–67.

[85] As Heyns and Brand (1998) note, Section 8 of the South African constitution implies that in certain cases socio-economic rights not only bind the state but could also apply 'horizontally', in respect of the relationship between private entities. However, we do not focus on this issue here.

[86] Linda Stewart, 'Adjudicating socio-economic rights under a transformative constitution', *Penn State International Law Review* 28 (487) (2010).

In South Africa, the Constitutional Court ultimately rejected the notion that the provisions protecting socio-economic rights in the constitution impose a direct, unqualified obligation on the state to provide social goods and services to people on demand.[87] Sunstein argues that the Constitutional Court has adopted an approach to socio-economic rights that focuses on a 'requirement of reasoned judgment, including reasonable priority-setting'. He argues that this approach to public law, while unfamiliar to many constitutional law scholars, is common in administrative law.[88] Such an approach, while not without its problems, suggests that the courts can play a meaningful role in the protection of socio-economic rights provided for in constitutions, without impeding the legitimate role of other institutions of the state. However, this flexible approach can impede implementation of court orders and make monitoring of court decisions more difficult.

A lack of compliance with court judgments can hamper the ability of courts to effectively act to give meaning to the inclusion of socio-economic rights in the constitution. Where the Constitutional Court in South Africa has issued orders in relation to cases involving socio-economic rights, substantial challenges have arisen in relation to implementation of changes following on from the orders. Interestingly, this has been a challenge in cases where the Constitutional Court issued mandatory orders, for example *TAC*, as well as issues where the orders were of a declaratory nature. Issues around enforcement and implementation are linked to the general nature of many of the court's orders and its reluctance to exercise a supervisory jurisdiction over the implementation of these orders.[89] While it is important that such supervisory jurisdiction does not become excessively intrusive and undermine the autonomy of other branches of government, it is also important that sufficient oversight is provided to ensure that the court's decisions are adhered to in a meaningful way. Failure to do so not only undermines the value of including socio-economic rights in the constitution but may also undermine the role of the courts more broadly.

In India, orders following in public interest law (PIL) cases involving socio-economic rights tend to have two parts—a declaratory part and a mandatory part. Declaratory orders and judgments do not include consequential directions for the state authorities. Such orders require the state to

[87] Liebenberg, 'South Africa: Adjudicating social rights under a transformative constitution', 83.
[88] Sunstein, 'Social and economic rights? Lessons from South Africa', 11.
[89] Liebenberg, 'South Africa: Adjudicating social rights under a transformative constitution', 99.

accept their binding nature before implementation can occur. This can lead to long delays in implementation. For example, in *Unnikrishnan J.P. v. State of Andhra*, a judgment on the right to education, the state responded to this declaration nine years later by inserting an amendment to the constitution. Mandatory orders are specific time-bound directions to the administrative or state authority requiring it to take specific steps. In many such cases the court has also laid down the consequences of non-compliance with its order in its judgment and kept the case on board during the implementation stage for monitoring purposes.[90] This more directive approach to mandatory orders contrasts with the approach most frequently taken by the South African Constitutional Court, as discussed above. While it clearly has advantages in terms of making the monitoring of orders more straightforward, there is a significant trade-off in terms of a reduction in the autonomy of the Indian executive and legislature and increased restrictions on their ability to formulate and implement public policy and legislation in line with their democratic mandates. Furthermore, there is a question as to the efficiency of the courts' spending excessive amounts of time and other resources reviewing compliance with their decisions. This issue could be addressed through the involvement of other expert bodies, such as the South African Human Rights Commission and Commission for Gender Equality, which could carry out the reviews or supervision and report back to the courts.[91] In fact, the expertise and resources of expert commissions have also been used by courts in India to provide detailed information or verify facts to allow for initial decisions.[92]

Another potential practical problem is that of access to justice. Especially given that in many contexts the inclusion of socio-economic rights in constitutions is part of a broader desire to achieve greater levels of social justice, those in greatest need may not have the capacity to voice their claims through the courts system. The Indian judiciary has been very active and creative in finding ways to ensure that the poorest citizens are able to bring claims through PIL. This has involved the adoption of several measures to increase access to the courts. For example, the definition of those with legal standing to bring cases before the courts was expanded to allow civil society, including academics, journalists and social organisations, to bring cases, essentially on behalf of those in the community without the resources to do so. Initiatives to

[90] Muralidhar, 'India: The expectations and challenges of judicial enforcement of social rights', 110.
[91] Liebenberg, 'South Africa: Adjudicating social rights under a transformative constitution', 100.
[92] Muralidhar, 'India: The expectations and challenges of judicial enforcement of social rights', 110.

increase access also included flexibility around court procedures such as cases bring initiated by letter or note rather than formal petition. Cases have also been treated as class actions to expand the impact of decisions.[93]

PIL acknowledged that a majority of the population, on account of their social, economic and other disabilities, were unable to access the justice system. The removal of insurmountable barriers in the form of formal procedures has allowed the Indian Supreme Court to hear a range of PIL cases including those directly related to socio-economic rights, such as access to education.[94]

[93] Ellen Wiles, 'Aspirational principles or enforceable rights? The future for socio-economic rights in national law', *American University International Law Review* 22 (1) (2006), 35–64: 57.
[94] See for example *Unnikrishnan J.P. v. State of Andhra Pradesh* (1993) 1 SCC 645.