LEABHARLANN CHOLÁISTE NA TRÍONÓIDE, BAILE ÁTHA CLIATH | TRINITY COLLEGE LIBRARY DUBLIN
Ollscoil Átha Cliath | The University of Dublin

Terms and Conditions of Use of Digitised Theses from Trinity College Library Dublin

Copyright statement

All material supplied by Trinity College Library is protected by copyright (under the Copyright and Related Rights Act, 2000 as amended) and other relevant Intellectual Property Rights. By accessing and using a Digitised Thesis from Trinity College Library you acknowledge that all Intellectual Property Rights in any Works supplied are the sole and exclusive property of the copyright and/or other IPR holder. Specific copyright holders may not be explicitly identified. Use of materials from other sources within a thesis should not be construed as a claim over them.

A non-exclusive, non-transferable licence is hereby granted to those using or reproducing, in whole or in part, the material for valid purposes, providing the copyright owners are acknowledged using the normal conventions. Where specific permission to use material is required, this is identified and such permission must be sought from the copyright holder or agency cited.

Liability statement

By using a Digitised Thesis, I accept that Trinity College Dublin bears no legal responsibility for the accuracy, legality or comprehensiveness of materials contained within the thesis, and that Trinity College Dublin accepts no liability for indirect, consequential, or incidental, damages or losses arising from use of the thesis for whatever reason. Information located in a thesis may be subject to specific use constraints, details of which may not be explicitly described. It is the responsibility of potential and actual users to be aware of such constraints and to abide by them. By making use of material from a digitised thesis, you accept these copyright and disclaimer provisions. Where it is brought to the attention of Trinity College Library that there may be a breach of copyright or other restraint, it is the policy to withdraw or take down access to a thesis while the issue is being resolved.

Access Agreement

By using a Digitised Thesis from Trinity College Library you are bound by the following Terms & Conditions. Please read them carefully.

I have read and I understand the following statement: All material supplied via a Digitised Thesis from Trinity College Library is protected by copyright and other intellectual property rights, and duplication or sale of all or part of any of a thesis is not permitted, except that material may be duplicated by you for your research use or for educational purposes in electronic or print form providing the copyright owners are acknowledged using the normal conventions. You must obtain permission for any other use. Electronic or print copies may not be offered, whether for sale or otherwise to anyone. This copy has been supplied on the understanding that it is copyright material and that no quotation from the thesis may be published without proper acknowledgement.

Constitutional Equality in Ireland:
A Critical Account

by

Oran Doyle

Thesis submitted for the
degree of Doctor of Philosophy,
Trinity College, Dublin

April 2004

Supervisor: Professor Gerry Whyte
Law School, Trinity College, Dublin

TRINITY COLLEGE
02 JUN 2004
LIBRARY DUBLIN
THESIS
7966
7505

Declaration

I, Oran Doyle, hereby declare that:

(a) This thesis has not been submitted as an exercise for a degree at this or any other University;

(b) This thesis is entirely my own work.

I agree that the Library may lend or copy this thesis upon request.

Oran Doyle

24 July 2003

Summary

The ideal of equality has become increasingly prominent in Irish political discourse. Article 40.1 of the Constitution of Ireland, 1937 guarantees the equality of all citizens, as human persons, before the law, but has for many years remained undeveloped by the courts. This thesis attempts to provide a comprehensive overview of the case law interpreting Article 40.1 and to place that case law in its theoretical context.

The major conclusions of this thesis are that the drafters of Article 40.1 understood it is a guarantee of civil and political equality, but not social equality. In interpreting the Constitution, however, the courts have adopted a weak process conception of equality which applies in civil, political and social spheres of life. This weak process conception is based on the first half of Aristotle's injunction to treat like cases alike and unlike cases unalike. As a matter of constitutional law, this requires the courts to test whether legislative classifications correspond to real differences in society. *Dicta* in a number of recent cases suggest that the courts may be strengthening this process conception by requiring a higher level of justification for some grounds of classification, such as race, than for others.

The major argument of this thesis is that even this strengthened process conception of equality is inadequate to meet the demand of human equality, expressed in Article 40.1, because it is incapable of perceiving and addressing the substance of inequality in Irish society. I argue that a substantive conception of equality, which prohibits the unjust subordination of historically disadvantaged groups, is a morally more appealing account of Article 40.1. I conclude, however, that although this substantive conception of equality could have been a permissible interpretation of Article 40.1, it is now precluded by the case law.

Standard research methodology has been employed. Constitutional cases relevant to Article 40.1 have been examined in detail. This case law is placed in its historical, political, philosophical and sociological context through reference to books, learned journals, parliamentary debates and archival material.

Acknowledgements

This thesis was written between 2000 and 2003 in the Law School in Trinity College. I am grateful to my supervisor, Professor Gerry Whyte, for his constant advice, support and encouragement over the three years. His comprehensive knowledge of Irish constitutional law has been of invaluable assistance to me. I hope that the thesis reflects his input. I am also grateful to Professor Jack Balkin of Yale University. In the Spring of 2000, I took his course in constitutional equality at Harvard Law School. That course motivated me to write this thesis; as should become clear on reading, I owe Professor Balkin a significant intellectual debt.

I am grateful to Trinity College who provided the financial resources, first in the form of an Ussher scholarship and then in the form of a postgraduate teaching studentship, which allowed me to focus on the thesis. Due to their generosity, I have managed to complete this work on time.

I am grateful to the staff of the libraries in Trinity College, University College Dublin (in particular the archives department), the Central Catholic Library and the State Papers Office.

Chapter two was presented as a paper to the Dublin legal workshop in Trinity College and to a law faculty seminar in National University of Ireland, Galway. Chapter six was previously published in volume nine of the *Irish Student Law Review* (2001). Chapter eleven was presented as a paper to a conference in Trinity College and to a meeting of the Irish Association of Law Teachers. I am grateful to all who commented on these chapters at those early stages.

Patricia Brazil, Niall Buckley, Rob Cannon, Áilín Doyle and Brendan Slattery all read drafts of the thesis and made very helpful comments and suggestions. I am grateful.

Finally, thanks to my parents for all their support and to Kevin for putting up with me while this thesis was researched and written.

Table of Contents

Introduction

Part I

Chapter One: The Ideal of Equality **5**

Introduction 5

Aristotelian Equality and Formal Equality 6

Human Equality 9

Equality and Self-criticism 13

The Tripartite Conception of Equality 16

Process Conceptions of Equality 19

The Substantive Conception of Equality 25

Equality Before the Law as a Discrete Concept 26

Inequality in Ireland 28

Chapter Two: Constitutional Interpretation and Limits to Judicial Power **33**

Judicial Activism 33

The Scope of Judicial Power under the Constitution 37

Literal Interpretation 38

Originalism 40

The Moral Reading 45

Reinforcing the Process of Democracy 49

Reinforcing the Substance of Democracy 53

Process or Substance under Irish Constitutional Law? 54

Part II

Chapter Three: Original Understandings **61**

Introduction 61

Equality Before the Law 63

Equality as Human Persons 67

Legitimate Recognition of Difference 72

Chapter Four: The Courts' Conception of Constitutional Equality **79**
Introduction 79
Not Just Formal Equality 79
Early Indications of a Process Conception on the Part of the Court 81
The Aristotelian Conception 83
The Neutrality of the Process Conception 88
Indirect Discrimination 91
State Action 95
Reverse Discrimination 96
The Preference for Rights over Equality 97
Remedies for Inequality 100
Possible Litigants 104
A New Direction in Constitutional Equality Doctrine? 105

Chapter Five: Legitimate Classification and Standards of Review **109**
Introduction 109
Equality-affirming Classification 110
Differences in Moral and Physical Capacity or Social Function 111
Other Differences 113
Equality-derogating Classification 114
Constitutional Values 115
Legitimate Legislative Purpose 119
Standards of Review and Double Deference 120
Standards of Review for Equality-affirming Classification 122
Invidious Discrimination 122
Rational Basis 124
Proportionality 126
Standards of Review for Equality-derogating Classification 127

Legitimate Legislative Purpose 127
Legitimate Legislative Purpose and Proportionality 128
Constitutional Values and Proportionality 129
Article 40.1 in Conjunction with a Substantive Right 130
Problems with Standards of Review 130
Onus of Justification 131
Actual and Hypothetical Justification 131
The Tautology of Means-End Rationality 136
Conclusions 140
An Alternative Conception of Classification: Under and Over Inclusion 141
Conclusion 143

Chapter Six: The Human Personality Doctrine and Differentiated Review 145
Introduction 145
Competing Interpretations 146
Critical Assessment 154
The Original Understanding 157
A Differentiated Standard of Review 157
Evaluation of a Differentiated Standard of Review 164
Conclusion 168

Chapter Seven: Sex and Sexuality 169
Introduction 169
The Feudal Relics 169
Fatherhood 175
Civil Equality in a Legislative Context 182
Social Equality 189
Marriage 192
Sexual Orientation 194
Sexual Identity 196
Conclusion 197

Chapter Eight: Instances of Constitutional Equality **201**
Equality in the Political Process 201
Equality in Substantive Criminal Law 205
Special Treatment by the Criminal Law 207
Equality in Criminal Procedures 210
Inconsistent Decisions of State Officials 215
Laws of Civil Procedure 221
Property 222
Delegated Legislation 225
Miscellaneous Cases 227

Part III

Chapter Nine: Process Conceptions of Equality **231**
Introduction 231
The Irish Courts' Development of Constitutional Equality Doctrine 231
Right-leaning Strong Process Conceptions 233
The Strong Process Conception Adopted by the Irish Courts 236
An Alternative Strong Process Conception for the Irish Court 237
Strong Process Conceptions of Equality and Indirect Discrimination 242

Chapter Ten: Substantive Conceptions of Equality **245**
Introduction 245
The Substantive Impulse in Equality Law 245
The Basic Differences Between Process and Substantive Conceptions 247
Sex Inequality: the Substantive and Process Conceptions Contrasted 250
A Substantive Understanding of Equality: Subordination of Status Groups 255
Unjust Subordination 258
Which Groups are Unjustly Subordinated? 260
A Standard of Review under the Anti-Subordination Doctrine 263
The Substantive Conception as an Interpretation of Irish Constitutional Law 265
Conclusion 267

Chapter Eleven: The Criminalisation of Trespass **269**
Introduction 269
The Criminalisation of Trespass 270
Travellers and the Criminalisation of Trespass 271
Part IIA Analysed under Current Constitutional Doctrine 272
Introduction 272
Is Part IIA an Equality Issue? 273
Must Part IIA Meet a Higher Standard of Review? 277
Does Part IIA Meet the Appropriate Standard of Review? 280
Conclusions 283
Contextual Criticisms of a Process Conception of Equality 283
Part IIA Analysed under a Substantive Conception of Equality 286
Are Travellers a Historically Disadvantaged Status Group? 286
Does Part IIA Subordinate Travellers? 289
Are Travellers an Unjustly Subordinated Status Group? 290
Is There a Justification for Part IIA? 291
Conclusions 291
Conclusion 291

Chapter Twelve: The Best Conception of Equality **293**
Introduction 293
Interpretations of the Constitution 294
Constitutional Text 294
Constitutional Precedent 297
Conclusions 298
The Right Process Conception as an Understanding of Equality 298
The Left Process Conception as an Understanding of Equality 301
General Criticisms of Process Conceptions of Equality 303
The Substantive Conception as an Understanding of Equality 306
General Criticisms of the Substantive Conception of Equality 309
Conclusion 310

Conclusion 313

Table of Abbreviations

ALJ	Australian Law Journal
DULJ	Dublin University Law Journal
EHRR	European Human Rights Reports
GA	Georgia
HC	High Court
ICEL	Irish Centre for European Law
ILRM	Irish Law Reports Monthly
ILT	Irish Law Times
ILTR	Irish Law Times Reports
IPA	Institute of Public Administration
IR	Irish Reports
Ir Jur	Irish Jurist
ISLR	Irish Student Law Review
SC	Supreme Court
US	United States

Introduction

Article 40.1 of the Constitution of Ireland provides:

> All citizens shall, as human persons, be held equal before the law.
> This shall not be held to mean, however, that the State shall not in its enactments have due regard to differences of capacity, physical and moral, and of social function.

The courts' interpretation of this guarantee has tended to be restrictive. At a time when the courts enthusiastically adopted an expansionist reading of many constitutional provisions, most notably in their enumeration of rights under Article 40.3.2, Article 40.1 remained a constitutional backwater. Some *dicta* of the Supreme Court in recent cases suggest that the restrictive interpretation of Article 40.1 may be revisited. As equality becomes a more prominent ideal in Irish political debate and as the courts grapple in a new way with the problems of judicial power, this is an opportune moment to assess the courts' interpretation of Article 40.1 and its potential for development.

I argue in this thesis that the courts, in interpreting Article 40.1, have adopted a restrictive conception of equality and that they have interpreted that conception in a restrictive way. The courts have decided that Article 40.1 guarantees process equality, concerning themselves with the integrity of the legislative process: legislation is considered to comply with the equality guarantee to the extent that the classifications it makes proportionately take into account relevant differences between persons. Further, the courts' conception of process equality has itself been subjected to a number of significant restrictions. From the 1970s to the 1990s, the courts often adopted an interpretation of the phrase "as human persons" which practically foreclosed all equality arguments. The courts held that equality was guaranteed only in contexts in which the essential attributes of one's human personality were at stake, but never identified any such context.[1] Relying on its process status, the courts consistently subordinated the equality guarantee to other, more substantive, norms in the Constitution, deeming that a classification was justified if it served another constitutional

---

[1] See chapter six.

value.[2] Finally, the courts evolved tests for the infringement of Article 40.1 which required deference to legislative judgment not only as to whether there was a good reason to derogate from equality but also as to what equality required in the first instance. This distinguished the equality guarantee from all other constitutional guarantees.[3]

In this thesis, I shall comprehensively set out Irish constitutional equality doctrine, as well as the potential for development now implicit in that doctrine. I shall also set out a number of alternatives to this doctrine, both plausible and implausible. Interpretatively plausible alternatives are set out in order to demonstrate the choices that judges must now make when they decide on issues of constitutional equality. Interpretatively implausible alternatives are set out in order to demonstrate the choices already made by judges in deciding issues of constitutional equality. Together these observations illustrate two propositions of critical legal thinking. First, law is indeterminate: in adjudicating constitutional equality cases, judges ultimately decide based on their own personal conceptions of what equality requires, i.e. their own understanding of political morality. Secondly, law is ideology: the interpretative choices which are plausibly open to judges are limited to variations within one particular ideology, process equality.[4]

Lawyers, in particular academic lawyers, should not be tacit evangelists for the ideal of liberal legality.[5] Too much academic criticism takes the form of arguing against decisions on the grounds that the courts misunderstood the law. In this model, the academic presents the true law, conveniently ignoring the fundamental proposition of positivism that the courts make the law. She then criticises the court's decision and suggests what the correct answer should have been. In reality, however, the law is sufficiently indeterminate that legal support can usually be found for whatever a judge decides. The commentator's assertion that the judge misunderstood the law is thus an indication that the commentator disagrees with the judge's moral choice of one plausible interpretation.[6] This method of reasoning conveys the false impression that law and political morality are generally *ad idem* and that short-run departures

---

[2] See chapter four.
[3] See chapter five.
[4] The thesis is a practical illustration of these points, not a theoretical defence of them.
[5] By which I mean, broadly, the rule of law, the idea of the rational resolution of disputes under the law.
[6] Although I argue in this thesis that some conceptions of equality are preferable to others, I generally do so on a moral basis not a legal basis.

are due to inadequate judging. This legitimises the law through its suggestion that the law generally achieves morally good results. This amounts to evangelism for the ideal of liberal legality because it implies that one can simultaneously enjoy rational resolution under the law and morally desirable results. One must abstain from this evangelism; one must be critical.

Thus in this thesis, I rarely suggest that a judge has misunderstood the law. Instead, I suggest that judges, in exercising the interpretative choices left open to them by indeterminate law, have fairly consistently, but not uniformly, chosen the least egalitarian option. This should be a cause of concern for a society committed to equality. The problem with traditional academic commentary is that it conceals the moral character of these choices and leads to a monopolisation by lawyers of the concealed moral debate. Law provides the context within which the choice is made, but the choice itself is a matter of morality. The moral debate should be open to all, not just to lawyers.

In Part I, I address two preliminary issues: the meaning of equality and the limits on judicial power. In Part II, I comprehensively set out constitutional equality doctrine. I first make suggestions as to original understandings of Article 40.1. I then outline a number of doctrinal issues that have arisen in the interpretation of Article 40.1. I conclude with a thematic analysis of the case law interpreting Article 40.1. In Part III, I elaborate further on the theoretical context of constitutional equality doctrine. I suggest a number of alternative conceptions of equality, consider their application in a particular context and question whether they are legally plausible and morally desirable.

Part I

Chapter One

The Ideal of Equality

Introduction

Sartori comments that equality is a "protest ideal". A society committed to equality is a society fighting itself, fighting its inner laws of inertia:

> When equality is sought, differences in power, wealth, status, and life chances, as they are "naturally" found to exist, cease to be routinely accepted differences. By appealing, then, to liberty, and in its wake – but with greater impact – to equality, man asserts his claim to a city that is no longer subject to necessary and ascriptive forms of organization.[1]

In the constitutional context, Sunstein notes how equality provisions attempt "to protect disadvantaged groups from discriminatory practices, however deeply ingrained and longstanding".[2] Such a commitment to equality is almost paradoxical. How does a society commit itself to such critical self-examination? What authority does a society have to undermine itself?

The purpose of this chapter is to address this paradox and to place in context the Irish courts' treatment of the constitutional guarantee of equality. I shall consider a number of conceptions of equality, both general and legal, which inform the constitutional position and my criticism of that position. I shall conclude with an examination of inequality in Ireland.

---

[1] Sartori, *The Theory of Democracy Revisited* (Chatham House Publishers, 1987), at 337.

[2] Sunstein, "Sexual Orientation and the Constitution: A Note on the Relationship between Due Process and Equal Protection" 55 *University of Chicago Law Review* 1161, at 1163 (1988).

Aristotelian Equality and Formal Equality

> For equals share alike in the honourable and the just, as is just and equal. But that the unequal should be given to equals, and the unlike to those who are alike, is contrary to nature, and nothing which is contrary to nature is good.[3]

This idea of equality – treating equals equally and unequals unequally – is a prominent feature of western thought. Aristotle referred to this idea as "proportionate equality" and developed it in response to and as a compromise between two competing doctrines of distributive justice.[4]

The difficulty lies in determining equality of what.[5] Proportionate equality recognises that persons can be equal in some respects yet unequal in other respects. In order to decide, in a particular context, whether equal treatment is required, one must decide whether the persons are equal in relevant respects. In von Leyden's view, the inquiry into what are the relevant types of equality rescues equality from vagueness; it gives focus to the concept of equality. Some, however, do not accept that the Aristotelian conception of equality – and indeed equality in general – can be rescued from tautology. They maintain that the Aristotelian conception of equality is purely formal; any inquiry into which equalities are relevant is an issue not of equality but of substantive entitlements.

In this vein, Flathman argues that to treat people equally is to treat them in the same way.[6] He adopts a neutral, formal principle of generalisation as a statement of the idea of equality: "What is right (or wrong) for one person must be right (or wrong) for every relevantly similar person in relevantly similar circumstances."[7] He notes that there are two premises in this rule: first, that the thing is right for the first person; second, that the second person is a relevantly similar person in relevantly similar circumstances. He argues that, given the diversity of people's situations, they can be equal in some respects and unequal in others. Treating people equally in one respect will involve treating them unequally in another

---

[3] Aristotle, *Politics* VII.3, at 5 *et seq.* Translated by Jowett (Oxford, 1885).
[4] See von Leyden, *Aristotle on Equality and Justice: His Political Argument* (Macmillan, 1985), at 3.
[5] Aristotle, *op. cit.*, III.12.
[6] Flathman, "Equality and Generlization: A Formal Analysis" in Roland and Chapman (eds), *Nomos 9: Equality* (Atherton Press, 1967), at 38.
[7] He adopts this from Singer, *Generaliztion in Ethics* (Alfred A. Knopf, 1961), at 19-20.

respect.[8] To assert one respect as the more egalitarian of the two is really to assert that it is a more relevant and more important equality: this is a choice which cannot be informed by equality itself.[9] In this regard, equality connotes merely "according to one and the same rule".[10] Whenever one treats people according to a rule, one must treat them equally according to that rule.[11] The question is according to which rule one should treat people in a particular case. The question poses a choice between equalities, a choice which cannot be resolved by the idea of equality itself. Arguments generally characterised as "egalitarian" are in reality merely arguments that equality in one respect is more important than equality in another respect.[12]

Westen makes a similar argument, noting its effects for legal equality.[13] He asserts that there is only one formal idea of equality: that likes should be treated alike and that unalikes should be treated unalike. There are as many substantive versions of equality as there are substantive notions of right entitlement by which persons can be said to be "alike" or "unalike". But the substantive element of these conceptions turns not on equality but on some independent view of what is right and proper. The formal rule of equality has no substantive content. It requires one to identify whether persons are alike and what like treatment is consequently required. These identifications can only plausibly be made by reference to the rule itself. Westen thus takes the same position as Flathman: equality reminds one to apply

---

[8] For example, a rule that required Dáil constituencies to have a set ratio of representatives to population would treat persons equally in terms of the ratio of representatives to population but unequally in terms of their distance from Dublin.

[9] In the Irish context, Article 16.2.2° comes close to making this choice, but it was not so clear in the American context, which Flathman was discussing.

[10] Sadurski sees this as one form of equality, namely equality before the law. Nevertheless, he comments that this is not so much a principle of equality as a principle of non-arbitrariness. It follows necessarily from any rule which calls for certain treatment of certain individuals in certain situations. Sadurski, "Equality Before the Law: A Conceptual Analysis" (1986) 60 *ALJ* 131, at 132. On this point, see also Oppenheim, "Egalitarianism as a Descriptive Concept" 7 *American Philosophical Quarterly* 143, at 144 (1970). Both Sadurski and Oppenheim maintain that one can legitimately talk about other forms of equality which deal with the substance of distribution, not just the form.

[11] Flathman, *loc. cit.*, at 49.

[12] For instance, that in terms of Dáil representation, equality in terms of the ratio of representatives to population is a more important equality than equality in terms of persons' distance from Dublin. This analysis allows limited scope for equality arguments in political and moral debate. Flathman accepts this point noting that, if one approaches moral questions solely in terms of equality, one unduly narrows one's analysis for one can then only question whether a rule has been applied with integrity. Nevertheless, he argues, equality does have some use as it provides a logical principle, neutral to any substantive moral question, that can discipline one's thinking: it forces one to apply the same rules to oneself, if one is a relevantly similar person in relevantly similar circumstances, as one applies to others. *Ibid.*, at 55.

[13] Westen, "The Empty Ideal of Equality" 95 *Harvard Law Review* 537 (1982).

rules honestly; it does not provide one with an independent criterion for assessing the justice of rules:

> [T]o say that people who are morally alike in a certain respect "should be treated alike" means that they should be treated in accord with the moral rule by which they are determined to be alike. Hence "likes should be treated alike" means that people for whom a certain treatment is prescribed by a standard should all be given the treatment prescribed by the standard. Or, more simply, people who by a rule should be treated alike should by the rule be treated alike. So there it is: equality is entirely circular. It tells us to treat like people alike; but when we ask who "like people" are, we are told they are "people who should be treated alike". Equality is an empty vessel with no substantive moral content of its own. Without moral standards, equality remains meaningless, a formula that can have nothing to say about how we should act. With such standards, equality becomes superfluous, a formula that can have nothing to say about how we should act.[14]

Equality merely reinforces the tautological proposition that a rule should be applied in all cases to which the terms of the rule dictate that it should be applied. Westen argues that all equality analysis in law ultimately and necessarily collapses into rights analysis because it requires a substantive determination of the respects in which persons are alike; equality cannot provide that determination. Equality arguments have rhetorical force but engender conceptual confusion.

There is a number of possible responses to the view that equality is purely formal equality and that formal equality is tautological.[15] Waldron argues that the weakness in Westen's argument lies in his failure to elaborate the substantive principles which identify relevant equalities. In Waldron's view, the idea of equality, "considered as a deep principle of political justification", is of assistance.[16] Where a particular good is to be distributed in a particular

---

[14] *Ibid.*, at 547.
[15] See, for instance, Greenawalt, "How Empty is the Ideal of Equality?" 83 *Columbia Law Review* 1167 (1983).
[16] Waldron, "The Substance of Equality" 89 *Michigan Law Review* 1350, at 1359 (1991).

way, one can determine the most relevant equality by questioning which distribution best demonstrates equal concern and respect for all people.[17]

The command of equal concern and respect derives from a belief in human equality. This command can then inform one's choice of relevant equalities. One can question the basis of human equality.[18] For the purposes of this thesis, it suffices to note that Article 40.1 of the Constitution, although containing some language redolent of the Aristotelian conception, guarantees equality for citizens "as human persons". It is a commitment to human equality.[19]

Human Equality

The idea of human equality has been a feature of natural law thinking since before the time of Christ. Sabine and Thorson identify a complete rupture in political thought upon the death of Aristotle.[20] The most significant feature of this rupture was the emergence of the idea that all men were equal, even the slave, the foreigner and the barbarian.[21] These ideas became associated with the Stoic school of philosophy and ultimately, largely through the writings of Cicero, lost their identification with any system of philosophy and became the common property of educated people:

> In the light of [the universal law of nature] all men, as Cicero insists in the most unequivocal terms, are equal. They are not equal in learning ... but in the possession

---

[17] Raz has argued that the command of equal concern and respect is really just a humanitarian command for concern and respect; the "equal" adds nothing. See Raz, "Professor Dworkin's Theory of Rights" (1978) 26 *Political Studies* 123, at 130, cited in Waldron, *loc. cit.*, at 1362. Waldron responds:

> That may be true. But in political philosophy, the claim that people have a right to concern and respect in virtue of their humanity (their being human agents, moral persons, or whatever) has been advanced so often to counter claims about radical *differences* in human worth, it is not surprising that it has come to be characterized in terms of "equality". Its typical use is to argue against a common temptation to differentiate human rights on the basis of birth, ability, race, sex, or merit.

Idem.

[18] For a sympathetic but questioning view, see Williams, "The Idea of Equality" in Laslett and Runciman (eds), *Philosophy, Politics and Society (Second Series)* (Basil Blackwell, 1962).

[19] See chapter three.

[20] Sabine and Thorson, *History of Political Theory* (4th ed., Dryden Press, 1973), at 143.

[21] Aristotle had not believed in general human equality, instead maintaining that men were equal in certain respects and should be treated equally proportionately to those respects.

> of reason in their underlying psychological make-up, and in their general attitude toward what they believe to be honorable or base, all men are alike.[22]

Cicero himself wrote:

> Out of all the material of the philosophers' discussions, surely there comes nothing more valuable than the full realization that we are born for Justice, and that right is based, not upon man's opinion, but upon Nature. This fact will immediately be plain if you once get a clear conception of man's fellowship and union with his fellow men. For no single thing is so like another, so exactly like its counterpart, as all of us are to one another. Nay, if bad habits and false beliefs did not twist the weaker minds and turn them in whatever direction they are inclined, no one would be so like his own self as all men would be like all others.[23]

The idea of human equality before God was endorsed by early Christian teaching.[24] St. Paul writes to the Galatians:

> There is neither Jew nor Greek, there is neither slave nor free, there is neither male nor female; for you are all one in Christ Jesus.[25]

The idea of human equality has remained a part of mainstream Christian teaching. In 1922, Pope Pius XI wrote:

> Only in this Kingdom of Christ can we find that true human equality by which all men are ennobled and made great by the selfsame nobility and greatness, for each is ennobled by the precious blood of Christ.[26]

---

[22] Sabine and Thorson, *op. cit.*, at 162.
[23] Cicero, *The Laws* I, 10, 28-9, (translated by CW Keyes), cited in Sabine and Thorson, *op. cit.*, at 162.
[24] The Christian view of equality is of particular relevance for this thesis given the influence of Roman Catholic teaching on the equality guarantee in the Irish Constitution. See chapter three. Sabine and Thorson note that, although the rise of the Christian church was a revolutionary event in the politics and political philosophy of western Europe, the political conceptions of early Christians were not particularly distinctive. *Ibid.*, at 176.
[25] Gal., 3,28 (Revised Standard Version).
[26] Pope Pius XI, *Ubi Arcano Dei Consilio* (1922), at para. 58.

This is a rather restrictive understanding of human equality. Humans are basically equal, but that equality can only be realised in the next world, not the current one. For this reason, any number of temporal inequalities are fully consistent with the commitment to human equality. In the temporal world, church teaching seems to have placed more emphasis on the Aristotelian conception of equality:

> There naturally exist among mankind manifold differences of the most important kind; people differ in capacity, skill, health, strength; and unequal fortune is a necessary result of unequal condition. Such inequality is far from being disadvantageous either to individuals or to the community. Social and public life can only be maintained by means of various kinds of capacity for business and the playing of many parts; and each man, as a rule, chooses the part which suits his own peculiar domestic condition.[27]

Over time, however, a more expansive position has emerged in Roman Catholic teaching. This position views basic human equality as a reason to treat humans as equal: the transcendental mandates a particular political programme:

> Since all men possess a rational soul and are created in God's likeness, since they have the same nature and origin, have been redeemed by Christ and enjoy the same divine calling and destiny, the basic equality of all must receive increasingly greater recognition. True, all men are not alike from the point of view of varying physical power and the diversity of intellectual and moral resources. Nevertheless, with respect to the fundamental rights of the person, every type of discrimination, whether social or cultural, whether based on sex, race, color, social condition, language or religion, is to be overcome and eradicated as contrary to God's intent.... Therefore, although rightful differences exist between men, the equal dignity of persons demands that a more humane and just condition of life be brought about. For excessive economic and social differences between the members of the one human

[27] Pope Leo XIII, *Rerum Novarum: Encyclical on Capital and Labour* (1891), at para. 17.

> family or population groups cause scandal, and militate against social justice, equity, the dignity of the human person, as well as social and international peace.[28]

Dworkin also argues for human equality but in a very different way. He posits a crucial distinction between a natural model of morality and a constructive model of morality.[29] Under the natural model, theories of justice describe an objective morality. As with observational science, a moral theory is built upon the concrete moral intuitions of (at least some) people. Under the constructive model, intuitions of justice are not clues to the existence of independent principles, but are stipulated features of a general theory to be constructed. It assumes that officials, and perhaps people generally, must act consistently and so can only act on the basis of moral intuitions which can be explained in terms of a coherent moral theory. The constructive model lends itself well to group consideration of problems of justice. It can provide a theory of justice that belongs to the community rather than to particular individuals. Under the constructive model, moral reasoning aims at equilibrium; it is a two-way process. One may amend one's theory of justice so that it fits one's intuitions about justice; but one may also amend one's intuitions about justice so that they fit one's theory of justice.

Dworkin argues that, in order to fit our intuitions about justice, a theory of justice must be rights-based, as opposed to duty-based or goal-based.[30] The assumption of natural rights, on the constructive model, is not metaphysically ambitious. It assumes, for the purposes of the theory, that rights are not simply the product of deliberate legislation or explicit social custom, but are independent grounds for judging legislation and custom. Dworkin then imagines men and women in the Rawlsian original position and questions what abstract right would be the fundamental one of their theory of justice. Although such people have an interest in general liberty, they do not know that general liberty will improve their individual liberty. The opposite may indeed be the case: they may have other interests that can only be protected by political constraints on the acts of others.

---

[28] Pope Paul VI, *Gaudium et Spes: Pastoral Constitution on the Church in the Modern World* (1966), at para. 29. The political programme motivated by human equality does not mean a rejection of Aristotelian equality. Rather human equality is used to substantiate Aristotelian equality by stipulating certain differences which cannot justify differences in treatment. The current catechism of the Church reflects a synthesis of the two conceptions. See *Catechism of the Catholic Church* (Veritas, 1994), at paras 1934-8.

[29] Dworkin, *Taking Rights Seriously* (Harvard, 1977), at 159.

Equality, according to Dworkin, is the concept that Rawlsian men and women cannot choose other than to protect:

> The right of each man to be treated equally without due regard to his person or character or tastes is enforced by the fact that no one else can secure a better position by virtue of being different in any such respect.[31]

Dworkin's equality is a highly abstract right of individuals to equal concern and respect in the design and administration of the political institutions that govern them. This allows for many competing different conceptions of equality. Before outlining a number of possible conceptions of equality, it is necessary to comment on the interpretation of the ideal of equality.

Equality and Self-criticism

Equality emerged as a powerful political ideal in the eighteenth century. The United States Declaration of Independence (1776) asserts equality as the first self-evident truth:

> We hold these truths to be self-evident: that all men are created equal, that they are endowed by their creator with certain inalienable Rights; that among these are Life, Liberty, and the pursuit of Happiness.[32]

---

[30] *Ibid.*, at 176.

[31] *Ibid.*, at 179.

[32] Redenius considers it interesting that "pursuit of Happiness" appears where one might expect to see "property". This further underlines the egalitarian character of the declaration. See Redenius, *The American Ideal of Equality: From Jefferson's Declaration to the Burger Court* (National University Publications, 1981), at 12. Finally, it is worth noting in passing that the 1916 Proclamation of Independence, similarly to the US Declaration of Independence, places equality in a more prominent setting than the 1937 Constitution does. Following the litany of national suffering, the following commitment is made:

> The Republic guarantees religious and civil liberty, equal rights and equal opportunities to all its citizens, and declares its resolve to pursue the happiness and prosperity of the whole nation and all of its parts, cherishing all of the children of the nation equally and oblivious of the differences carefully fostered by an alien government, which have divided a minority from the majority in the past.

Nevertheless, this commitment comes towards the end of the document and can scarcely be compared to the ringing US declaration that all men are created equal. Furthermore, the Proclamation has never achieved the prominence in public debate afforded to its US counterpart.

Irrespective of whether this truth is self-evident, the Declaration evidences the importance of this proposition for people of the time.[33] The Declaration of the Rights of Man (1789) takes a similar approach, Article 1 establishing, "Men are born and remain free and equal in rights. Social distinctions may be founded only upon the general good".[34]

The appeal of equality persists. Most constitutions and human rights covenants commit their signatories to equality. But what does it mean for a country to commit itself to achieving equality? I noted at the start of this chapter how equality, as a political ideal, requires continuous self-examination. As an ideal, equality is subversive. It demands a redistribution of popularity, power and privilege from those who have it to those who have not. It is necessarily sceptical of the claims of tradition.

This poses an analytical difficulty. For if equality requires a country to criticise its past history, it may require criticism of the practices of those who committed the country to the ideal of equality in the first instance. How can one reconcile obedience to the commitment to equality with scepticism of the practices of those who made the commitment? One could interpret the ideal of equality in such a way as to validate the practices of one's forebears, thereby fixing one's understanding of equality at the point in time when they committed the country to it. Such a course would remove the critical capacity of equality; it could no longer be the vehicle of radical self-examination. Alternatively, one could conclude that they never really meant to commit the country to equality at all. Either way equality loses out to the status quo. Abraham Lincoln cogently argued that this was a false dichotomy. His analysis, offered as a response to the US Supreme Court decision in *Scott v. Sandford*,[35] remains a powerful account of how

---

[33] Pole comments: "The moral universality of Jefferson's "self-evident" truths captured the imagination in 1776 because it expressed the passions of a morally inspired revolt. It caught the mood of independence before political responsibility had been translated into the more tortuous complexities of self-government. The timing for such a universal declaration was right; perhaps it was the only timing that was historically possible." Pole, *The Pursuit of Equality in American History* (2nd ed., University of California Press, 1993), at 36.

[34] Article 6 speaks in terms of equality before the law:

> Law is the expression of the general will. Every citizen has a right to participate personally, or through his representative, in its foundation. It must be the same for all, whether it protects or punishes. All citizens, being equal in the eyes of the law, are equally eligible to all dignities and to all public positions and occupations, according to their abilities, and without distinction except that of their virtues and talents.

I have taken this translation from <http://www.yale.edu/lawweb/avalon/rightsof.htm>.

[35] 60 US 393 (1857).

to interpret the political ideal of equality. Before considering his analysis, it is necessary to outline the decision in *Sandford*.

In *Sandford*, the Court had ruled that, as black people had not been considered citizens of the several states at the time of the enactment of the US Constitution, they could not now, as a matter of constitutional law, be citizens of the states and therefore they had no right to sue in federal courts. Taney C.J. made a number of other rulings favourable to the institution of slavery.[36] The Chief Justice, notes White, effectively elevated racial inferiority into a principle of law. Although most Americans were not particularly disturbed by the practice of racial discrimination, they did not like the suggestion that "the principle of the Declaration of Independence that all men were created equal was a mockery without moral force or had a special set of racially based limitations".[37] This idea of racial limitations to equality was advanced by Senator Stephen Douglas, a several time electoral opponent of Lincoln. On 26 June 1857, Lincoln replied:

> I think the authors of that notable instrument intended to include all men, but they did not intend to declare all men equal in all respects. They did not mean to say all were equal in color, size, intellect, moral developments, or social capacity. They defined with tolerable distinctness, in what respects they did consider all men created equal—equal in "certain inalienable rights, among which are life, liberty, and the pursuit of happiness." This they said, and this they meant. They did not mean to assert the obvious untruth, that all were then actually enjoying that equality, nor yet, that they were about to confer it immediately upon them. In fact they had no power to confer such a boon. They meant simply to declare the right, so that the enforcement of it might follow as fast as circumstances should permit. They meant to set up a standard maxim for free society, which should be familiar to all, and revered by all; constantly looked to, constantly labored for, and even though never perfectly attained, constantly approximated, and thereby constantly spreading and deepening

---

[36] For a discussion of the case, see Brest, Levinson, Balkin and Amar, *Processes of Constitutional Decisionmaking* (4th ed., Aspen, 2000), at 200-7.

[37] White, *The American Judicial Tradition* (Oxford, 1976), at 82-3, cited in Redenius, *The American Ideal of Equality: From Jefferson's Declaration to the Burger Court* (National University Publications, 1981), at 66.

> its influence, and augmenting the happiness and value of life to all people of all colors everywhere.[38]

In this way, Lincoln distinguished between the ideal and its practice. One may commit oneself to the political ideal of equality without being a perfect practitioner of that ideal. But by one's commitment, one undertakes constantly to strive for equality, constantly to revise one's practices in the light of what equality requires.[39] In this sense, equality appears as an ideal which can never be fully achieved but which must always be striven for. That very striving generates an egalitarian culture.[40]

The Tripartite Conception of Equality

As a result of the American Civil War, the Thirteenth, Fourteenth and Fifteenth amendments to the US Constitution were adopted. The Thirteenth Amendment, adopted towards the end of the war, abolishes slavery. The Fourteenth Amendment, adopted in 1868, is more wide-ranging in its scope. It provides that all persons born or naturalised in the United States are citizens both of the United States and of the State in which they reside, thereby overturning the decision in *Scott v. Sandford*. It then imposes a number of fundamental rights obligations on each State, including the obligation not to "deny to any person within its jurisdiction the equal protection of the laws". The Fifteenth Amendment, adopted in 1870, provides that the "right of citizens to vote shall not be denied or abridged by the United States or by any State on account of race, color, or pervious condition of servitude". It has been convincingly argued that these Reconstruction Amendments were understood by reference to a tripartite conception of equality, under which civil and political equality, but not social equality, were

---

[38] Part of this speech is cited in Redenius, *op. cit.*, at 67. I have taken this extract from <http://www.freemaninstitute.com/lincoln.htm>.

[39] This places the interpretation of equality fundamentally at odds with arguments for an originalist interpretation of the Constitution. See chapter two.

[40] Balkin makes a similar point, noting the "grammatical embarrassment" in the Declaration's call for equality. He comments that whenever one articulates the demand for equality, one does so imperfectly:

> At the time the Declaration was written, few in the Continental Congress understood the exclusion of women as an embarrassment, although more perhaps understood and felt the embarrassment of slavery. Yet this phenomenon of a document making a demand for equality, a demand that undermines itself and embarrasses the document that states it – this self-contradictory expression of an underlying ideal – is one of the central features of our political predicament. It is an apt and ironic expression of the ongoing and indeterminate demand for equality.

Balkin, "The Constitution of Status" 106 *Yale Law Journal* 2313, at 2344 (1997).

guaranteed by the State.[41] I shall later argue that a similar conception of equality informed some of Mr. de Valera's comments on Article 40.1 during the Dáil debates.[42] Furthermore, this tripartite conception was often connoted by the phrase "equality before the law",[43] the formulation of equality used in Article 40.1.

Siegel argues that, during the Reconstruction era, Americans viewed the Amendments as ending subordination in slavery and elevating African Americans to equality in law.[44] This was not a well-defined concept but served as a framework for political debate. Broadly speaking, civil equality connoted those rights exercised by "economic man", such as the right to own property and the right to enter contracts. It concerned a person's civil status in society.[45] It was not clear whether political equality was guaranteed by the Fourteenth Amendment; nevertheless, the Fifteenth Amendment's protected the equal right to vote and arguably political equality generally. As well as the right to vote, political equality connoted rights such as the right to sit on a jury. It concerned a person's political connection to the state. Social equality connoted equality in the social sphere, generally understood to consist of the voluntary association of individuals.[46]

A decision of the Georgia Supreme Court, dealing with a challenge to a ban on interracial marriage, best illustrates the perceived distinction between civil and political equality, on the one hand, and social equality, on the other:

---

[41] See for instance McConnell, "Originalism and the Desegregation Decisions" 81 *Virginia Law Review* 947, at 1016 (1995) who argues that the tripartite division of rights, although universally accepted at the time, has now been forgotten.

[42] See chapter three.

[43] See for instance Singer, "No Right to Exclude: Public Accommodations and Private Property" 90 *Northwestern University Law Review* 1283, at 1349 (1996).

[44] Siegel, "The Critical Use of History: Why Equal Protection no Long Protects: Evolving Forms of Status-Enforcing State Action" 49 *Stanford Law Review* 1111, at 1119 (1997).

[45] McConnell argues that, although the exact scope of civil rights is uncertain, those rights protected by the Civil Rights Act, 1866 – legitimated by the Fourteenth Amendment in 1868 – clearly lie within its core: the right to make and enforce contracts; the right to buy, lease and inherit, hold and convey property; the right to sue and be sued and to give evidence in court; the right to legal protections for the security of person and property; and the right to equal treatment under the criminal law. See McConnell, *loc. cit.*, at 1027. It was contestable whether education was a civil right. This could be seen in the Congressional debates over the adoption of the Civil Rights Act, 1875. Those who opposed segregation argued that education was a civil right; those who supported segregation argued that education fell within the social sphere, more a matter of privilege than of right. Neither side questioned the relevance of the civil/social distinction; they rather argued over the extent of each category.

[46] In modern parlance, the public/private distinction.

> Government has full power to regulate civil and political rights, and to give each citizen of the State, as our Code has done, equal civil, and equal political rights as well as equal protection of the laws. But Government has no power to regulate social status. Before the laws, the Code of Georgia makes all citizens equal, without regard to race or color. But it does not create, nor does any law of the State attempt to enforce, moral or social equality between the different races or citizens of the State. Such equality does not in fact exist, and never can. The God of nature made it otherwise, and no human law can produce it, and no human tribunal can enforce it.[47]

In the American context, the assertion that the law did not, and could not, guarantee social equality was buttressed by strong rhetoric of individual freedom, beyond the reach of government.[48] But this laissez-faire attitude is not a necessary concomitant of the tripartite conception of equality. A state could quite consistently deny that equality was guaranteed in the social sphere and vigorously pursue its own social programme in that sphere. In chapter three I shall argue that the drafters of the Irish Constitution understood the tripartite conception in this way. In the United States by the end of the Nineteenth Century, the distinction between civil and political equality had collapsed, leaving one with a bipartite conception of equality: civil/political versus social. The distinction between civil/political and social equality was endorsed by the US Supreme Court in *Plessy v. Ferguson*.[49] Justice Brown reasoned:

> The object of the [Fourteenth A]mendment was undoubtedly to enforce the absolute equality of the two races before the law, but in the nature of things it could not have been intended to abolish distinctions based upon color, or to enforce social, as distinguished from political equality...[50]

---

[47] *Scott v. Georgia* 39 Ga 321, at 326 (1869), cited in Siegel, *loc. cit.*, at 1122 (fn. 41).

[48] Nevertheless, the laws actually validated by the tripartite conception (anti-miscegenation laws and racial segregation laws) amounted to considerable restrictions on individual freedom. McConnell also adverts to this point. See McConnell, *loc. cit.*, at 1020. If one assumed, as courts may well have done, that blacks wished to associate with whites, but that whites did not wish to associate with blacks, the appeals to individual freedom made more sense. The problem with this line of argument, however, is that it undermines the other argument of segregationists that segregation did not constitute inequality as both sides were treated equally.

[49] 163 US 537 (1896).

[50] *Ibid.*, at 544. Again note how this (now) bipartite conception of equality is considered to be synonymous with the phrase "equality before the law".

The tripartite conception of equality is now an historical relic. Indeed, it is difficult to understand how it could ever have been understood as equality at all. In the US the decision of *Brown v. Board of Education*,[51] declaring state segregation in public schooling unconstitutional, jettisoned the idea that equality was not guaranteed in the social sphere. This decision precipitated a legal struggle over what conception of equality should be adopted. This struggle ended with the adoption of a strong process conception of equality, outlined below. This built on a weaker process conception of equality that had co-existed with the tripartite conception as a means of testing the rationality of "socio-economic" legislation. In Ireland, the tripartite conception of equality still had some vitality at the time the Constitution was enacted, but it never gained a foothold in the courts. When the courts began seriously to consider equality arguments in the 1960s and 1970s, they initially borrowed heavily from the US weaker process conception. Ever since, there has been a debate as to whether Ireland should also adopt the strong process conception.[52]

Process Conceptions of Equality[53]

One can usefully characterise conceptions of equality as marking the division between those practices which the law will regard as unequal and those which the law will not regard as unequal. Whereas the tripartite conception achieves this division by reference to the sphere of life (civil, political or social) in which the practice takes place, the process conception focuses on the process by which the practice was adopted.[54] This is now the dominant

---

[51] 347 US 483 (1954).

[52] See chapter six.

[53] There is much discussion in the academic literature of the differences between process and substantive accounts of equality. In formulating this account, I have relied on the following works: Abrams, "Equality and Impasse: Mobilizing Group-Based Perspectives in an Era of Group Blindness" in Douglas and Devins (eds), *Redefining Equality* (Oxford, 1998); Balkin, *loc. cit.*; Brest, "Foreword: In Defense of the Antidiscrimination Principle" 90 *Harvard Law Review* 1 (1976); Colker, "Anti-Subordination Above All: Sex, Race and Equal Protection" 61 *New York University Law Review* 1003 (1986); Fallon and Weiler, "Firefighters v. Stotts: Conflicting Models of Racial Justice" (1984) *Supreme Court Review* 1; Fiss, "Groups and the Equal Protection Clause" 5 *Philosophy and Public Affairs* 107 (1975); Freeman, "Legitimizing Racial Discrimination Through Antidiscrimination Law: A Critical Review of Supreme Court Doctrine" 62 *Minnesota Law Review* 1049 (1978); McCrudden, Equality and Socio-Economic Rights in the Contexts of a Global Economy Paper presented to the Equality Studies Centre Conference in UCD, 15 December 2000; McCrudden, "Introduction" in McCrudden (ed.), *Anti-Discrimination Law* (Dartmouth, 1991); MacKinnon, "Reflection on Sex Equality under Law" 100 *Yale Law Journal* 1281, at 1287 (1991); Siegel, "The Critical Use of History: Why Equal Protection no Long Protects: Evolving Forms of Status-Enforcing State Action" 49 *Stanford Law Review* 1111, at 1119 (1997).

[54] The tripartite conception and the process conception are not necessarily entirely inconsistent. Operating under the tripartite conception, one could plausibly argue that in the spheres in which equality is guaranteed,

conception of equality adopted by the courts. Its origins can be traced to the Aristotelian conception of equality, mentioned above; in this sense it is divorced from the political ideal of human equality, focusing on the ways in which humans are different rather than their basic equality. Nevertheless, this separation from the political ideal is uneasy. One sees consistent attempts to infuse the process conception with substantive, political notions of what is required by the ideal of equality. These tend to undermine the coherence and credibility of the process conception.

The idea of formal equality, advanced by Flathman and Westen simply requires integrity in the application of rules. A rule should be applied to all identified by its terms. As a political imperative, formal equality is consonant with the idea of the rule of law: *non sub homine sed sub lege et deo*. In its simplicity, it is a powerful argument against tyranny, legislative or judicial. Rules must be laid down in advance and applied fairly, without fear nor favour. This sentiment appears to be grammatically captured by the phrase "equality *before the law*".[55] Nevertheless, formal rule of law is a political programme that is largely achieved in modern liberal democracies. As a conception of equality, it allows for the existence of what are generally perceived to be grotesque inequalities. Most obviously, the Holocaust and chattel slavery were fully consistent with formal equality before the law.

For this reason, a purely formal interpretation of equality has not found much favour with the courts.[56] This prompts a return to the original, non-formalised, Aristotelian conception. Aristotle sees his conception of proportionate equality as requiring an assessment of what constitute relevant differences in a particular context.[57] Whether a difference is relevant constitutes the core of equality inquiry. In terms of judicial review, this understanding of

---

infringements of equality should be assessed by reference to a process (or indeed substantive) conception of equality.

[55] See Hogan and Whyte, *Kelly: The Irish Constitution* (3rd ed., Butterworths, 1994), at 712-3.

[56] Although there have been occasional *dicta* from the Irish courts to the effect that Article 40.1 only protects formal equality. See chapter four.

[57] Having considered the relevant differences in the context of awarding the best flute, Aristotle considers differences in other contexts:

> [T]here is good reason why in politics men do not ground their claim to office on every sort of inequality.... For if some be slow, and others swift, that is no reason why the one should have little and the others much; it is in gymnastic contests that such excellence is rewarded. Whereas the rival claims of candidates for office can only be based on the possession of elements which enter into the composition of a state....

Aristotle, *op. cit.*, at III.12.

equality involves judicial oversight of the legislature's assessment of relevant similarities. For this reason, the Aristotelian conception is labelled a process conception: the courts attempt to ensure that the process of legislation takes into account only relevant differences.

The idea of relevance necessarily imports questions of substance into the courts' assessment of equality. Formal "equality before the law" has become, to a certain extent, substantive "equality in law".[58] But relevance is a peculiarly slippery idea. Two main methods of assessing relevance have emerged: the purposes approach and the natural classes approach. The purposes approach questions whether two persons are relevantly similar by reference to the purpose of the rule. If so, they should be treated in the same way. The natural classes approach questions whether two persons exist naturally in relevantly similar positions in society. If so, they should be treated in the same way. In chapter five, I shall elaborate further on the differences between these approaches, but for present purposes it suffices to note that both allow for large levels of judicial deference. Applying the former, the courts are often quick to imagine purposes that are well served by treating the persons differently. Applying the latter, the courts tend to defer to the legislature's assessment of social reality; they question not whether a relevant difference exists but whether it would be reasonable for the legislature to think it exists.

When people criticise a constitutional equality regime for being weak, it is generally this deference that they have in mind. Although there may be other doctrinal devices which circumscribe the scope of constitutional equality,[59] it is judicial deference to legislative assessments of relevance that strikes at the core of the guarantee of equality. It is this that has persuaded some commentators that the Irish constitutional guarantee of equality is the dead letter of constitutional argument.[60]

---

[58] See Sadurski, "Equality Before the Law: A Conceptual Analysis" (1986) 60 *ALJ* 131.

[59] In the Irish context, most obviously the interpretation afforded to the phrase "as human persons". See chapter six.

[60] For some thoughts on this issue in the Irish context, see Whyte, "A Comment on the Constitution Review Group's Proposals on Equality" in Duncan and Byrne (eds), *Developments in Discrimination Law in Ireland and Europe* (ICEL, 1997), at 93-4. There is a related concern from the opposite perspective. If such deference is the norm, what authorises judges to be occasionally less deferential and strike down differentiating legislation on the basis that the persons were relevantly similar?

Confronted with the twin realities of widespread inequality and a weak equality guarantee, the courts in a number of jurisdictions have attempted to strengthen the equality guarantee by reducing the scope for judicial deference. This is done in a number of ways. The courts can refuse to imagine purposes which the differentiation might reasonably serve, instead requiring the state to demonstrate a purpose which the differentiation actually serves. Further, the courts can require that the purpose be more substantial and that the differentiation be more closely related to it. In the context of natural classes, the courts can require that the difference really exists and is actually, as opposed to hypothetically, relevant in the context of the legislation.

Courts have not imposed such an approach across the board. Instead, they have prioritised certain grounds of classification as objectionable and have subjected such classifications to a more onerous justificatory test, relying on some of the doctrinal devices set out in the previous paragraph. For instance, in the United States classifications generally need only be rationally related to a legitimate government objective; classifications on the basis of race, however, must be closely tailored to meeting a compelling governmental objective. I shall argue in this thesis that Irish constitutional equality may be moving from a weak process conception to a strong process conception.

The strong process conception of equality is an approach which injects a further element of substance into the process account of equality. Not only must the courts decide whether a ground of classification is irrelevant in a particular context, they must also make *a priori* decisions as to what are presumptively irrelevant grounds of classification. This latter move is arguably motivated by a belief in basic human equality and a realisation that such basic human equality can be prejudiced by a conception of equality too deferential to the legislature's assessment of relevant differences. A crucial point to note, however, is that although this strong process conception contains substantive elements, its justificatory rhetoric speaks of legal process. It is this justificatory rhetoric that determines most of the content of the conception.

The strong process conception focuses on individuals and questions whether they have been unfairly treated by the law. Its premise is that the function of law is to classify and

differentiate, to separate individuals into different classes and to accord them correspondingly different treatment. Provided that, in the legislative process of differentiation, only relevant considerations are taken into account and provided that such considerations are rationally assessed, the differentiation has not been unfair and there is no inequality. Inequality occurs where there has been an unfair differentiation, where a person has been classified by reference to considerations that are, properly understood, irrelevant.

The process conception is individualist in two ways. First, it focuses on the differentiation and classification of individuals as the potential inequality against which it guards. Although in common parlance one may, for example, talk of a measure which discriminates against Jews, under the process conception one must identify an individual person who has been unfairly differentiated on the basis of religion. Secondly, the process conception focuses on individual responsibility for inequality. The focus on the purity of the legislative process results in the proposition that, in order for an inequality to be subject to constitutional invalidation, it must be fairly attributable to a responsible state actor. By requiring a degree of culpability or responsibility on the part of the actor, this analogises constitutional wrongs to torts and criminal offences. Rather subtly, this requires one to conceive of inequality from the perspective of the perpetrator rather than the perspective of the victim.[61] The focus is not on the life conditions of the victim class but rather on what particular perpetrators are doing to some victims. Under this account, inequality is not perceived as a social phenomenon; rather, it is perceived as the misguided activities of particular individuals.

The process conception of equality aspires to be both universalist and essentialist. As noted above, the strong process conception *a priori* deems some differentiations to be objectionable. This relies on a belief that such differentiations are rarely, if ever, relevant to legitimate governmental activity. Its understanding and account of irrelevant considerations is informed by a universalist belief that certain characteristics of individuals should never be taken into account in drawing legislative classifications. At a time when most people accept the universality of human rights as a fundamental tenet, this aspect lends the process

---

[61] See Freeman, "Legitimizing Racial Discrimination Through Antidiscrimination Law: A Critical Review of Supreme Court Doctrine" 62 *Minnesota Law Review* 1049, at 1053-7 (1978).

conception great moral currency. One appears to underscore one's moral commitment by asserting that the same is required in all places and at all times.[62]

The process conception of equality aims to be both neutral and objective. It is characterised by a strong belief that constitutional law should be neutral between competing visions of society, ordinarily allowing such disputes to be resolved through the democratic process.[63] Only where the democratic, legislative process is corrupted by irrationality does constitutional law declare an inequality. Objective rules can be stated with sharpness and clarity, are not heavily dependent on factual inquiries or judgments of degree and are not time-bound.[64] The universalist turn of the process conception supports objectivity. Only the consideration of traits universally thought to be irrelevant can justify judicial intervention in the legislative process. Such traits must be objectively identifiable as universally irrelevant, a requirement perhaps implicit in universality itself.

Fiss argues that the process consideration has been predominant precisely because it is particularly appealing to the courts.[65] It embodies a conception of equality that roughly corresponds to the conception of equality governing the judicial process: equal justice, treat similar cases similarly, etc. It also coincides with a further norm of the judicial craft: value neutrality. Judges should not substitute their own value judgments for those of other people. Under the process conception, judges only question the means of legislative differentiation not the results reached.[66] I suggest, in addition, that the process conception neatly fits the

---

[62] This appearance may be misleading. It does not necessarily follow from a universalist commitment to equality that equality requires the same thing in all places and at all times.

[63] Thus in *Romer v. Evans* 517 US 620, at 636 (1996), Scalia J. (dissenting) commented on an amendment to the State Constitution which discriminated against homosexuals:

> In holding that homosexuality cannot be singled out for disfavorable treatment, the Court ... places the prestige of this institution behind the proposition that opposition to homosexuality is as reprehensible as racial or religious bias. Whether it is or not is *precisely* the cultural debate that gave rise to the Colorado constitutional amendment (and to the preferential laws against which the amendment was directed). Since the Constitution of the United States says nothing about this subject, it is left to be resolved by normal democratic means, including the democratic adoption of provisions in state constitutions. This Court has no business imposing upon all Americans the resolution favored by the elite class from which the Members of this institution are selected, pronouncing that "animosity" toward homosexuality ... is evil.

[64] See Fiss, "Groups and the Equal Protection Clause" 5 *Philosophy and Public Affairs* 107, at 121 (1975).

[65] *Ibid.*, at 118-28 (1975).

[66] Fiss sees this as a false justification: "The belief that the counter-majoritarian objection to judicial review can be avoided by a 'mechanical jurisprudence' is false. The entitlement of the judiciary to intervene is no less controversial because only the means are being attacked. The means too have been chosen by the people." *Ibid.*, at 121.

ideology of our times: liberal individualism. Equality is conceived to protect individuals from irrational behaviour on the part of the state, without placing any discommoding obligations on individuals to improve the lot of other people. In this model, equality becomes a negative, individual right. Indeed, one might wonder whether there is anything in the process conception of equality which could not plausibly have been deduced from a liberal commitment to individual autonomy.

The Substantive Conception of Equality

The process conception, arguably motivated by the ideal of equality, incorporates some substantive elements. This allows it to perceive as relevant the reality of subordination, a reality that directly concern the substantive conception, but this aspect of social reality must, for the process conception, be mediated through the language and doctrine of legal process. The substantive conception, in contrast, directly focuses on subordination as a relevant aspect of social reality. It tries to make equality law a direct response to the problem of subordination, rather than a response mediated through some traditional, rather conservative, judicial values. Realised in law, it presents a significantly different picture of what constitutional equality should be trying to do.

Whereas a process conception of equality focuses on the process by which legal measures are adopted, a substantive conception of equality focuses on the result and effect of a measure. Facially differentiating measures that produce equal results are not a concern but facially neutral measures that produce unequal results are.[67] This basic concern establishes the proper object of equality scrutiny. Whereas a process conception questions whether individuals have been unfairly differentiated or classified, a substantive conception of equality questions whether a particular group has been subordinated or unjustly treated.

The substantive conception focuses on groups as the subjects and agents of inequality. First, the substantive conception focuses on whether a group has been unjustly subordinated.

---

[67] By "facially differentiating measure", I mean a measure which contains a differentiation on its face, i.e. a measure which explicitly differentiates. Nevertheless, a substantive conception does not preclude the constitutional adoption of some individual fairness protection. It just denies that this is a prime concern of equality.

Secondly and more subtly, it focuses on group and societal responsibility for inequality. It eschews the perpetrator perspective of the process conception. Inequality need not be traced to a responsible "bad person" in order to be the subject of legal redress. This in turn makes it possible to perceive the benefits which members of the dominant group collectively gain from the continuance of deep-seated patterns of social discrimination which cannot be traced to a responsible actor. The relative positions of the two groups are the prime concern, not the current individual actions of state agents.

Further, whereas a process conception aspires to be universalist and essentialist, a substantive conception of equality is both particular and contingent. By this I mean that the substantive conception of equality sees itself as a response to forms of inequality and subordination that have historically been a problem in a particular society. Thus, under the substantive conception, discrimination against Travellers would be a particular problem for Ireland, and properly the subject of constitutional scrutiny, but not, perhaps, for Tuvalu. Under the process conception, differentiation on the basis of membership of the Travelling community is only problematic if there is something intrinsically and universally unfair in differentiation on that ground.

Finally, a substantive conception of equality does not accept that the courts should be neutral as between competing groups in society. It considers that the constitutional guarantee of equality commits the courts to take sides in the struggle between those who dominate and those who are dominated. Inequality is an asymmetrical problem and can only be remedied by asymmetrical action on the part of the law. Although such an approach does not turn its back on objectivity, it is sceptical of the existence of objectively ascertainable factors.

Equality Before the Law as a Discrete Concept

Although I have borrowed a number of equality formulations from various sources, I have not yet adverted to the possible implications of the existence of different formulations of an equality guarantee. Must a commitment to equality before the law be interpreted differently to a commitment to equal protection of the laws? Are both these commitments necessarily

narrower than a simple commitment to equality? This is of particular importance given the formulation of the Irish constitutional guarantee of equality:

> All citizens shall, as human persons, be held equal before the law.
> This shall not be held to mean that the State shall not in its enactments have due regard to differences of capacity, moral and physical, and of social function.

If this provision represents a commitment simply to equality before the law, in contradistinction to all other forms of equality, general discussion of equality would be pointless. An assessment of the relative merits of the process conception and the substantive conception would turn not on which is a better account of equality but on which is a better representation of equality before the law. There are four arguments as to why this is not a plausible approach.

First, the linguistically and grammatically soundest interpretation of equality before the law is Flathman's principle of formal equality. But this is fundamentally at odds with the second sentence of Article 40.1. If the first sentence only commits the State to equality in rule application, why does the second sentence specify the criteria to which the legislature may legitimately have regard in enacting legislation? Borrowing the language of Sadurski, read as a whole Article 40.1 appears to guarantee equality in law, not just formal equality before the law. If one rejects the most obvious, literal meaning of the first sentence of Article 40.1, it is difficult to see why one should in any way restrict one's interpretation of Article 40.1 by reference to the literal meaning of "equality before the law".

Secondly, the Irish courts have nearly always taken the approach that Article 40.1 guarantees some sort of equality in law. Indeed, they have frequently referred to US cases, decided on the basis of equal protection of the laws, without adverting to the difference in formulation. Although one might criticise the courts for their lack of philosophical and comparative rigour, this amounts to little more than throwing one's toys out of the pram.[68]

---

[68] It has been done before by others, is likely to have little, if any, effect and would not greatly advance the understanding of constitutional equality.

Thirdly, the general understanding of equality before the law is not fixed; indeed, it is easy to demonstrate ways in which it has changed. Even apart from the idea of equality in rule application,[69] there have been two very different interpretations of equality before the law. As already noted, equality before the law was the phrase adopted by the US Supreme Court to connote the tripartite conception of equality which guaranteed the legitimacy of racial segregation. Nowadays, equality before the law is generally considered synonymous with the process conception outlined above. This requires that the state not classify people irrationally, presumably precluding racial segregation. Given this demonstrated capacity for change, it cannot plausibly be argued that equality before the law necessarily connotes the process conception. Any such argument requires an evaluation of the relative merits of the process conception and the substantive conception, not an exercise in definitions.

Fourthly, as Balkin has argued and as was considered above, the statement of the ideal of equality often embarrasses itself. The demand for equality often undermines and embarrasses the document that states it. By committing themselves to equality, the people commit themselves to continually revising their social practices and institutions, including the institution in which they first committed themselves to equality. This point was made with regard to the grammatical embarrassment of "all men are created equal" but also applies to the grammatical embarrassment of equality "before the law".

For these reasons, a narrowly literal focus on the words "before the law" is not appropriate. I shall take it that the Irish people have politically committed themselves, albeit imperfectly, to the ideal of equality. The role of the courts is to make sense of that commitment by elaborating conceptions of equality. The role of legal commentators is to question whether the courts have elaborated a convincing conception of equality.

Inequality in Ireland

Ireland is not renowned as an egalitarian society. The commitment to equality made in the Constitution has not been to the forefront in organising our society. Baker puts it well:

---

[69] This was perhaps the understanding of the phrase at the time of the French Revolution. See Kelly, "Equality Before the Law in Three European Jurisdictions" (1983) 18 (ns) *Ir Jur* 259, at 260-1.

> On the face of it, equality is just another of those principles which Irish society is happy to endorse on ceremonial occasions, so long as it doesn't impinge on real life.... Meanwhile, back in the real world, Ireland is a deeply unequal country, marked by one of the most unequal distributions of income in Europe, massive class inequalities in educational participation and entrenched intolerance towards minorities such as Travellers. So equality seems to be no more than a pious aspiration, an idea which is fine for the Constitution, so long as it stays there.[70]

In this section, I shall briefly draw on a number of sources to demonstrate the prevalence of inequality in Irish life. This suggests that there may be a connection between the weak conception of equality adopted by the courts and the deep-seated inequality present in society.[71] By connection, I do not mean to suggest that the court's conception of equality is a cause, still less the main cause, of all inequality in Irish society. Rather I mean that there are certain inequalities which the courts could remedy but choose not to, on account of their weak conception of equality. To that extent, certain inequalities can be partially attributed to the courts' conception of equality. Chapter 11 elaborates on this point in the context of the criminalisation of trespass. Further, if the courts were to address these certain inequalities, society would be forced to confront equality as an organising principle in social life. Such a confrontation might – although this is far from certain – lead to a more egalitarian culture. This is an intuitive, not an empirical, point made simply to suggest that the reconception of Irish constitutional equality is not a purely academic exercise.[72]

Fanning argues that Irish history has been marked by discrimination against minority groups. The current hostility towards immigrants, in particular asylum seekers, is only the latest manifestation of a general hostility towards those excluded from the core definition of Irishness.[73] He identifies a persistent vein of anti-Semitism in post-independence Ireland:

---

[70] Baker, "Equality" in Healy and Reynolds (eds), *Social Policy in Ireland* (Oak Tree Press, 1998), at 21. See also Hardiman, "Inequality and the Representation of Interests" in Crotty and Schmidt (eds), *Ireland and the Politics of Change* (Addison, Wesley, Longman Ltd, 1998).

[71] This connection presumably works both ways.

[72] For a more detailed elaboration of this point in a particular context, see chapter 11.

[73] Fanning, *Racism and Social Change in Ireland* (Manchester University Press, 2002), at 1-7.

> During the 1930s a range of Catholic publications – *The Irish Catholic,* the *Catholic Bulletin, The Irish Mind, The Irish Rosary and the Cross* – depicted Jews as conspiring against the moral fabric of the nation and, along with communists and freemasons, plotting international conspiracies and revolution. Jewish conspiracies were, it was alleged, in control of the international press, international finance and cinema.[74]

This anti-Semitism was not limited to religious groupings. It was also prevalent in political life:

> [Oliver J. Flanagan T.D.], who in the 1943 general election topped the poll in the Laois-Offaly constituency, advocated a Nazi-style repression of the Jews in Ireland in his maiden speech in the Dáil in July 1943; "There is one thing that Germany did, and that was to rout the Jews out of their country. Until we rout the Jews out of this country it does not matter a hair's breadth what orders you make."[75]

Fanning also demonstrates how anti-Semitism infused the immigration rules of the State between 1938 and 1956.[76] A Department of Justice memorandum, dated 28 February 1953, illustrates this attitude:

> In the administration of the alien laws it has always been recognised in the Departments of Justice, Industry and Commerce and External Affairs that the question of the admission of aliens of Jewish blood presents a special problem and the alien laws have been administered less liberally in their case.[77]

Anti-Semitism was certainly not universal at the time. The legal system contained a number of protections for the Jewish people,[78] most notably the explicit recognition afforded to the Jewish religion in the (since deleted) Article 44.1.3° of the Constitution, combined with the guarantee of freedom of religious conscience and the prohibition of religious discrimination in

---

[74] *Ibid.*, at 67.
[75] *Ibid.*, at 70.
[76] *Ibid.*, at 72-82.
[77] *Ibid.*, at 81.
[78] Although note the rather ambivalent judgment of Gavan Duffy J. in *Schlegel v. Corcoran* [1942] IR 19.

Article 44.2.[79] These legal safeguards may be attributed to the fact that the overwhelmingly dominant politician of the era, Éamon de Valera, was a strong advocate of religious tolerance. Fanning suggests, however, that Mr. Flanagan was more typical of the political perspective on whether Jews should be admitted into the country.[80]

Travellers are the most obviously excluded group in Irish society. Whyte summarises their position of deprivation:

> While some of the Irish Traveller families are wealthy, most endure conditions of great deprivation. In 1999, 1,207 families lived on the roadside and Traveller infant and adult mortality rates are over twice those of the settled community. Travellers also have a shorter life expectancy than settled people, with census information released in March 1998 indicating that only 1% of Travellers live to be 65. Traveller children do not remain in education for as long as their settled counterparts, though this situation is gradually improving.[81]

Since the publication of this book, the Oireachtas has effectively criminalised the nomadic way of life.[82] Fanning sets out a detailed account of Traveller exclusion, with regard to the provision of accommodation, in County Clare, concluding:

> [T]he spatial exclusion of Travellers and discrimination in the allocation of local authority housing was often justified by racialised accounts of Traveller deviancy and violence. These drew upon claims about past transgressions by Travellers rather than specific events. This history was invoked to suggest that the settled community and the local authorities were the victims of Travellers. It contrasted with an actual history of unremitting spatial exclusion and anti-Traveller hostility.[83]

---

[79] Special provision for Jewish people was made in legislation dealing with meat preparation (see, for instance, section 15 of the Slaughter of Animals Act, 1935), electoral law (see, for instance, the Local Elections Order, 1925), and jury swearing (see, for instance, section 52 of the Juries Act, 1927).

[80] Fanning, *op. cit.*, at 80.

[81] Whyte, *Social Inclusion and the Legal System: Public Interest Law in Ireland* (IPA, 2000), at 218 (footnotes omitted).

[82] Public Order Act, 1994, Part IIA, as inserted by the Housing (Miscellaneous Provisions) Act, 2002. For a discussion of this, see Chapter 11.

MacGréil notes the extent of prejudice against Travellers.[84] Interpreting survey data from 1988-89, he observes:

> It is difficult to comprehend that our attitudes towards our fellow-Irish citizens could be so negative. It is a classic case of severe anti-minority prejudice.... Only one in seven of *the national sample* would welcome a Traveller into the family through marriage, while 59% (three out of five) would not welcome Travellers as next-door neighbours. One in ten would deny citizenship to Irish Travellers.[85]

Another marginalised social group are homosexuals. Despite the decriminalisation of consensual homosexual activity between men, homosexuals remain under a number of legal disabilities in the sphere of partnership-recognition and child-rearing. In MacGréil's survey, the level of intolerance of homosexuality was disturbing. Only 12.5% would welcome a gay person to kinship, while 25.8% would deny citizenship to gay people.[86] Nevertheless, a plurality of the sample (44%) were in favour of decriminalising homosexual behaviour between consenting adults.[87] Nearly 10 years after decriminalisation, it seems likely that this prejudice has been reduced.

This account is far from a comprehensive survey of inequality in Ireland. One should also consider the position of women, people with disabilities and immigrants. An area on which I have not touched is socioeconomic discrimination. This is generally considered to be beyond the remit of constitutional law although, as will become apparent in the next chapter, I am not convinced by arguments to that effect. Nevertheless, an analysis of this area would amount to a thesis in itself and I am not going to pursue it here. Instead my focus is on the non-socioeconomic inequality generally considered to be within the remit of constitutional law. With regard to such inequality, I shall ask whether constitutional law has produced a convincing conception of equality.

---

[83] Fanning, *op. cit.*, at 145-6.
[84] MacGréil, *Prejudice in Ireland Revisited* (Survey and Research unit, St. Patrick's College, Maynooth, 1996).
[85] *Ibid.*, at 327 (emphasis original). He further notes that there has been a marked decrease in tolerance/acceptance of Travellers since an earlier survey in Dublin in 1972-3.
[86] *Ibid.*, at 71. In this regard, gay people were "outscored" only by members of Sinn Féin and the Provisional IRA, Hare Krishna, drug addicts and people with AIDS.
[87] *Ibid.*, at 86.

Chapter Two*

Constitutional Interpretation and Limits to Judicial Power

Judicial Activism

When courts articulate and enforce a conception of equality, one must evaluate not just the conception of equality but also the exercise of judicial power. Constitutional equality is an equality enforced by an unelected judiciary against the electorally accountable organs of government. One might thus subscribe to a conception of equality and yet believe that it is, in some sense, illegitimate for the courts to enforce that conception of equality. Constitutional equality is thus a question both of equality and of judicial power. For the purposes of this thesis, therefore, it is necessary to ascertain what limits, if any, there are on the conceptions of equality that can be legitimately articulated and enforced by the courts.[1]

More specifically, the argument of this thesis is (a) that the courts have conceived of constitutional equality as a guarantee of rational process and (b) that a more substantive conception of constitutional equality would be preferable. An objection to this argument is that the more substantive conception, which requires the courts to play a more active role in

---

* An earlier draft of this chapter was presented to the Dublin Legal Workshop in Trinity College and to a Law Faculty seminar in NUIG on Wednesday . I am grateful to those present for their helpful comments and probing questions.

[1] In Irish constitutional law, concerns about the exercise of judicial power have tended to arise in a number of discrete areas, generating a wealth of academic commentary. This commentary frames a general debate on the legitimacy and appropriate limits of judicial review. The first major area of concern was the unenumerated rights doctrine and the related suggestion that natural law was superior to the people's power to amend the Constitution: does the unenumerated rights doctrine admit of consistent decision-making? For academic discussion of this, see Hogan, "Unenumerated Personal Rights: *Ryan's* Case Re-evaluated" (1990-1992) 25-27 (ns) *Ir Jur* 95; Walsh, "The Constitution and Constitutional Rights" in Litton (ed.), *The Constitution of Ireland 1937-1987* (IPA, 1988); Humphreys, "Constitutional Interpretation" (1993) 15 *DULJ* 59; Humphreys, "Interpreting Natural Rights" (1993-1995) 28-20 (ns) *Ir Jur* 221. The second, less prominent but more persistent, area of concern focused on standards of review: in assessing restrictions of constitutional guarantees, how much deference should the courts pay to the judgment of elected officials? For academic discussion of this, see Hogan, "The Constitution, Property Rights and Proportionality" (1997) 32 (ns) *Ir Jur* 373. The third, and currently pre-eminent, concern focuses on issues of justiciability: are socioeconomic rights recognised by the Constitution and to what extent should such rights be enforced by the courts against the elected branches of government? For academic discussion of this, see Murphy, "Economic Inequality and the Irish Constitution" in Murphy and Twomey (eds), *Ireland's Evolving Constitution: 1937-1997* (Hart Publishing, 1998), at 179; Whyte, *Social Inclusion and the Legal System: Public Interest Law in Ireland* (IPA, 2002), at 9-57; Hogan, "Directive Principles, socioeconomic Rights and the Constitution" (2001) 36 (ns) *Ir Jur* 174; Hogan, "Judicial Review and socioeconomic Rights" in Sarkin and Binchy (eds), *Human Rights, the Citizen and the State* (Round Hall Sweet and Maxwell, 2001); McDermott, "The Separation of Powers and the Doctrine of Non-justiciability" (2000) 35 (ns) *Ir Jur* 280.

structuring Irish society, would involve an unwarranted exercise of judicial power. If this objection is well founded, the argument of this thesis is foreclosed undermined. For this reason it is necessary to examine, at the outset, whether there are any constitutional limits on the judicial power which preclude the courts from adopting a substantive conception of equality.

Fears of judicial power, and the assertion that there are significant limits to the judicial power, tend to be expressed in terms of an antipathy towards "judicial activism", although it is rarely specified what is understood by this term. Professor Morgan has argued that the courts, in their interpretation of the Constitution, have gone too far down the road of judicial activism.[2] His book resonates with many people's concerns about judicial decision-making and so provides a useful starting point for this analysis. Morgan offers the following provisional definition of judicial activism:

> [I]n some constitutional cases, an act of selection by the judge beyond the mere deployment of the skills of legal technique is called for, and if s/he makes the positive choice of departing from the path adopted by the legislative or executive, we may call this judicial activism.[3]

This definition involves three important ideas. First, there are standard cases which can be decided simply through the application of normal legal technique; furthermore, these cases can be distinguished from "hard cases".[4] Secondly, hard cases of this type require the application of novel legal techniques, most significantly the exercise of choice on the part of

---

[2] Morgan, *A Judgment Too Far? Judicial Activism & the Constitution* (Cork University Press, 2001). This book expounds on ideas previously expressed in Morgan, "Judicial Activism – Too Much of a Good Thing" in Murphy and Twomey (eds), *Ireland's Evolving Constitution 1937-1997* (Hart Publishing, 1998).

[3] Morgan, *op. cit.*, at 8. Although this is stated to be a provisional definition, it does not appear to be substantively revised anywhere in the text. Cox observes that activism can also be passive; i.e. it can arise where the courts refuse to interpret a provision which requires interpretation. See Cox, "Constitutional Law – Constitutional Interpretation – Passive Judicial Activism – Constitutional Crime of Blasphemy" (2000) 22 *DULJ* 201, at 201. This appears correct. Nevertheless, the apparent contradiction of "passive activism" should alert one to the fact that judicial activism is a considerably more complex concept than a literal understanding of "activism" might suggest.

[4] Morgan does not use this term but it seems to describe what he has in mind.

the deciding judge. Thirdly, where such choices differ from those made by democratically accountable branches of government, the courts have engaged in judicial activism.[5]

Two different understandings of judicial activism animate Morgan's definition. First, there is an understanding that judicial activism involves an interventionist judiciary, a judiciary that sees itself as having a decision-making role in a large number of areas. I have stated this in absolute terms, but I suspect that it really operates in comparative terms. That is, the activist judiciary is a judiciary which sees itself as having a decision-making role in more areas than those in which other judiciaries, of a different time or place, see themselves as having a role. Secondly, there is an understanding that judicial activism is an illegitimate exercise of judicial power: it involves a judiciary that intervenes in areas which should be left to another organ of government and makes choices that are not governed by law. Properly understood, therefore, allegations of judicial activism involve both a descriptive and normative claim. There is nothing problematic in this, provided it is recognised that the descriptive and normative claims are separate and that proving the former does not substantiate the latter. Many allegations of judicial activism, however, do not recognise this distinction; frequently they suggest that the substantiation of the descriptive claim – i.e. that the judiciary is more interventionist – constitutes the normative claim – i.e. that such interventionism is unwarranted. In short, the descriptive allegation of judicial activism is generally thought to carry the pejorative, normative connotation that such activism is impermissible: judicially activist judges substitute their own preferences and value judgments for what the Constitution actually says.

This observation is reflected in the debate between Dworkin and Bork. Bork observes:

> Either the Constitution and statutes are law, which means that their principles are known and control judges, or they are malleable texts that judges may rewrite to see that particular groups or causes win.[6]

---

[5] I have argued elsewhere that judges, given the norms governing legal argument, inevitably have power, in the sense that they are generally free to decide a case in more than one way. If that analysis is correct, the issue about judicial power is not whether it is legitimate and appropriate for the courts to have such power, but rather whether it is legitimate or appropriate for the courts to exercise such power in a way that is not deferential to the wishes of the elected organs of government. See Doyle, "The Duration of Primary Education: Judicial Constraint in Constitutional Interpretation" (2002) 10 *ISLR* 222.

Dworkin responds:

> Nearly all the constitutional lawyers and legal philosophers who disagree with [Bork] disagree not about whether the Constitution should be obeyed but about the proper way to decide what its various provisions actually require.[7]

Thus, in order fully to substantiate a charge of judicial activism, one must show (a) that the judiciary is more interventionist and (b) that such interventionism is illegitimate. This latter proposition can only be proven by showing that the Constitution, properly understood, precludes the course adopted by the judiciary. The coherent opponent of judicial activism must therefore articulate a theory of constitutional interpretation which precludes the impugned exercise of judicial power; she must also show why this theory of constitutional interpretation is preferable to any theory of constitutional interpretation which legitimates that impugned exercise of judicial power.

I shall articulate three theories of constitutional interpretation: literalism, originalism and the moral reading. I shall argue that the first two theories are flawed and that the third theory permits two understandings of the judicial power under the Irish Constitution, a process understanding and a substantive understanding. I shall examine the debate between these two understandings in some detail, concluding that the claims of the process understanding – to the effect that the substantive understanding is precluded – have not been convincingly made out. For this reason, there is no *a priori* barrier in Irish constitutional law to the adoption of a substantive conception of equality on the part of the courts. Whether the courts should adopt such a conception cannot be resolved in this chapter, depending as it does on the merits of such a conception as an interpretation of Article 40.1.

---

[6] Bork, *The Temptation of America* (Sinclair-Stevenson, 1990), at 4.
[7] Dworkin, *Freedom's Law* (Harvard, 1996), at 289.

The Scope of Judicial Power under the Constitution

It is a questionable exercise to read the Constitution in order to determine the appropriate manner of constitutional interpretation. For one's views on interpretation logically precede how one should read the text in the first place. Nevertheless, one operates on the assumption, described as axiomatic by Murray J. in *Sinnott v. Minister for Education*,[8] that constitutional interpretation begins with the constitutional text. Operating on this assumption, it seems appropriate, if not entirely explicable, to allow the text of the Constitution inform its own method of interpretation. Theories of interpretation are then of use as one attempts to elucidate a compelling account of what the text requires; in a strange way, such theories are both antecedent and subsequent to the text. They help one to interpret the text but their parameters are informed by the text itself.[9]

The Constitution separates powers but does not expressly state a rule that powers must be separated. Any general views as to what is appropriate to each organ of government, therefore, must be based on inferences from the constitutional text. Article 6 provides that all the powers of government, legislative, executive and judicial, derive, under God, from the people and can only be exercised by or on the authority of the organs of the State established by the Constitution. Article 15.2 vests the "sole and exclusive power of making laws for the State" in the Oireachtas. Article 28.2 provides that the executive power of the State shall be exercised by the Government. Article 34.1 provides that justice shall be administered in courts established by law. Nevertheless, although these provisions do separate the powers of government, they do not hermetically insulate the different powers from one another.[10] Most relevant to the current discussion, Article 34.3.2° provides that the High Court has the jurisdiction to determine the validity of any law having regard to the provisions of the Constitution.[11] This provision has effectively established the courts as

---

[8] [2001] 2 IR 545, at 679. See also Humphreys, "Constitutional Interpretation" (1993) 15 *DULJ* 59, at 66.

[9] The reason perhaps for this paradox is that it is assumed that it is within the power of the courts to interpret the Constitution, yet the origin and scope of that power also requires interpretation. How does one know that it is the courts' power to interpret the Constitution before one has interpreted the power of interpretation? One practically, if not in a theoretically sound manner, avoids this regression if one assumes that constitutional interpretation begins with the constitutional text. This assumption is axiomatic or, in less fashionable language, self-evident. That is, it seems right but I am unable to justify it.

[10] See *Attorney General v. Hamilton (No. 1)* [1993] 2 IR 250, at 267-8 and 299; [1993] ILRM 81, at 96 and 123-4.

[11] Article 15.4 provides that the Oireachtas may not enact a law which is repugnant to the Constitution; any such law will be invalid to the extent of its repugnance. Article 28.2 provides that the executive power of the State is exercised by the Government subject only to the provisions of the Constitution. Although the power of the High

authoritative interpreters of the Constitution. The powers of the Oireachtas and the Government are fettered by the Constitution, in particular by the fundamental rights provisions of Articles 40-44, and it is generally accepted that it is the function of the courts to determine whether the Constitution has been breached. But the Constitution does not dictate how the courts should fulfil this role; it does not dictate the appropriate method of its own interpretation.

The Constitution thus attempts a balance. It allows for majority rule but does not mandate crude majoritarianism. On the one hand, it provides the institutions which allow for self-government of the polity by majority rule. On the other hand, it imposes limits on the powers of those institutions. These limits are policed by the courts through the device of judicial review. A plausible theory of constitutional interpretation must respect this broad balance while providing a more precise delineation of the powers. Operating on the basis of that theory, the courts can interpret what the Constitution means. The theory necessarily precludes some interpretations of the Constitution. For the purposes of this thesis, the question is whether the best interpretation of the Constitution imposes limits on the judicial power which preclude the courts from adopting a substantive conception of equality.

Literal Interpretation

The Constitution contains many different types of provision. In some cases the axiomatic principle – constitutional interpretation should begin with the text – disposes of the issue.[12] For instance, Article 7 provides that the national flag is "the tricolour of green, white and orange". In other circumstances, more seems to be required: Article 40.1 provides that all citizens "shall, as human persons, be held equal before the law"; Article 38.1 guarantees trial "in due course of law". Whereas Article 7 has a clear literal meaning, Article 40.1 and Article 38.1 have no clear meaning. Equality before the law and trial in due course of law are

---

Court to determine the validity of any law having regard to the Constitution probably covers the validity of laws enacted by the Executive, it is not specified in the Constitution which organ of government shall determine whether the Government has transgressed the Constitution in its non-law-making functions. It is generally assumed that the courts have this power. See, for instance, *Boland v. An Taoiseach* [1974] IR 338; (1975) 109 ILTR 13. For discussion, see Hogan and Whyte, *Kelly: The Irish Constitution* (3rd ed., Butterworths, 1994), at 230-3.

contested concepts. No method of interpretation which confines itself entirely to the text, whether that text is understood narrowly, contextually or harmoniously, can provide a convincing account of equality.[13]

Moral concepts cannot be understood simply by reference to a dictionary. More than literal interpretation is required. I shall consider two possible theories which provide guidance on how to go beyond the literal meaning of words: originalism and the moral reading. Originalism, in its purest form, requires that the contested moral concepts in the Constitution be interpreted to mean whatever the drafters of the Constitution understood them to mean. The moral reading requires that one give such concepts their best meaning, implicitly by reference to current standards.

A constitutional theory can be evaluated in two ways. First, one can question whether it is consistent and compelling on its own terms. Secondly, one can question its functionality. Tushnet argues that constitutional theories have a particular purpose or function within the broad liberal tradition. Where the Constitution attempts to circumscribe majority tyranny through the institution of judicial review, constitutional theories attempt to circumscribe judicial tyranny through the identification of limits on the exercise of judicial power. The ideal constitutional theory will elaborate limits which allow judges to do enough to protect the polity from majoritarian tyranny without substituting a judicial tyranny.[14] Hogan echoes this functional concern:

> We come back then to the question of legitimacy. Unless the decisions of the courts can be seen to be based on conventional legal sources – the text of the Constitution and the traditional legal principles that are necessarily implied therein – constitutional adjudication would thereby become politicised and devalued. The task therefore is to find a method of constitutional adjudication that allows the courts to create new rights

---

[12] See Humphreys, "Constitutional Interpretation" (1993) 15 *DULJ* 59, at 66. For the contrary view that textual interpretation is never sufficient, see Tushnet, *Red, White and Blue: A Critical Analysis of Constitutional Law* (Harvard, 1988), at 60-9.

[13] See Hogan and Whyte, *op. cit.*, at xcviii-cxxii. In considering various theories of constitutional interpretation, I shall focus on the interpretation of abstract constitutional commitments, such as equality before the law. This is done simply because they have most relevance for the subject-matter of this thesis.

> under the Constitution, *if* these can be shown to be enduring rather than ephemeral and to represent fundamental community values that transcend political judgment.[15]

In assessing originalism and the moral reading, I shall focus on whether each provides a consistent and compelling account of constitutional law. My primary interest in this thesis lies with illustrating the range of choices that are open within the mainstream of constitutional thought, rather than questioning the whole endeavour of constitutional thought. I shall suggest that if a consistent and compelling interpretation of the judicial power results in too much power for judges, the solution lies in constitutional amendment not reinterpretation.

Originalism

Originalism, also referred to as "historicism" and "interpretivism", holds that judges should interpret the terms of the Constitution in line with the original understanding of those terms; they should try to ascertain the "original intent" of the provisions. The appeal of originalism seems two-fold.[16] First, it better fits one's ordinary understandings of law and meaning. If text (the Constitution) is an attempt to convey the meaning of the author (the drafters) to the reader (the courts), it seems reasonable, where the text is unclear, to revert to other evidence of the drafters' intentions. Secondly, such an approach appears to insulate the interpretation of the Constitution from judicial discretion insofar as is possible; it is thus a bulwark against the judicial tyranny that constitutional theory seeks to prevent. But these first impressions are somewhat misguided. First, it is not clear that the Constitution should be interpreted as analogous to an attempt to convey meaning. Such a view is a contested conception of the Constitution which must be defended on its own terms, independently of originalism. Secondly, as noted above, the Constitution establishes a tension between majoritarianism and judicial protection from majoritarianism. It is therefore not a good

---

[14] See Tushnet, *op. cit.*, at 16-7. Tushnet argues that this programme is doomed to failure. For a similar sentiment see Murphy, "Economic Inequality and the Irish Constitution" in Murphy and Twomey (eds), *Ireland's Evolving Constitution: 1937-1997* (Hart Publishing, 1998), at 179.

[15] Hogan, "Constitutional Interpretation" in Litton, *op. cit.*, at 188. Emphasis original. It is notable that Hogan's argument is derivative, demonstrating a concern more for perceived legitimacy than for actual legitimacy. Morgan makes a similar point. He views respect for the judiciary as an asset which could be frittered away unless "judges' decisions are perceived as being derived from some clearly, articulated, consistently followed and rationally grounded principles". Morgan, "Judicial Activism – Too Much of a Good Thing" in Murphy and Twomey (eds), *Ireland's Evolving Constitution: 1937-1997* (Hart Publishing, 1998), at 118.

[16] Ely, *Democracy and Distrust: A Theory of Judicial Review* (Harvard, 1980), at 3.

argument in defence of a theory of constitutional interpretation simply that it circumscribes judicial protection from majoritarianism.[17] More is required.

Bork has been the foremost advocate of the original understanding in the United States.[18] His argument is based on a democratic imperative: the scope for judicial discretion is only contained if judges (unelected officials) are bound to implement not their own views but the views of the framers.[19] In its purest form, this requires that current cases should be decided according to how the drafters of the Constitution would have decided them. For instance, if the drafters of the Irish Constitution considered that Article 40.3.1 did not proscribe restrictions on contraceptive devices, the stronger version of originalism would have required the Supreme Court, in *McGee v. Attorney General*,[20] to uphold the provisions banning the importation of contraceptives.

Only if originalism is used in this way does it constrain judges. For if it is accepted (a) that the drafters had views at differing levels of generality, and (b) that these views might now be thought to conflict, and (c) that a judge may choose between these different views, then originalism does not provide significant constraint on judicial decision-making. For example, one could argue that the drafters of the Irish Constitution had a commitment to privacy which they understood to cohere with a ban on contraceptives. This commitment to privacy is now understood to preclude such a ban. If originalism leaves the courts free to choose between fidelity to the general commitment and fidelity to the framers' understanding of that commitment, then the courts are not constrained. Indeed, such are the differences between the two approaches that it is not conceptually useful to describe the former commitment as "originalism".[21]

The purest form of originalism, although sometimes employed to interpret legalistic provisions in the Constitution, has received little support with regard to the interpretation of

---

[17] Ely, *op. cit.*, at 8. I shall argue later that it is not clear that originalism does circumscribe judicial discretion to any real extent.
[18] Bork, *op. cit.*
[19] Hogan concurs with this rationale, commenting that the original understanding approach allows judges, with justification, to forswear that they have attempted to interpolate their own views into the Constitution. Hogan, "Constitutional Interpretation" in Litton, *op. cit.*, at 174.
[20] [1974] IR 284.
[21] This example, if not the precise conclusions, is drawn from Whyte, *op. cit.*, at 23-4.

the moral guarantees in the Constitution.[22] Hogan argues that a Constitution should be flexible and capable of adapting to change and observes that the historical approach might fossilise the Constitution by applying 1937 values and beliefs to a different era.[23] A further problem is the absence of a historical record of the drafters' intentions. This mitigates against any form of originalism but is a particular problem for the purest form which must ascertain with reasonable precision the framers' views on particular topics. Although historical records do exist, these are not widely available; furthermore, they may not shed light on particular issues.

Even Bork does not always accept the purest form of originalism. For instance, he believes that *Brown v. Board of Education*[24] was correctly decided, notwithstanding the fact that those who ratified the Fourteenth Amendment did not think that it outlawed segregation in education or any aspect of life.[25] He suggests that the Fourteenth Amendment was intended to achieve black equality but that the ratifiers assumed that black equality and state-compelled separation of the races were consistent. By 1954 it was clear that this was not the case; in such circumstances, the Court was bound to honour the principle of equality contained in the text and not the ratifiers' mistaken beliefs as to the compatibility of segregation with that principle. Although there is little wrong with this expansive interpretation on its own terms, there are two fundamental objections in the context of Bork's defence of originalism. First, it is not the purest form of originalism: Bork has imposed his own interpretation of the concept to which the framers committed themselves, as opposed to the framers' own understanding of that concept. Further, once Bork has jettisoned the framers'

---

[22] Kelly proposed this distinction, arguing that a historical approach was appropriate to the interpretation of legalistic provisions of the Constitution whereas a "present-tense" approach was appropriate to the interpretation of constitutional standards and values. Kelly, *The Constitution: Law and Manifesto* in Litton, *op. cit.*, at 215. In some instances, however, it is far from clear what is legalistic and what is a value. The contortions of the Supreme Court in interpreting the content and duration of "primary education" in *Sinnott v. Minister for Education* [2001] 2 IR 545 bear out this point. See Doyle, *loc. cit.*

[23] Hogan, "Constitutional Interpretation" in Litton, *op. cit.*, at 174-5. Not everyone shares this view. It can be plausibly argued that an "organic" constitution disenfranchises people by assigning the task of elaborating a society's core values to a societal elite. An inflexible constitution might encourage the general populace to take ownership of this task through the process of popular amendment. In the American context, it is arguable that, through its reinterpretation of the Constitution, the Supreme Court stymied social movements in favour of women's rights and a federal power to regulate the economy.

[24] 347 US 483 (1954).

[25] Bork, *op. cit.*, at 74-5. In contrast, Berger believes that *Brown* was wrongly decided according to the original understanding. See Berger, *Government by Judiciary* (Harvard, 1977), at 245. See also, Berger, "Ronald Dworkin's *The Moral Reading of the Constitution*: A Critique" 72 *Indiana Law Journal* 1099 (1997). I am grateful to Professor Gerard Quinn of NUIG for bringing this article to my attention.

understanding of equal protection, there is no reason to accept his limitation of the concept to black equality or, indeed, to racial equality. Given the general language of the guarantee, it is more plausible to read it as a general guarantee of equality, a point that Bork rejects. Secondly, on other occasions, Bork has adopted the purest form of originalism. This suggests that Bork sees himself as free to move between different forms of originalism (or to focus on the intention of the framers at different levels of generality), thus removing the constraint arguably provided by fidelity to the original understanding. Dworkin has been a cogent critic of Bork's theory:

> [O]nce he abandons the reductive interpretive strategy, which limits the force of the clause to the framers' own specific convictions about what forms of discrimination are incompatible with equal citizenship, then he has no other means of checking the abstract language solely by reference to those convictions. He is in a kind of free fall in which the original understanding can be anything, and the only check on his judgment is his own political instincts.[26]

Although the purest form of originalism has strong rhetorical appeal, few are prepared to live with its rigour. Some of its most cogent and vehement advocates do not always limit the meaning of the Constitution to what the framers precisely understood it to mean. Berger, however, is a more consistent advocate of the original understanding. Of the decision in *Brown* he comments:

> [Chief Justice Warren] did not merely "shape" the law, he upended it; he revised the Fourteenth Amendment to mean exactly the opposite of what its framers designed it to mean, namely, to leave suffrage and segregation beyond federal control, to leave it with the States, where control over internal, domestic matters rested from the beginning.[27]

Nevertheless, even if the purest form of originalism were uniformly adopted by the courts, it would remain problematic. If one accepts that originalism cannot be justified by reference to

---

[26] Dworkin, *op. cit.*, at 300.
[27] Berger, *op. cit.*, at 245.

the original understanding itself,[28] the only justification is that offered by Bork and Hogan: it prevents judges from interpolating their own views into the Constitution. As noted earlier, Ely rejects this rationale on the basis that it justifies itself by reference purely to one half of what is supposed to be a constitutional balance: a contradiction can prove anything. Further, it is seriously questionable whether historical facts can ever be ascertained with the degree of certainty necessary to substantiate originalism's rhetoric of restraint.[29]

For all of these reasons, originalism does not recommend itself as a theory of constitutional interpretation. But there are other reasons, specific to the context of equality, that should make one wary about adopting originalism. As I argued in chapter one, equality is an ideal that requires a society to struggle against itself. It requires continuous, critical examination of accepted and long-established practices in society. The words of Abraham Lincoln are instructive:

> [The signatories of the Declaration of Independence] meant simply to declare the right [to equality], so that enforcement of it might follow as fast as circumstances should permit. They meant to set up a standard maxim for free society, which should be familiar to all, and revered by all; constantly looked to, constantly labored for, and even though never perfectly attained, constantly approximated, and thereby constantly spreading and deepening its influence, and augmenting the happiness and value of life to all people of all colors everywhere.[30]

The ideal of equality requires that one question accepted practices and strongly suggests that one may find a practice inegalitarian even though one's forebears found it unobjectionable. An originalist understanding of the Constitution, in its purest form, precludes the courts from giving effect to the ideal of equality and empties the guarantee of all meaning.

---

[28] As this justification is regressive.

[29] For a detailed discussion of this point, see Tushnet, *op. cit.*, at 33-41.

[30] See Redenius, *The American Ideal of Equality: From Jefferson's Declaration to the Burger Court* (National University Publications, 1981), at 67.

The Moral Reading

Dworkin is critical of originalism. In his view, most contemporary constitutions declare individual rights against the government in very broad and abstract language; he argues that one should interpret and apply these provisions on the basis that they invoke moral principles about political decency and justice. This places political morality at the heart of constitutional law.[31] He rejects the conservative argument that the issue is simply whether judges should change the Constitution by fiat or leave it alone. The issue, he argues, is not *whether* to interpret but *how* to interpret. He argues for a moral reading of the Constitution. There are two restraints on this moral reading. First, judges must start with what the drafters said. Nevertheless, he emphasises that history is only relevant to the question of what the drafters intended to say, not the different question of what other intentions they had.[32] Secondly, judges must fit their views with the structural design of the Constitution and previous decisions: they are constrained by precedent. Where very different conceptions of a constitutional principle sufficiently fit language, precedent and practice, however, judges must then decide on their own which conception does most credit to the nation.[33]

Fundamental to the moral reading is the rejection of the "majoritarian premise". This premise insists that the political process should be designed so that, at least on important issues, the decision that is reached is one that a majority of citizens would favour, at least if they had adequate time for reflection.[34] In Dworkin's view, the constitutional conception of democracy denies this premise:

> It takes the defining aim of democracy to be a different one: that collective decisions be made by political institutions whose structure, composition, and practices treat all members of the community, as individuals, with equal concern and respect. This alternate account of the aim of democracy, it is true, demands much the same structure of government as the majoritarian premise does. It requires that day-to-day political decisions be made by officials who have been chosen in popular elections. But the constitutional conception requires these majoritarian procedures out of a

---

[31] Dworkin, *op. cit.*, at 1-2.
[32] That is, the moral reading insists that the Constitution means what the drafters intended to say, whereas the originalist reading insists that it means what they expected their language to do.
[33] Dworkin, *op. cit.*, at 11.

> concern for the equal status of citizens, and not out of any commitment to the goals of majority rule. So it offers no reason why some nonmajoritarian procedure should not be employed on special occasions when this would better protect or enhance the equal status that it declares to be the essence of democracy, and it does not accept that these exceptions are a cause of moral regret.[35]

This conception of democracy directly confronts the arguments against judicial activism outlined at the start. It asserts that majority rule, although a crucial aspect of a democratic system, is not the justification for that system. Majority rule is itself justified by the sovereign virtue of the community: the obligation to treat all its members with equal concern and respect. Although majority rule allows one to live this virtue, it is itself subject to a number of moral commitments in the Constitution. These commitments, interpreted by judges, are also motivated by the sovereign virtue of equal concern and respect. This process is necessarily anti-majoritarian, but it is not anti-democratic. Provided judges faithfully engage with this moral enterprise, observing the constraints of integrity, there is no judicial activism, in the pejorative sense.

Berger criticises Dworkin's moral reading on a number of grounds. First, he argues that Dworkin has substituted abstract moral reasoning for the pragmatic case-by-case development of the common law.[36] In particular, he criticises Dworkin's view that the right of free speech is phrased in exceedingly moral language. Berger argues, *inter alia*, that "political speech" is "not protected on moral grounds but because democratic government requires that it be open to criticism".[37] But this reasoning appears closer to Dworkin's approach of moral abstraction than to Berger's approach of pragmatic case-by-case reasoning. It is not self-evident that democratic government requires criticism. Such a view depends for its attractiveness on a particular conception of political morality. Admittedly, there are problems once one abstracts particular commitments to general moral principles. Once one begins a process of abstraction, it becomes difficult to see why one should ever stop abstracting. Further, differences that appear important at a more concrete level often

---

[34] *Ibid.*, at 15-6.
[35] *Ibid.*, at 17.
[36] Berger, *loc. cit.*, at 1100.
[37] *Ibid.*

lose their significance at the more abstract level. This is a valid criticism of Dworkin's approach. That said, it is difficult to conceive of a form of interpretation which does not adopt some abstraction. Bork was prepared to abstract to some extent with regard to equal protection; Berger appears to abstract with regard to free speech. The problems of abstraction are not Dworkin's alone.

Secondly, Berger criticises Dworkin for mistaking morality for legality, arguing that Dworkin's interpretative theory assumes that what is wrong is unconstitutional.[38] This overlooks Dworkin's core distinction between constructive morality and absolute morality. The moral reading of the Constitution does not require that the Constitution conform to an *a priori* established moral code, but rather that the Constitution be read to identify the moral vision which underlies it. It can be argued that if one can identify two moral readings of the Constitution (two constructive moralities), one must choose between the two moral readings, implicitly by reference to one's own standards of morality. This critique considerably undermines Dworkin's core distinction and, consequently, his claim that his theory provides meaningful judicial constraint. Nevertheless, it is a considerably more subtle critique than that advanced by Berger and does not require that one eschew the moral reading entirely. This thesis aims to be a practical illustration, rather than a theoretical defence, of the proposition that the moral reading allows judges to choose between plausible interpretations of the Constitution based on their own personal conceptions of morality.

Thirdly and more cogently, Berger criticises Dworkin's study of the historical record as regards the meaning of the equal protection guarantee. He argues that Dworkin is too quick to ascribe intentions to the framers rather than to deal with actual historical records of their intentions.[39] All the evidence, Berger asserts, is that the framers did not intend to lay down a general guarantee of equality. Instead, they committed themselves to a minimalist guarantee of equality, necessary for bare existence. In short, whereas Dworkin insists that framers can misunderstand the requirements of the moral principle which they enact, Berger insists that framers' understandings of the moral principle constitute one's best evidence as to what that principle is. There is some merit to this viewpoint which ties future interpreters to the

---

[38] *Ibid.*, at 1101.
[39] *Ibid.*, at 1106.

understanding of original drafters. That said, one still faces two problems which undermine the claims to judicial constraint on which the originalist position relies for its attractiveness. First, one must make a choice, as a matter of political morality, to adopt the originalist interpretation in the first instance. Secondly, the historical record is rarely as clear cut as advocates for a particular position maintain. McConnell, for instance, advances an elaborate argument that the original understanding of the equal protection guarantee outlawed segregation.[40] If both the historical record and the very decision to look to the historical record are so contestable, the original understanding does not appear to provide any more constraint on the courts than does the moral reading.

Notwithstanding the possibility for judicial choice in the moral reading, Dworkin's interpretative methodology provides the best account of Irish constitutional law. It plausibly reconciles judicial review with majority rule, as opposed to seeing the former as a pernicious exception to the latter. For this reason it accords better with the Irish constitutional text, a text which explicitly provides for judicial review and the framers of which appeared to envisage a reasonably extensive judicial power. Nevertheless, the moral reading is a general theory of interpretation, not a specific instruction as to the scope of judicial power. It is consistent with a number of different institutional arrangements; furthermore, the limits and objectives of judicial review will depend on the moral meaning of the constitution in question. Whereas the purest form of originalism dictates how the judicial power should be exercised – to give effect to the drafters' understanding of the effect of the constitutional provision in question – the moral reading requires one to read the particular constitution to see what is the best holistic interpretation of its delineation of governmental powers.

In the remainder of this chapter, I shall discuss two different accounts of judicial power – both identifiable by a moral reading of the Irish Constitution – which are of particular relevance to the discussion of constitutional equality which follows. The theoretical exegesis of each is again taken from US constitutional theory. I have, however, attempted to link each theory with the more limited academic and judicial debate that occurs in Irish constitutional law.

---

[40] McConnell, "Originalism and the Desegregation Decisions" 81 *Virginia Law Review* 947 (1995).

Reinforcing the Process of Democracy

As noted above, Ely is sympathetic to the intuitive appeal of originalism. Nevertheless, he argues that originalism is not in itself sufficient to interpret a Constitution; some provisions cannot intelligibly be given content on the basis solely of language and their surrounding history.[41] In the context of the US Constitution, he refers to the due process clause, the privileges and immunities clause and the equal protection clause.[42] Hogan has made a similar point in the Irish context. He argues that the language and structure of Articles 40.3 and 45 "strongly suggest that the rights protected in Article 40.3.1 are not confined to the rights expressly enumerated elsewhere in the Constitution".[43] A similar point can presumably be made with regard to the equality guarantee in Article 40.1.[44] Nevertheless, Ely and Hogan disagree over the proper response to this textual hiatus. Hogan believes that there is "no mechanism whereby the existence of these rights can be objectively ascertained".[45] Ely, in contrast, believes that the courts can supply content by utilising a theory derived from the general themes of the Constitution itself.[46] Although Ely's justification for looking beyond the drafters' original understanding differs from that of Dworkin, Ely's actual approach of trying to base a theory on the general themes of the Constitution coheres with the moral reading.

In identifying such a theory, concerns over judicial tyranny re-emerge: the courts should not adopt a theory which would constitute them as a council of legislative revision. Ely argues that the best theory is one which does not seek to make its own substantive judgments but instead seeks to ensure that "the political process – which is where such [substantive] values *are* properly identified, weighed and accommodated – was open to those of all viewpoints on

---

[41] Ely, *op. cit.*, at 12.

[42] He also refers to the Ninth Amendment to the US Constitution which provides: "The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people."

[43] Hogan, "Unenumerated Personal Rights: *Ryan's* Case Re-evaluated" (1990-1992) 25-27 (ns) *Ir Jur* 95, at 114.

[44] With regard to the equal protection guarantee of the US Constitution, Ely notes that its general concern (equality) "is clear enough but [its] content beyond that cannot be derived from anything within its four corners or the known intentions of its framers". Ely, *op. cit.*, at 31. He further notes that any constitutional grievance can be formulated in terms of an equal protection complaint by competent counsel. One must merely find someone who is receiving better treatment in order to frame one's grievance in differential rather than absolute terms.

[45] Hogan, "Unenumerated Personal Rights: *Ryan's* Case Re-evaluated" (1990-1992) 25-27 (ns) *Ir Jur* 95, at 114.

[46] This position could have been reached more directly under the moral reading. Such a reading requires one to identify the best interpretation of constitutional provisions and does not need an explicit textual hiatus to justify so doing.

something approaching an equal basis".[47] Although this proposition has not been advanced so clearly in the Irish context, much of the academic commentary suggests that judicial review is permissible where it deals with the process of democracy but not the substance. It is therefore worthwhile paying some attention to Ely's theory and its Irish counterparts.

Much of Ely's theory is built around the famous *Carolene Products* footnote. Justice Stone of the United States Supreme Court attempted to articulate the circumstances in which judicial review might be more exacting than the norms of deference to legislative judgment generally require:

> It is unnecessary to consider now whether legislation which restricts those political processes which can ordinarily be expected to bring about repeal of undesirable legislation, is to be subjected to more exacting judicial scrutiny under the general prohibitions of the Fourteenth Amendment than are most other types of legislation....
>
> Nor need we inquire whether similar considerations enter into review of statutes directed at particular religions ... or national ... or racial minorities [or] whether prejudice against discrete and insular minorities may be a special condition, which tends seriously to curtail the operation of those political processes ordinarily to be relied upon to protect minorities, and which may call for a correspondingly more searching judicial inquiry.[48]

In Ely's view the process value of participation, clearly identified in this footnote, is closely linked to the general value of popular control (or majority rule), thereby making judicial review on this basis less objectionable than judicial review based on substantive values. The problem with representative democracy is that it fails to ensure the effective protection of minorities whose interests differ from the interests of many others in society. Although it is permissible to treat minorities worse than majorities, it is not permissible to refuse to represent minorities at all. Ely believes that there are three reasons why a "participation-

---

[47] Ely, *op. cit.*, at 74 (emphasis original). If one characterises process as a substantive value in itself, Ely contends that his analysis is still sound. He argues that it is a value with which the Constitution most concerns itself, whose imposition actually supports the American system of representative democracy and which the courts, set aside from the political process, are uniquely situated to impose.

[48] *United States v. Carolene Products* 304 US 144, at 152-3 (1938) (citations omitted), cited in Ely, *op. cit.*, at 75.

oriented, representation-reinforcing" approach is the best theory of judicial review.[49] First, he considers that the US Constitution is not a statement of general values but rather an instrument that leaves the selection of such values to the political process. It is concerned with procedural fairness and broad participation. Secondly, this type of review reinforces rather than undermines the underlying premises of American democracy. Thirdly, the courts, both because they are experts on process and because they are political outsiders, are better qualified to adjudicate on such matters than are elected officials.

Hogan appears to approve of this theory of judicial review commenting that, if the process works properly, an enlightened and responsible legislature will repeal laws which discriminate against minorities. Nevertheless, he accepts, prejudice may stultify the normal process; the role of judicial review should be to combat the legal manifestation of such prejudice.[50] As a programme for action, this justification for judicial review is limited. It is only the clear legal manifestations of prejudice which are the target of judicial review. By implication, other manifestations of prejudice which stultify the process are not to be considered. Indeed, Hogan goes so far as to suggest that the *Carolene Products* footnote agenda has been nearly fulfilled:

> At the risk of a significant over-generalisation, the courts in most countries have more or less come to the end of the route map sketched out in *Carolene Products*. It is nowadays very unusual to find legislation that can be said to restrict "those processes which can ordinarily be expected to bring about the repeal of undesirable legislation"....[51]

Hogan argues tentatively for an expansion of judicial review to allow for more exacting review of the rationality of socioeconomic legislation, but rejects the suggestion that judicial review should be allowed to enforce socioeconomic rights. What is relevant to this thesis, however, is the effect that Hogan's approach would have on the interpretation of the equality guarantee as it regards minority interests. For reinforcing the process of democracy, if taken in the

---

[49] Ely, *op. cit.*, at 87-8.
[50] Hogan, "Judicial Review and socioeconomic Rights" in Sarkin and Binchy (eds.), *Human Rights, the Citizen and the State* (Round Hall, Sweet and Maxwell, 2001), at 2.

formal way that Hogan suggests, requires that judicial review is legitimate if it overturns only legal restrictions on the democratic expression of minority interests. The overturning of other restrictions would, on this account, be unwarranted judicial activism.

In contrast, Ely accepts that, in reinforcing the process of democracy, the courts may overturn informal constraints on participation, most notably the difficulties which members of oppressed minorities might have in forming coalitions with other groups in order to form legislative majorities on issues important to them. In his view, as well as clearing the channels of political change, judicial review should facilitate the representation of minorities. This requires more than removal of barriers, for "[n]o matter how open the process, those with most of the votes are in a position to vote themselves advantages at the expense of the others, or otherwise to refuse to take their interests into account".[52] What this theory ultimately requires of judicial review is more an issue of equality than general constitutional theory. Nevertheless, it clearly requires that the courts should be concerned with the process as opposed to the substance of democracy, if not solely with formal impediments of that process.

This distinction between formal and informal impediments grounds a criticism of the process approach. If the reinforcement of the process of democracy is concerned solely with formal impediments, Tushnet argues that it does not protect against sufficient legislative tyranny to be considered a good theory of judicial review.[53] On the other hand, if the theory concerns itself with informal impediments, it necessarily draws the courts into making complex assessments of political reality: when a particular group suffers from a legislative decision, does it do so because of prejudice against it or simply because it is an ordinary loser in a pluralist political process?[54] These complex assessments do not admit of a simple answer; if one allows judges to answer these questions, one has – Tushnet argues – substituted legislative tyranny with judicial tyranny and the theory of process-reinforcement fails on that account.

---

[51] *Idem.* Hogan cites *McKenna v. An Taoiseach (No. 2)* [1995] 2 IR 10; [1996] 1 ILRM 81 as an example of this kind of case.

[52] Ely, *op. cit.*, at 135.

[53] The narrowness of Hogan's account seems to bear out this observation.

Reinforcing the Substance of Democracy

Balkin offers a radically different interpretation of the *Carolene Products* footnote four, arguing that its language "points, however awkwardly and haltingly, toward sociological as well as procedural concerns".[55] He argues that the footnote contains the insight that the merely formal features of democracy are insufficient. The observation that prejudice against "discrete and insular minorities" is a "special condition" that might undermine democratic processes can be understood in a process way as Ely suggests: because of this special condition some social groups are unable to form coalitions with other social groups in order to protect their interests. But Balkin identifies a deeper and more important understanding of the footnote: "Democracy and democratic culture are themselves incompatible with certain kinds of prejudices against social groups."[56] Only this deeper understanding can explain why a legislative majority should not be allowed to preserve a system of social hierarchy, why their preferences can be discounted:

> [D]emocracy is not merely a formal theory about majority rule. Democracy is more than just a matter of letting majorities have their way, or, more correctly, it is more than a matter of letting elites elected by majorities have their way. It is also a theory about the proper organization of society and the proper mode of social relations. Democracy is premised on the establishment and preservation of a certain type of culture, a democratic culture. This deeper, substantive, and cultural vision of democracy is and must be opposed to unjust social hierarchy and caste, even when supported by a majority of citizens, and when justified by appeals to morality and tradition.[57]

This conception, which focuses on the substantive rather than the procedural aspects of democracy would clearly allow for more wide-ranging judicial review. Rather than simply ensuring that the processes of political democracy operate in a pure way, the courts would

---

[54] Tushnet, *op. cit.*, at 95-6.
[55] Balkin, "The Constitution of Status" 106 *Yale Law Journal* 2313, at 2367. I shall later consider the wider equality context of this article.
[56] *Ibid.*, at 2368.
[57] *Ibid.*

be empowered to oversee the substantive outcomes of those processes. The question is whether such an approach can be justified in the Irish context.

Process or Substance under Irish Constitutional Law?

Scant attention has been directly paid to this issue in Irish constitutional law. Nevertheless, much attention has been paid to a closely analogous issue: the judicial enforcement of socioeconomic rights. Judicial enforcement of socioeconomic rights, certainly at a constitutional level, requires judges to make complex, substantive decisions about the expenditure of funds in the polity, possibly reordering the allocation of funds agreed in the ordinary political process. Whyte defends this decision-making power where it is apparent that the constitutional rights of marginalised people are not adequately protected by the political process.[58] Objections to such decision-making power are generally framed in terms of the idea that the courts should limit themselves to the enforcement of formal civil and political rights, rights which ultimately protect the political process. It is in that political process that substantive choices should be made. The suggestion that the courts should enforce the substance of democracy, as against the choices made through the ordinary political process, rejects the proposition that the courts' only valid concern is with civil and political rights and the process of democracy. Arguments in its favour are therefore analogous to arguments in favour of judicial enforcement of socioeconomic rights. If the objections to the enforcement of socioeconomic rights can be shown to be unconvincing, it follows that the objections to the enforcement of substantive democracy are *a fortiori* unconvincing.

At the core of the argument against judicial enforcement of socioeconomic rights lie the *dicta* of Costello J. in *O'Reilly v. Limerick Corporation*.[59] In dismissing the plaintiffs' constitutional claim that the State was under an obligation to provide them with a halting site, Costello J. endorsed the Aristotelian distinction between commutative and distributive justice. The former, which essentially connotes justice as between individuals, is properly the concern of the courts. The latter, which essentially connotes justice in the polity's distribution of

---

[58] Whyte, *Social Inclusion and the Legal System: Public Interest Law in Ireland* (IPA, 2002), at 10.
[59] [1989] ILRM 181.

resources, is properly the concern of the political process. Although Costello J.'s judgment neatly captures the idea that the ordinary political process is the arbiter of certain democratic entitlements (such as distributive justice), it offers little in support of that idea apart from reiteration of the commutative/distributive justice distinction. Arguments made by others in favour of the distinction tend to take two forms. First, it is argued that judicial enforcement of distributive justice is undemocratic. Secondly, it is argued that such enforcement is pragmatically unwise given the limited capacities of the courts. I refer to these as the democratic critique and the functional critique.

A majority of the Constitution Review Group rejected, on a number of grounds, a suggestion that the Constitution should provide for socioeconomic rights. Most prominently, they elaborated on a conception of the political process of democracy:

> [T]hese are essentially political matters which, in a democracy, it should be the responsibility of the elected representatives of the people to address and determine. It would be a distortion of democracy to transfer decisions on major issues of policy and practicality from the Government and the Oireachtas, elected to represent the people and do their will, to an unelected judiciary.[60]

There has been a number of criticisms of this report.[61] Most pertinent here is the identification of the manner in which the report seeks to justify a particular vision of democracy by reference to the essence of that democracy which they seek to justify.[62] This is regressive reasoning. Hogan appears to support this approach and adds some functional criticisms of the socioeconomic rights argument. He observes that judges have no special competence in such matters and that the forensic process is not suited to a resolution of the merits of competing solutions to socioeconomic problems.[63] Whyte responds to this functional critique by observing that, if it is a problem, the solution lies not in precluding the courts from

---

[60] *Report of the Constitution Review Group* (Stationery Office, 1996), at 235.
[61] See Whyte, *op. cit.*, at 54-6
[62] "The problem is essentially one of the majority regarding that which is historically contingent as 'given'." Murphy, "Economic Inequality and the Irish Constitution" in Murphy and Twomey (eds), *Ireland's Evolving Constitution: 1937-1997* (Hart Publishing, 1998), at 169.
[63] Hogan, "Directive Principles, socioeconomic Rights and the Constitution" (2001) 36 (ns) *Ir Jur* 174, at 195.

enforcing socioeconomic rights but in improving "the ability of the courts to tackle these issues".[64]

It has not been clearly demonstrated that the judicial power should only be exercised to protect the democratic process and should not be used to protect socioeconomic interests from adverse decisions taken within that process. The democratic argument is regressive and the functional argument, although based on a sound observation, is as much a justification of greater powers for courts as it is of less jurisdiction. Balkin's argument, that the democratic process can only flourish within a democratic culture and that the courts are ultimately empowered to enforce that culture, is not clearly refuted. Moreover, there are two aspects of the Irish constitutional order which suggest that judicial review to enforce a substantive vision of democracy is not objectionable.

First, Ely's claim that the Constitution is a document concerned with process and participation, not substantive concerns, does not apply to the Irish Constitution. As Kelly has noted, the Irish Constitution is both a basic law and a manifesto. In his view, the Constitution deals with substantive matters of social policy which would have been better off out of the Constitution.[65] Indeed, in his explanatory address on the 1937 Constitution, Mr de Valera indicated that he viewed the Constitution as more than a legal Charter:

> I am aware that there are theorists who take a narrow view of the relation of the national polity to the national life and hold that a written Constitution should contain nothing more than the legal machinery for the establishment of the organs of the State. I do not share that view. In my judgment, if the constitution of a country like our own is written down at all it should not only define the character of the legislative, executive, and judicial regime, not only be a compendium of the great axioms of constitutional government, I mean e.g. that of the responsibility of the executive to Parliament or the independence of the judiciary or the principle of universal suffrage, but should contain as well a statement of some at least of the God-given rights of the individual both as a human being and as a member of society the protection of which

---

[64] Whyte, *op. cit.*, at 39.
[65] Kelly, "The Constitution: Law and Manifesto" in Litton (ed.), *op. cit.*

> by the State means more in the long run to the integrity and continuance of the civil society itself that the organisation of the institutions by which it is ruled.[66]

Given that the courts are the authoritative interpreters of the Constitution and that the Constitution is avowedly more than a formal charter for government, it is difficult to sustain the objection that judicial review should not deal with substantive matters.[67]

Secondly, the Irish Constitution can be more easily amended than the US Constitution. Although it is not easy to amend the Constitution, it is easy for the actors in the ordinary political process to seek to have the people change a judicial decision to which the actors in the ordinary political process object.[68] Given the clear rejection by the courts of the O'Hanlon Natural Rights thesis,[69] it can no longer plausibly be argued that the enforcement of substantive rights through judicial review can thwart the ultimate democratic process of popular amendment. For this reason, any substantive conception of democracy imposed by the courts is subject to popular revision through the process of constitutional amendment.[70] One might argue that ease of amendment suggests the opposite conclusion: namely, that the enforcement of a substantive vision of democracy should be left to constitutional amendment. But this misses the point. My argument here is not that the Constitution should be interpreted as guaranteeing socioeconomic rights but simply that, if the Constitution does provide substantive or socioeconomic guarantees, there is nothing in the Constitution to preclude the enforcement of those guarantees through judicial review. The balance between legislative and judicial tyranny is best achieved by making the legislature, in some areas, subject to the judiciary, and by making the judiciary, in all areas, subject to the people. Ultimately, both in legal theory and reality, one must take one's chances with the people.[71]

---

[66] University College Dublin Archives Department, P150/2431.

[67] Whether the equality clause itself has substantive content is another question.

[68] The Bail Referendum and Single European Act are good examples. I am grateful to Dr Gerard Hogan whose questioning caused me to refine this point.

[69] O'Hanlon, "Natural Rights and the Irish Constitution" (1993) 11 *ILT* 8. See *In re Article 26 and the Regulation of Information (Services outside the State for Termination of Pregnancies) Bill 1995* [1995] 1 IR 1; [1995] 2 ILRM 81.

[70] With regard to that process, the courts have a role similar to that outlined by Ely: they protect the process but do not question substantive results. See *McKenna v. An Taoiseach (No. 2)* [1995] 2 IR 10; [1996] 1 ILRM 81 and *In re Article 26 and The Regulation of Information (Services outside the State for Termination of Pregnancies) Bill 1995* [1995] 1 IR 1; [1995] 2 ILRM 81.

[71] See Whelan, "Constitutional Amendments and the Competing Claims of Democracy" in Quinn, Ingram and Livingstone (eds), *Justice and Legal Theory in Ireland* (Oak Tree Press, 1995).

There is a certain irony in this position: namely, that the ultimate argument in favour of judicial enforcement of substantive rights is one of popular process democracy. Nevertheless, this tension is not problematic because the amalgam of process and substance arguments can be easily reconciled in a coherent theory of judicial review. That is, the people committed themselves, through the Constitution, to the protection of a substantive conception of democracy. The courts are thus authorised to defend that conception against legislative encroachment through the ordinary political process. Nevertheless, the courts cannot, in the name of the Constitution which gives them this power, preclude the people from changing that conception of democracy through the constitutional democratic process. Accordingly, the people may by constitutional amendment alter the conception of democracy to which they have committed themselves.

It is doubtful, however, whether a parallel (and double) irony on the other side of the debate can be reconciled in a coherent theory of judicial review. As noted above, a majority of the Constitution Review Group rejected a suggestion to amend the Constitution to provide for socioeconomic rights primarily on the grounds that such an amendment would distort democracy. Hogan rejects the argument, made by the Irish Commission for Justice and Peace, that a constitutional amendment, itself conferring of democratic legitimacy, would resolve this problem:

> This fact alone, however, would not take in the least from the gist of the separation of powers argument – as articulated both by the Review Group and by Hardiman J. in *Sinnott* – namely, that it would effect a transfer of further powers to an unelected judiciary; that judges have no special competence in such matters; that the forensic process is not suited to a resolution of the merits of competing solutions to socioeconomic problems and that such decisions are best left to directly elected representatives whose mandate is liable to democratic recall.[72]

Thus Hogan ultimately rejects a process account of democracy in favour of a substantive account of democracy. He argues that a popular amendment of the Constitution to provide

---

[72] Hogan, "Directive Principles, socioeconomic Rights and the Constitution" (2001) 36 (ns) *Ir Jur* 174, at 195.

for socioeconomic rights would be, *inter alia*, undemocratic. This relies on an anterior understanding of what democracy is, an understanding apparently not susceptible to popular change through the constitutional democratic process. If judicial power were to be exercised in accordance with this argument (and it is worth noting that Hogan bases his argument in part on observations made by Hardiman J. as to the scope of the judicial power), the courts would have to interpret the Constitution as prohibiting any popular amendment which allows for the judicial enforcement of socioeconomic rights or a substantive vision of democracy. If its proponents are not willing to pursue the argument to its logical end, it is hard to see how it can have any weight in determining how the judicial power should be exercised under the Constitution as it stands.[73]

The second irony lies in the close similarities between the arguments used by both the Constitution Review Group and Hogan as to what the Constitution should be and the arguments used by Hardiman J. in *Sinnott* as to what the Constitution is. Hardiman J. ruled *obiter* that a mandatory order should not be issued against the State to provide education for Mr. Sinnott:

> Firstly, to do so would offend the constitutional separation of powers. Secondly, it would lead the courts into the taking of decisions in areas in which they have no special qualification or experience. Thirdly, it would permit the courts to take such decisions even though they are not, and cannot be, democratically responsible for them as the legislature and the executive are. Fourthly, the evidence based adversarial procedures of the courts, which are excellently adapted for the administration of commutative justice, are too technical, too expensive, too focused on the individual issue to be an appropriate method for deciding on issues of policy.[74]

It is puzzling that precisely the same arguments are considered relevant both to proposed amendments of the Constitution and to actual interpretations of the Constitution. One wonders whether those who oppose judicial activism, believing that it leads judges to substitute their own preferences for what the Constitution requires, have themselves

---

[73] I am grateful to Mr Eoin O'Dell whose questioning caused me to refine this point.

[74] *Sinnott v. Minister for Education* [2001] 2 IR 545, at 710. Hardiman J. reiterated these comments in *T.D. v. Minister for Education* [2001] 4 IR 259, at 361.

succumbed to the siren voices telling one to identify the constitutional conception of democracy with one's own.

The arguments of those opposed to judicial enforcement of socioeconomic rights are always advanced with great self-confidence. This self-confidence is unwarranted. There is a very strong argument that the judicial power under the Irish Constitution allows for judicial enforcement of socioeconomic rights and *a fortiori* a substantive conception of equality. If this is thought undesirable, it remains open to the people to amend the Constitution either to circumscribe the scope of the judicial power or to ensure that no socioeconomic or substantive rights are guaranteed by the Constitution, or indeed to do both. Whether or not the Constitution does guarantee a substantive conception of equality is a separate question. Nevertheless, if a substantive conception of equality is, under the moral reading, a plausible interpretation of the equality guarantee, there is no *a priori* limit on the judicial power which precludes the courts from giving effect to that substantive conception.

Conclusion

There are no indefeasible objections, based on the Constitution, to a judicial enforcement of a substantive conception of democracy. Arguments for an originalist understanding are not substantiated. That said, it is still of interest to examine original understandings of the Constitution. Such an examination points up the capacity for change in people's understanding of the Constitution. This is important because dominant conceptions of equality tend to be presented as ahistorical universals. An examination of original understandings helps to undermine this presentation.

The moral reading is a more appropriate approach to constitutional interpretation. That said, on the issue of judicial power, there are two plausible moral readings: enforcing the process of democracy and enforcing the substance of democracy. This means that if a substantive conception of equality is plausible as an interpretation of Article 40.1, its enforcement is not foreclosed by independent limits on the extent of judicial power.

Part II

Chapter Three

Original Understandings

Introduction

Bunreacht na hÉireann was enacted by the people of Ireland on 1 July 1937 and came into operation on 29 December 1937. It marries parliamentary democracy to popular sovereignty, fundamental rights and judicial review. Article 40.1 establishes:

> All citizens shall, as human persons, be held equal before the law.
> This shall not be held to mean that the State shall not in its enactments have due regard to differences of capacity, physical and moral, and of social function.[1]

The drafting of the Constitution is best understood in three stages. The first stage involved Éamon de Valera, then President of the Executive Council, working in private, assisted mostly by Mr John Hearne, legal adviser to the Department of External Affairs but also by a number of other people.[2] The second stage involved the confidential circulation of the draft Constitution to all government departments for comments and suggestions.[3] The third stage involved the publication of the draft Constitution and its debate in the Dáil before its enactment by the people.[4]

The evolution of the wording of the equality guarantee during the first and second stages sheds some light on the framers' understanding of that guarantee; the wording of the guarantee changed significantly during these stages. In contrast, although the Opposition raised a number of serious objections to the content of Article 40.1, no changes were

---

[1] Although the Proclamation of Independence had pledged to cherish equally all the children of the nation, this was an innovation in Irish constitutional law; the Constitution of the Irish Free State (1922) had contained no equality guarantee.

[2] The heads of the Constitution were drafted in Spring 1935, but it appears that detailed drafting did not begin until Summer 1936. This stage lasted until March 1937. My research on this phase is based on Mr de Valera's personal papers, catalogued by the University College Dublin Archives Department (UCDAD). I am grateful for the assistance of the staff of the UCDAD.

[3] This took place during March and April 1937. My research on this phase is based on official state papers of the Department of the President of the Executive Council, archived by the State Papers Office (SPO). I am grateful for the assistance of the staff of the SPO.

[4] Mr de Valera decided that the draft Constitution should be passed by the Dáil in the same manner as an ordinary bill before its submission to the people. This took place during May and early June of 1937.

approved by the Dáil. Nevertheless, the Dáil debates – in particular Mr de Valera's articulation and defence of the vision of equality guaranteed by Article 40.1 – provide valuable insights into the overall purpose of the provision. The Dáil debates, in which Mr de Valera defended Article 40.1 against criticism, thus provide further insights into the original understanding of Article 40.1.

The genesis of the new Constitution can arguably be traced to the work of the Constitution Review Committee of 1934. This committee, established by Mr de Valera, considered the issues of judicial review and the protection of fundamental rights, a protection which had been substantially undermined by the extended power of the Legislature to amend the 1922 Constitution by ordinary legislation.[5] This committee did not specifically address the issue of equality, presumably because there was no equality guarantee in the 1922 Constitution. When Mr. de Valera instructed Mr Hearne to draw up the heads of a new Constitution in 1935, he stipulated that the new Constitution should protect human rights and protect them in a way which prohibited legislative abrogation. It is this latter stipulation which has done most to secure the 1937 Constitution's continued vitality as a Charter of Rights.

From the earliest drafts of the new Constitution, it is clear that Mr Hearne and Mr de Valera intended there to be an equality guarantee in the Constitution, formulated in terms of "equality before the law".[6] Although this marked a departure from the 1922 Constitution, which as noted above contained no equality guarantee, it conformed to the European constitutional trend of the time. For at the time of the drafting of the 1937 Constitution, Article 95 of the Polish Constitution of 1921, Article 4 of the Constitution of the Kingdom of the Serbs, Croats and Slovenes, Article 6 of the Constitution of the Esthonian Republic of 1920, Article 109 of the Constitution of the German Reich of 1919 and Article 22 of the Constitution of the Russian Socialist Federal Soviet Republic of 1918 all guaranteed equality in terms of

---

[5] For a detailed discussion of the work of this committee, see Hogan, "The Report of the 1934 Constitution Review Committee" in Ó Muircheartaigh (ed.), *Ireland in the Coming Times: Essays in Honour of T.K. Whitaker* (IPA, 1997).

[6] See UCDAD/P150/2370. This file of Mr de Valera contains a number of early drafts of the Constitution, dated 17 May 1935 to 18 November 1936. Not all of the drafts are dated. A bald guarantee of equality before the law appears in all the drafts.

equality before the law.[7] Nevertheless, the drafters of the 1922 Constitution had also been aware of that constitutional trend and chose not to include an equality guarantee. For this reason, one cannot conclude that the drafters of the 1937 Constitution were merely following a constitutional trend; one is entitled to assume that they were, to an unascertainable extent, motivated by an egalitarian ideal. That said, their model for Article 40.1 was almost certainly that popular in continental Europe at the time. Any suggestion that the US Constitution provided the model is, to my mind, misplaced. For the US constitutional guarantee is phrased in terms of "equal protection of the laws" not "equality before the law". Although the US Supreme Court had decided in *Plessy v. Ferguson* that "equal protection of the laws" meant "equality before the law",[8] it seems unlikely that the drafters of the 1937 Constitution would have looked beyond the constitutional guarantee to a judicial interpretation, particularly an interpretation which held that racial segregation was fully consonant with equality. Thus, although the motivation for an equality guarantee is not entirely clear, it seems more likely than not that continental Europe provided the model for Article 40.1

That said, the new Irish Constitution contained two novelties, both of which materialised in the first stage of drafting. First was the interpolation of the phrase "as human persons" in the first sentence of the guarantee. Second was the provision of the second sentence which in some way narrowed the scope of the guarantee given in the first. Each of these requires consideration; before doing so, I shall consider the framers' understanding of the general guarantee. The limits of this guarantee were debated in the context of sex discrimination.

Equality Before the Law

The phrase "equality before the law" has been given different meanings at different times. The most restrictive meaning is that of formal equality: the equal application of rules to all to whom the rules apply. It seems clear that Mr de Valera did not consider the guarantee to have only this restrictive meaning. In March 1937, Dr Charles McQuaid, then President of

---

[7] See Rao, *Select Constitutions of the World* (2nd ed., Madras, 1934). The first edition of this book was prepared by order of the Irish Provisional Government in 1922. One can thus assume that its contents were well-known to the framers of the 1937 Constitution.

[8] 163 US 537 (1896). For discussion of this case, see Chapter 1.

Blackrock College, later Archbishop of Dublin, outlined his understanding of Article 40.1 in materials sent to Mr de Valera:

> This statement simply means that all citizens shall receive equal justice in the Courts. Moreover, it means that every citizen is to be regarded by the State as possessing the same human nature, the same human destiny and the same fundamental human rights in private and family and political life.[9]

I shall consider further this vision of human equality below. For present purposes, it suffices to note that Dr McQuaid believed that Article 40.1 guaranteed more than formal equality and judicial impartiality. Mr de Valera appears to have agreed with this interpretation. At the committee stage in the Dáil, he commented that the simple meaning of equality before the law was that if a person was before a court, "the judge is not going to deal differently with him, if he is in one particular class, from the way he would deal with him if he were in another class".[10] Nevertheless, he stated, people had attempted to stretch the concept of equality before the law beyond this "definite, precise and narrow meaning". Because of this, Mr de Valera asserted, it was necessary to insert the phrase "as human persons" because that was the only respect in which people could be taken as completely equal. This reasoning attributes to Article 40.1 a meaning which, although limited, goes beyond purely formal equality.

A more precise understanding of the way in which the meaning Article 40.1 was limited can be gleaned from a consideration of the issue of sex equality. In introducing the Constitution to the Dáil at the second reading, Mr de Valera was considerably exercised by criticisms from the women's movement. He argued that such criticisms were unfounded: he had always fought for women's rights and nothing in the Constitution detracted from women's rights. He considered that discrimination against women was an injustice but one not effected since Independence. Therefore, to insert a specific ban on sex discrimination was merely to remind people of how things were; it served no useful purpose as he had no intention of resuming discrimination against women. He considered the real political demands of women:

---

[9] UCDAD/P150/2406.
[10] 67 *Dáil Debates* 1590.

> Their attitude all the time was that they did not want to be put in any position other than that of equality, and they have got equality right through this document. There is nothing in it to suggest that they cannot vote for and become members of the Dáil, that they cannot vote for and be Senators, or that they cannot vote for and become President. There is nothing in this Constitution which will debar them from being President of the Supreme Court, from being Chief Justice or from holding any single office in the State. There is no distinction made whatever between men and women as far as the vote, the franchise, office or anything else is concerned.[11]

It is noteworthy that the examples chosen by Mr de Valera were all civil or political in nature. Women were equal in the sense that there were no bars on them entering into any public office or exercising their franchise. In contrast, Mr de Valera envisaged a specific social role for women, as stated in Article 41.2. This provides:

> In particular, the State recognises that by her life within the home, woman gives to the State a support without which the common good cannot be achieved.
> The State shall, therefore, endeavour to ensure that mothers shall not be obliged by economic necessity to engage in labour to the neglect of their duties in the home.

Mr. de Valera justified this provision by saying that it was necessary as part of the State's social programme. He was, however, clear that Article 41.2 was not a directive legal provision; it aimed to provide choices to women so that they could stay at home if they wanted to do so. This suggests that Mr de Valera's views on equality in matters social diverged from his views on equality in matters civil or political. Women were guaranteed civil and political equality but they were not socially equal and the Constitution should not guarantee that. He concluded his general justification of this divergence with the following observation:

> This Constitution has been attacked on the ground that it is taking away women's rights. What it is doing where women are concerned is that, where their rights are

[11] *Ibid.*, at 64-5.

> equal, they are equal. Therefore, where they are referred to here, they are referred to by way of protection and the protection which the State is bound to give.[12]

Mr. de Valera viewed Article 40.1 as guaranteeing the civil and political equalities which had been achieved prior to 1937 and of which he approved. However, in his view women were not fully equal in the social sphere, in the sense that they had a different ideal role to fill.[13] However, the non-justiciable Article 45.2(i) provides a different perspective. This requires the State to direct its policy towards securing:

> That the citizens (all of whom, men and women equally, have the right to an adequate means of livelihood) may through their occupations find the means of making reasonable provision for their domestic needs.

The parenthetical equal right to an adequate means of livelihood is not necessarily inconsistent with a view that women should remain in the home, as the means of livelihood could be provided by the State, endeavouring "to ensure that mothers shall not be obliged by economic necessity to engage in labour to the neglect of their duties in the home". Nevertheless, the aspiration that all citizens should find through their occupations the means of making reasonable provision for their domestic needs is inconsistent with the Article 41.2 position that women should work in the home. This inconsistency can perhaps be resolved if one views Article 41.2 as concerning "mothers" rather than "women", although it seems to use the terms interchangeably. The better view, I suggest, is that the constitutional attitude to women's place in the social sphere is internally inconsistent. Article 41.2, being justiciable, deserves greater weight than Article 45.2(i) but cannot obliterate the sentiment expressed in the latter provision. Thus, although Mr de Valera's conception of sex equality was weaker in the social sphere than in the civil and political sphere, he may have been content to see sex equality establish itself in the social sphere over time. This latter proposition is subject to his

---

[12] *Ibid.*, at 70.

[13] This version of sex equality, which recognises and encourages differences between the sexes within the social sphere, appears broadly in line with Catholic social teaching of the time. Pope Pius XI wrote: "The sexes in keeping with the wonderful designs of the Creator are destined to complement each other, in the family and in society, precisely because of their differences, which therefore ought to be maintained and encouraged." Pope Pius XI, *On the Education of Christian Youth* (Catholic Truth Society, 1930), at 32 cited in Cahill, *The Framework of a Christian State* (MH Gill and Son, 1932), at 425.

belief that mothers should not be forced, by economic necessity, to abandon their ideal type role as carers of children.

The view that Article 40.1 was conceived of primarily as a guarantee of civil equality is strengthened by the fact that what was to become Article 40.2 originally appeared in the same sub-article.[14] Article 40.2 provides:

> 1° Titles of nobility shall not be conferred by the State.
> 2° No title of nobility or of honour may be accepted by any citizen except with the prior approval of the Government.

Equality before the law was thus considered to be related to the removal of civil distinctions within society.[15]

Equality as Human Persons

The insertion of the phrase "as human persons" into the text of the equality guarantee appears to have occurred relatively late in the first stage of drafting. In a Department of External Affairs file cover, dated 2 January 1937, there is a number of partial drafts.[16] The relevant sentence of the one draft provided:

> The State acknowledges that all citizens are as human persons equal before the law.

The relevant sentence of another draft provided:

> The State acknowledges that the citizens are, as human persons, equal before the law.

---

[14] See Department of Taoiseach File S9715: Constitution 1937: First Draft. Thus, the two provisions remained in the same section right through the first stage of drafting. The Department of the Taoiseach commented that the provision regarding titles of nobility in the first draft of the Constitution was not numbered. The second revise of the Constitution (10 April 1937) placed the titles of nobility provision in its own sub-article.

[15] All of the constitutions mentioned above, with the exception of that of the USSR, contained a provision similar to Article 40.2 in the same section as their equality guarantee.

No explanation is given in the state papers for the insertion of the phrase as human persons. This phrase reflected Catholic social teaching of the time.[17] For instance, Pope Pius XI wrote:

> Only in this Kingdom of Christ can we find that true human equality by which all men are ennobled and made great by the selfsame nobility and greatness, for each is ennobled by the precious blood of Christ.[18]

This teaching was drawn specifically to the attention of Mr de Valera in two ways. First, Longford and O'Neill note that Dr McQuaid gave to Mr de Valera a copy of the *Code Social: Esquisse d'une Synthese Social Catholique* and comment that this book "was to prove of great help in de Valera's work on the Constitution...".[19] This booklet was produced in 1934 by the International Union of Social Studies under the Presidency of Cardinal Mercier. It formed part of Mr de Valera's personal files.[20] The chapter on civil life provided:

> The human person has rights anterior and superior to all positive law. These rights – individual or collective – stem from human nature, free and reasonable.... In the announcement and legal regulation of the corollaries of the equality of nature, such as equality before the law, before justice, before taxes and before public functions, it is necessary that the legislator take account, not only of the equality of nature, but of accidental inequalities, which can render individuals more or less capable of the exercise of this or that faculty.[21]

This passage linked the concept of equality to that of human persons. A more direct link was provided in the submission made to Mr de Valera by Fr Edward Cahill on behalf of the

---

[16] UCDAD/P150/ 2387.

[17] See chapter one for a discussion of the Catholic Church's endorsement of human equality.

[18] Pius XI, *Ubi Arcano Dei Consilio* (1922), at para. 58.

[19] Longford and O'Neill, *Eamon de Valera* (Gill and Macmillan, 1970), at 296.

[20] UCDAD/P150/2366.

[21] *Code Social*, at 26-8. The original French provides: "La personne humaine a des droits antérieurs et supérieurs à toute loi positive. Ces droits – individuel ou collectifs – découlent de la nature humaine, raisonnable et libre.... Dans l'énoncé et la réglementation juridique des corollaires de l'égalité de nature, tels que égalité devant la loi, devant la justice, devant l'impôt, devant les fonctions publiques, il est nécessaire que le législateur tienne compte, non seulement de l'égalité de nature, mais des inégalités accidentelles, qui peuvent rendre les individus plus ou moins aptes a l'exercice de telle ou tell faculté." I am grateful to Rémi Thomas for assisting me with this translation.

Jesuits.[22] The Jesuit submission, dated 21 October 1936, contained a preamble, the eighth paragraph of which provided:

> [W]e guarantee to all citizens of this State full equality, before the law as human persons, and full recognition and protection by the State of all their personal and family rights.[23]

In his own writings, Fr Cahill had expounded somewhat on the meaning of human equality:

> Human Equality and Inequality.- In their inborn or congenital rights, as well as in the dignity of their human personality, and in all the attributes attached to that personality, all men are equal. For human nature, with its supernatural destiny which is the origin of these rights is the same in all men.[24]

In material sent to Mr de Valera in March 1937, Dr McQuaid commented on the meaning of Article 40.1:

> [I]t means that every citizen is to be regarded by the State as possessing the same human nature, the same human destiny and the same fundamental human rights in private and family and political life.[25]

---

[22] UCDAD/P150/2393. For a detailed discussion on the role of the Jesuits in preparing this submission and of Fr Cahill as interlocutor, see Faughnan, "The Jesuits and the Drafting of the Irish Constitution of 1937" (1988) 26 *Irish Historical Studies* 79. Faughnan comments that the timing of this contribution was significant because it was at this stage that work was beginning on the fundamental rights provisions. *Ibid.*, at 90. Keogh argues that Cahill was a rather extreme figure, marginalised by the Jesuits in the drafting of their submission. Keogh, "The Irish Constitutional Revolution: An Analysis of the Making of the Constitution" in Litton (ed), *The Constitution of Ireland 1937-1987* (IPA, 1988), at 11-9. That said, Cahill's views on human equality do not seem particularly extreme and are a useful illustration of a Catholic understanding of that concept in the 1930s.

[23] The submission cited the preamble to the Polish Constitution of 1921 as support for this paragraph. This reference, however, seems to have been by way of support for a fundamental rights guarantee in a preamble rather than for the phraseology of human persons. The relevant provision of the preamble to the Polish Constitution of 1921 provided: "and to guarantee to all citizens of the Republic equality, respect for the dignity of labour, and recognition of their rights, together with individual protection by the State". See Rao, *op. cit.*, at 85. It is known that the Jesuits also made use of the Austrian Constitution of 1934. This Constitution's phrasing of equality does not seem to have influenced the Jesuits. (I am grateful to Susanne Bachfischer of the Austrian embassy for locating a copy of this Constitution and to Sarah Palmer of the Law School in Trinity College for translating the relevant provisions.)

[24] Cahill, *op. cit.*, at 288. Later he comments: "Men and Women have all the essential attributes of human nature. Hence, men and women equally are persons." *Ibid.*, at 423.

[25] UCDAD/P150/2406.

As discussed in chapter one, the Christian account of human equality asserts that human persons are all equal all are equally the children of God. This assertion manifests in two ways. First, an acceptance of purely metaphysical or transcendental equality: because humans are basically equal, they have equal rights in the next life. Nothing in this world can detract from that transcendental equality in any way; as such, no inequality in this world prejudices human equality. Secondly, an acceptance of practical equality based on that metaphysical equality: given that all humans are equal, all humans should be treated as equals. Some inequalities of this world do not treat people as equal human persons; they prejudice the ideal of human equality. I argued in chapter one that the teaching of the Catholic Church, which may originally have been committed to human equality as a purely transcendental matter, is now committed to human equality at both a transcendental and practical level.[26]

What is unclear is whether Mr de Valera was committed to practical human equality as well as to metaphysical human equality. In the Dáil debates, he indicated that the phrase "as human persons" was intended to ensure that the correct meaning was accorded to equality before the law:

> [T]he only respect in which people can be taken as completely equal is in the fact that they are human persons, having a certain same nature, certain destinies and so on. That is the only really true, philosophical way in which you can speak of equality, so that "as human persons" is put in here deliberately to make the statement a true one and not a false one.[27]

Mr McGilligan questioned whether the equality guarantee could also have been stated in negative form: "All citizens shall not be held equal before the law except in so far as they are

---

[26] "Since all men possess a rational soul and are created in God's likeness, since they have the same nature and origin, have been redeemed by Christ and enjoy the same divine calling and destiny, the basic equality of all must receive increasingly greater recognition. True, all men are not alike from the point of view of varying physical power and the diversity of intellectual and moral resources. Nevertheless, with respect to the fundamental rights of the person, every type of discrimination, whether social or cultural, whether based on sex, race, colour, social condition, language or religion, is to be overcome and eradicated as contrary to God's intent." Pope Paul VI, *Gaudium et Spes* (1965), at 29.

human persons."[28] He concluded that the phrase "as human persons" had the effect of detracting from the clear-cut declaration of equality. Unless it had a sensible and valuable meaning, it should be dropped.

Unsurprisingly, Mr de Valera rejected this suggestion. He stated that he wanted the Constitution to contain accurate principles which would stand up to the test of time. He considered that even the phrase "all citizens shall be held equal before the law" was inaccurate. It needed to be limited in some way, although Mr de Valera was not altogether clear on this point.[29] There followed a rather semantic exchange with Mr McGilligan. Mr de Valera rejected the suggestion that the first sentence could be phrased in a negative way and carry the same meaning, on the basis that a positive and negative formulation were not equivalent. He saw the first statement as a "positive statement that [citizens] shall be held equal as human persons – that is, as individuals with common human nature, they shall be held equal before the law".[30] However, this did not logically mean there was no other respect in which citizens would be held equal before the law, although that might be the practical effect of the statement.[31]

The debates do not provide a clear sense of what Mr de Valera understood by the phrase "as human persons". It was intended to restrict the guarantee in some way, but it is not clear exactly how. At one stage, Mr de Valera seemed to suggest that people could only be equal in the respect that they were human persons. This is the purely metaphysical approach, and is perhaps consonant with the words of Pope Pius XI, quoted above. At another stage, he seemed to suggest that citizens should be held equal before the law because they were human persons. This gives practical effect to human equality, prohibiting discriminations which deny common humanity; it appears consonant with the extracts from the *Code Social* and later Church teaching. In chapter six, I shall consider the courts' treatment of the human

---

[27] 67 *Dáil Debates* 1591. Again, it is worth noting Mr de Valera's use of "truth" and "falsity" in support of his normative claims.

[28] 67 *Dáil Debates* 1603.

[29] The example he gave was that a judge could not deal with people of a different moral capacity in the same way; this possibility is, however, probably covered by the second sentence and does not explain the need for the phrase "as human persons" in the first sentence.

[30] 67 *Dáil Debates* 1609-10.

[31] This is somewhat disingenuous. Although Mr de Valera was right to say that the first sentence of Article 40.1 does not preclude equality in respects unconnected to citizens' human personality, it does mean that the *Constitution* guarantees equality only in that respect.

persons phrase, which treatment broadly follows the division between metaphysical and practical human equality.

Legitimate Recognition of Difference

The second sentence of Article 40.1 is something of a novelty item. It, perhaps unsurprisingly, did not appear in the initial rather bald drafts of the fundamental rights provisions. Its phraseology changed in a number of small ways. The first appearance of the second sentence is in documents contained in a Department of External Affairs file cover dated 2 January 1937. In a draft dated 11 January 1937, there is a typescript of the equality guarantee not containing a second sentence. In a document which may be dated 3 February 1937, although this is unclear, the second sentence first appears:

> The State shall, however, in its enactments have due regard to individual differences of capacity, physical and moral, and of social function.[32]

In the draft Constitution dated 15 March 1937, the second sentence reads:

> The state shall, in particular, in its laws have due regard to individual differences of capacity, physical and moral, and of social function.[33]

In Mr de Valera's hand, there are amendments suggesting the removal of the word "individual" and the replacement of the words "in particular" with "however".

In its comments of 23 March 1937 on the Constitution, the Department of Finance was scathingly critical of the fundamental rights provisions. It commented:

> In [these articles] there are a number of mandatory provisions making it compulsory on the State to do a number of vague and undefined things e.g. "to have due regard to individual differences of capacity, physical and moral, and of social function"....

---

[32] UCDAD/P150/2387. This may be a slight amendment of another version of the second sentence contained in a document in the same file.
[33] UCDAD/P150/2401.

> These articles are not of a kind usually enshrined in the Constitution. They will not be helpful to Ministers in the future but will provide a breeding ground for discontent and so create instability and insecurity. They are consequently objectionable and even dangerous. Their provisions are too vague to be of positive assistance to any Government and yet sufficiently definite to afford grounds for disaffection to sections of the community, who might claim that the Government were not living up to the Constitution.[34]

Mr de Valera appears to have taken on board the criticism as to the mandatory nature of the second sentence of Article 40.1. In a redraft dated 7 April 1937, the second sentence appears as:

> This shall not mean, however, that the State shall not in its laws have due regard to individual differences of capacity, physical and moral, and of social function.[35]

The words "shall not mean, however" are crossed out and above them written, "paragraph shall not be held to mean". "Laws" is crossed out and "enactments" is written in the margin. In a redraft dated 8 April 1937 the final version appears:

> This shall not be held to mean that the State shall not in its enactments have due regard to individual differences of capacity, physical and moral, and of social function.

Faughnan suggests that the early drafts of Article 40.1 containing the second sentence first appeared in Dr McQuaid's draft articles.[36] It is therefore useful to consider what Dr McQuaid understood the provision to mean. In commenting in March 1937 on the general guarantee of equality before the law as human persons, Dr McQuaid wrote:

---

[34] SPO, S9715.
[35] UCDAD/P150/2413.
[36] Faughnan, *De Valera's Constitution: The Drafting of the Irish Constitution of 1937* (MA Thesis, UCD, 1988), at 109. A document from Dr McQuaid, dated by the Archivist to March 1937, seems to supports this contention: UCDAD/P150/2407.

> [I]t is a fact of evident experience that inequalities do and must exist in organized society. The State, in making its laws – which are enactments of reason with a view to the common good – cannot duly provide for and safeguard its citizens, unless it takes account of the unequal capacity of its citizens. A child has not the same moral capacity, that is the power of mind and will, as the adult, and cannot be treated as if it had: even though the child by reason of its common human nature merits equal respect as a person with the adult. A judge has a higher function in Society than a bank-clerk and for that reason merits a higher recompense, and in virtue of the good of Society that recompense must be accorded to him. Social inequalities are just, not only because they represent higher grades of service to Society, but also because they are required for the attainment of the public good.[37]

Thus Article 40.1 was understood to guarantee human equality as well as formal equality, but human equality was understood to allow of many social inequalities between persons. The second sentence offered an interpretation of the general guarantee which clarified this point, allowing the State to draw distinctions between persons in its enactments.

Nevertheless, Mr de Valera's political opponents were strongly of the view that the second sentence went too far. It did not simply confine the ideal of equality before the law to its proper meaning; instead, it deprived that ideal of all meaning. Dr Rowlette, an independent TD for the Dublin University constituency, proposing an amendment to delete the second sentence, well expressed these fears:

> I have again and again been greatly taken with the phrase, which seems to give one something solid to rest upon and something that is really useful as a basis of the State. But when I read the next sentence, I find that the stability that I thought at first was there was taken away by some qualifications, so that one is left in doubt as to

---

[37] UCDAD/P150/2406. This is consonant with Catholic social teaching of the time. Pope Pius X wrote:

> Human society as God established it, is composed of unequal elements, just as the members of the human body are unequal. To make them all equal is impossible, and would be the destruction of society itself.... Consequently it is conformable to the order established by God, that in human society there should be princes and subjects, masters and men, rich and poor, learned and ignorant, nobles and plebeians, who, united by a bond of love, should help one another to attain their final end in Heaven, and their material and moral well-being on earth." *Fin Dalla Prima* (1903), at 183, cited in Cahill, *op. cit.*, at 290.

> which is the dominant phrase or whether it is the phrase which lays down the general principle or the phrase which states the qualifications.[38]

Dr Rowlette worried that a future Government would view the second sentence as a direction to pay due regard to the physical differences between the sexes and that, instead of being a protection, it would become a weapon to be used against women. Given that the second sentence was, at the behest of the Department of Finance, phrased in a permissive rather than mandatory way, this objection was somewhat misplaced. That said, the permissive phrasing would not preclude legislators from treating the phrase as a direction. Dr Rowlette's prediction – that, insofar as equality would exist under the Constitution, it would be derived from law not the Constitution – proved prescient. In reply, Mr de Valera stated that the general approach taken in the Constitution was to indicate an ideal to be aimed at, but then to take account of the fact that the ideal was stated in a form which is not in fact true. Despite the fact that all should be equal before the law, life was in fact full of inequality:

> [The clause] is designed to prevent a straining of what was a narrow expression into another sphere, and to prevent its being used to suggest that we should not have regard in our enactments to differences of capacity, social functions and so on.... If we want to be just; if laws are to be just, they must take account of capacity of various kinds and therefore that statement as it stands is true. Without this sentence, the statement would be false.[39]

There then followed some discussion of what the second sentence meant and, in particular, of what differences were covered by the headings of moral and physical capacity and social function. Professor Alton, another independent TD for the Dublin University constituency, urged a reconsideration of the second sentence on the basis that it was ambiguous. He thought that moral capacity referred to mental capacity,[40] that physical capacity referred more

---

[38] 67 *Dáil Debates* 1584.

[39] 67 *Dáil Debates* 1591.

[40] Mr de Valera rejected this contention, but did not explain what was meant by moral capacity. 67 *Dáil Debates* 1600. From his personal papers, it appears that he thought of moral capacity as referring to the moral agency of an individual. In an undated document, he hand-wrote some definitions of words used in the Constitution, appearing to be particularly concerned with the meaning of natural law type language. See UCDAD/P150/2382. Some of his handwriting is difficult to decipher, but a number of his comments about "moral capacity" are legible: "subject to Natural Law", "subject of rights", "found in Natural Law of Social Structure of moral being",

to age than to sex, but that social function referred to sex itself. He suspected that Mr de Valera wished to avoid a Platonic Republic in which there would be no differences, physical or social, recognised between men and women and that the second sentence of Article 40.1 was meant to achieve this. Mr de Valera, however, rejected the contention that the second sentence was concerned with sex.[41] He argued that even if Ireland were a community consisting entirely of men, some sentence along the lines of the second sentence would be required. In his view, the phrase "social function" referred to more than differences between the sexes. This argument does not, however, preclude the proposition that differences in social function include, among other things, the difference between men and women. In a society which is not solely male, such a provision would legitimise considerable differentiation of women from men. This point precipitated a rather caustic contribution from Mr Costello, a Fine Gael TD and later Taoiseach:

> The President sometimes in the course of frivolous moments has either seen or read of the Gilbert and Sullivan opera, *Princess Ida*. Perhaps he would in his spare moments, when relieved from the task of drafting the Constitution, draft a comic opera consisting entirely of males, on the lines of *Princess Ida* and, as an interlude or a prologue, he might draft a Constitution for an entirely male community.... As a mere effort in the construction of a document anyone is entitled to assume that the second part of the Article enables a law to be passed, and specifically declares it not to be unconstitutional, which will take account of the physical difference and capacity arising solely from sex.[42]

Although Mr Costello accepted that nothing in the Constitution precluded women from getting work equally with men, he argued that the effect of the second sentence was that nothing in the Constitution precluded the Oireachtas from legislating to that effect. Mr de Valera,

---

"sciens et volens", "willing". It thus appears that Mr de Valera considered that distinctions were permissible between those who had different capacities to act as moral agents. Nevertheless, it remains unclear whether – in practical terms – there are any differences between mental capacity and moral capacity. Unless Mr de Valera believed that there are people of full mental capacity who are not full moral agents, it appears that there is no practical difference.

[41] It is perhaps interesting to note that in Mr de Valera's personal papers there was present a published copy of the draft Constitution annotated in an unidentified hand and autographed by Mr de Valera on 30 April. The phrase from "differences" to "function" is underlined and in right margin is written "i.e. women!" and in left margin is written "What can it be taken to mean?". See UCDAD/P150/2429.

[42] 67 *Dáil Debates* 1612.

however, maintained his defence of the second sentence. The Legislature should be allowed to draw certain distinctions. Insofar as a general declaration of equality, such as that contained in the first sentence, would preclude the Legislature from making such distinctions, it would be regrettable. The second sentence foreclosed such a regrettable state of affairs and was, in his view, a more accurate statement of the principle of equality:

> These words were not chosen haphazardly. They were chosen with very great care, and they were chosen in order to rectify the wrong use and the wrong statement of certain principles which contain a germ of truth in them, but which can be wrongly and falsely applied. [Mr de Valera commented that principles had to be qualified, and then continued.] Are we, then, in order to try to face life and truth as it is, to leave the principle out altogether? I say what we should not. I say that we are doing a good thing in holding certain things up as a virtue to be aimed at and then indicating where the wrong practice or the misapplication or the misunderstanding of the virtue becomes an abuse.[43]

The dividing line between the proper interpretation of equality before the law, as seen by Mr de Valera, and the improper interpretation, now foreclosed by the second sentence of the guarantee, again seems to have reflected the distinction between civil and political equality, on the one hand, and social equality on the other. For instance, Professor O'Sullivan noted that Mr de Valera was willing to assuage anxieties as far as political discrimination was concerned, but not as far as economic discrimination was concerned. He claimed that women, although wanting a constitutional guarantee of political equality, were more concerned about equal opportunities to work. That Mr de Valera did not respond to this contention suggests that he was not particularly troubled by such a conclusion. Article 40.1 was meant to guarantee equality before the law not social equality; if the second sentence clarified that, it had achieved its purpose.

A different interpretation of Mr de Valera's views is possible. It could be argued that he was supporting a classification model of equality, i.e. that equality required the proscription of certain objectionable classifications but permitted classifications on other bases. The second

---

[43] 67 *Dáil Debates* 1601.

sentence can be read as a statement of the grounds on which it was legitimate to classify and has been so read by the courts and academic commentators. I do not, however, think it was how Mr de Valera viewed the sentence. In speaking of differentiation based on social function, he did not seem to envisage careful scrutiny of legislative classifications to see how they corresponded to differences of social function. Conversely, in considering his focal case of equality before the law (judicial impartiality) he does not seem to have considered that any classifications were permissible. This suggests a tripartite conception of equality rather than a classification conception.[44]

If this analysis is correct, one can suggest a few tentative conclusions about Mr de Valera's views of the second sentence. The second sentence sharpened the proper meaning of "human equality before the law" by stating that the Legislature could draw distinctions in certain areas. Most notably, it clarified that equality before the law established civil and political equality but was not a programme for social equality. Although the Constitution did not preclude social equality, it contained no mandate to that effect, leaving the matter to the decision of future legislators, thus leaving the State free to pursue its social programme, particularly as to the status of women.

[44] Those who read the debates to deduce the latter conception are perhaps interpreting the debates through the conceptual framework of legitimate classification later adopted by the courts.

Chapter Four

The Courts' Conception of Constitutional Equality

Introduction

The courts have interpreted Article 40.1 as a guarantee of fair process, mandating judicial intervention where the other organs of State take account of irrelevant considerations in their classifications. In this chapter, I shall consider a number of basic issues in the courts' conception of constitutional equality. I shall set out the cases which illustrate the courts' adoption of the process conception as well as the courts' general attitude to the equality guarantee.

Not Just Formal Equality[1]

In a number of cases, the Irish courts have stated that there is no breach of Article 40.1 provided that everyone in the same class is treated the same way, taking the legislation itself as determinative of who is in what class. This analysis produces the tautology of purely formal equality whereby the classes established by legislation necessarily reflect relevant differences because it is the legislation itself which determines which differences are relevant. This can be seen in *O'Brien v. Manufacturing Engineering Ltd.*[2] In the High Court, Pringle J. stated that the second sentence of Article 40.1 envisaged that citizens might be divided into different classes and, therefore, that there was no unfair discrimination "provided that every person in the same class is treated in the same way".[3] Effectively, this would mean that no classification could ever breach Article 40.1. Recognising this, Barrington J., who had been counsel in *O'Brien*, suggested a gloss on the formula of Pringle J.:

---

[1] For a discussion of formal equality, see chapter one.

[2] [1973] IR 334; (1974) 108 ILTR 105.

[3] *Ibid.*, at 341; 119. Pringle J.'s reading of the second sentence was incomplete. That sentence provides that the State may make some classifications. By implication, there are some classifications which are impermissible. The equality guaranteed by Article 40.1 cannot be purely formal equality.

> No doubt this is true, but it might be prudent to express, what is perhaps implied in it, that the classification must be for a legitimate legislative purpose, that it must be relevant to that purpose, and that each class must be treated fairly.[4]

This formula has been approved on numerous occasions by the Supreme Court.[5] Nevertheless, on occasion the courts have reverted to the unglossed formula of Pringle J. For instance, in *People (DPP) v. Quilligan (No. 3)*,[6] the Supreme Court considered a challenge to the constitutionality of section 30 of the Offences Against the State Act, 1939. What is of interest here is Finlay C.J.'s rejection of the argument based on Article 40.1:

> Every person who is suspected of the commission of an offence under the Act of 1939 or an offence scheduled for the purposes of that Act is subject in law to the same rights and obligations and to the possibility of detention for the same period or periods.... The mere fact that a law discriminates as between one group or category of persons and another does not, of itself, render it constitutionally invalid. What is necessary to establish such invalidity is the existence of invidious discrimination, and the court is satisfied that that has not been established with regard to s. 30 of the Act of 1939 in this case.[7]

The weight of authority is against this reading of Article 40.1. That said, the protection of non-formal equality does not imply non-protection of formal equality. Formal equality is protected by guaranteeing equal application of the laws.[8] Thus in *Purcell v. Attorney General*,[9] Blayney J., with whom Hamilton C.J. and Denham J. concurred, held that where an Act of the Oireachtas evidenced no intention to discriminate between persons to whom the Act applied,

---

[4] *Brennan v. Attorney General* [1983] ILRM 449, at 480.

[5] See chapter five.

[6] [1993] 2 IR 305.

[7] *Ibid.*, at 320-1. For further examples of this line of authority, see *State (Kenny) v. Ó hÚadhaigh* [1979] IR 1, *Doyle v. Hearne (No.2)* [1988] IR 317 and *Kavanagh v. Government of Ireland* [1996] 1 IR 321; [1996] 1 ILRM 133.

[8] For a disscussion of formal equality before the law, see Zander, *Inequalities Before the Law* (Open University Press, 1976), at 7.

[9] [1995] 3 IR 287; [1996] 2 ILRM 153. The Act at issue was the Farm Tax Act, 1985. The administrative scheme was contained in the Farm Tax Regulations, 1986 and the Farm Tax (Adjusted Acreage) Regulations, 1986. The effect of the Regulations was to start taxing some farms a number of years before other farms. Although the legislation envisaged that the assessment, on which the taxation regime was backed, would take a number of years, it did not clearly envisage that some farms would be taxed before the assessment was completed.

it would be unconstitutional for the administration of that Act to introduce such discriminations. Blayney J. did not state which provision of the Constitution was breached but formal equality is effectively protected, even if such nomenclature was not employed. The courts are also subject to this obligation to apply laws equally; this obligation has manifested itself in complaints about special treatment under the criminal law and in demands for consistency in the application of the criminal law.[10]

Early Indications of a Process Conception on the Part of the Courts

The outlines of a process conception of equality can be discerned in *State (Nicolau) v. An Bord Uchtála*,[11] the first case in which the Supreme Court gave detailed consideration to an argument based on Article 40.1. The prosecutor argued that sections 14 and 16 of the Adoption Act, 1952 discriminated against natural fathers on the grounds of paternity and sex in that they did not require the consent of a natural father to an adoption and that they did not give a natural father any entitlement to be heard on the application for an adoption order. This differentiated the natural father most significantly from the natural mother but also from certain other persons to whom such entitlements were granted.[12] The Court, the judgment of which was given by Walsh J., did not accept this argument, observing that the natural father was only excluded from the process if he did not fall within one of the other categories of person specified in the Act. Despite this, the Court proceeded to consider whether the classification drawn between the natural father and those other persons was justifiable by reference to the second sentence of Article 40.1:

> When it is considered that an illegitimate child may be begotten by an act of rape, by a callous seduction or by an act of casual commerce by a man with a woman, as

[10] See the discussion of these topics in chapter eight.

[11] [1966] IR 567; (1968) 102 ILTR 1.

[12] Section 14 requires that the consent of the natural mother, guardian and any person having charge of or control over the child must be obtained before an adoption order can be granted. Section 16 entitles the following persons to be heard: the applicants, the mother of the child, the guardian of the child, a person having charge of or control over the child, a relative of the child (on the mother's side), a representative of a registered adoption society which is or has been at any time concerned with the child, a priest or minister of a religion recognised by the Constitution (or, in the case of any such religion which has no ministry, an authorised representative of the religion) where the child or a parent (whether alive or dead) is claimed to be or to have been of that religion, an officer of the Board and any other person whom the Board, in its discretion, decides to hear.

> well as by the association of a man with a woman in making a common home without marriage in circumstances approximating to those of married life, and that, except in the latter instance, it is rare for a natural father to take any interest in his offspring, it is not difficult to appreciate the difference in moral capacity and social function between the natural father and the several persons described in the sub-sections in question.[13]

There is much that is troubling in this reasoning.[14] For present purposes, it suffices to note that it is an early indication of the basic features of a process conception. Walsh J. considered not the effect on natural fathers as a group but rather the basis of distinction between natural fathers and those who have rights in the adoption process. He rejected the contention of the prosecutor that sex and paternity were the grounds of the distinction and found the distinction justified on the basis of a difference in moral capacity and social function.

Walsh J. also observed that Article 40.1 did not guarantee equal measure in all things to all citizens and that inequality might result from special needs, abilities or deficiencies.[15] He reiterated this view in *Quinn's Supermarket v. Attorney General*,[16] where he stated that Article 40.1 was not a guarantee of absolute equality for all citizens in all circumstances.[17] These comments suggested a view of equality as a safeguard against unjust differentiation of persons. The Constitution, in the view of Walsh J., did not require undifferentiated treatment of all citizens but allowed for such differentiation in circumstances where it was justified by real differences between the persons concerned.

A subtly different expression of this idea was given by the Supreme Court in *State (Hartley) v. Governor of Mountjoy Prison*.[18] There the Court stated that "a diversity of arrangements does not effect discrimination between citizens in their legal rights. Their legal rights are the same in the same circumstances. This in fact is equality before the law and not

---

[13] [1966] IR 567, at 641.
[14] See chapter seven.
[15] [1966] IR 567, at 638.
[16] [1972] IR 1.
[17] *Ibid.*, at 13.
[18] Unreported, Supreme Court, 21 December 1967.

inequality....".[19] A similar view was taken by the Court in *O'Brien v. Keogh*,[20] where the plaintiff challenged section 49(2) of the Statute of Limitations, 1957 which, as regards the limitation period for personal injury claims, discriminated between a child in the custody of a parent (broadly defined) and a child not in such custody. Rejecting the argument that this contravened Article 40.1, Ó Dálaigh C.J. speaking for the Court stated that Article 40.1 did not require identical treatment of all persons without recognition of differences in relevant circumstances; it merely forbade invidious discrimination.[21] In *O'Brien v. Manufacturing Engineering Co. Ltd.*,[22] Walsh J. appears to have approved the statements from *O'Brien v. Keogh*, *Hartley* and *Nicolau* without adverting to the difference between them.[23]

The difference was that in *Quinn's* and *Nicolau* the second sentence of Article 40.1 had been seen as authorising derogation from equality, by allowing differences in treatment. In *Hartley* and *O'Brien v. Keogh*, in contrast, the second sentence of Article 40.1 led the Court to conclude that the guaranteed equality did not require identical treatment. For this reason, differences in treatment could be seen as necessary to achieve equality not as derogation from equality. The former view equated sameness with equality and allowed for derogation; the latter view equated equality with reasonable differentiation. This latter view is more convincing and coheres better with the position of the courts, expressed frequently in later cases, that Article 40.1 guarantees an Aristotelian conception of equality.

The Aristotelian Conception[24]

In *de Búrca v. Attorney General*,[25] the plaintiffs challenged certain provisions of the Juries Act, 1927. Section 3(1) of that Act provided that a person would be qualified and liable for jury service if the rateable valuation of his/her land equalled or exceeded the minimum rating qualifications prescribed for that jury district by the Minister for Justice. Section 5 provided that certain classes of persons would be exempted from jury service but could opt in for

---

[19] See extract in O'Reilly and Redmond, *Cases and Materials on the Irish Constitution* (Incorporated Law Society of Ireland, 1980), at 473.
[20] [1972] IR 144.
[21] [1972] IR 144, at 156.
[22] [1973] IR 334; (1974) 108 ILTR 105. This judgment was delivered on the same day as the judgment in *O'Brien v. Keogh*.
[23] *Ibid.*, at 364; 139.
[24] For a general discussion of Aristotelian equality, see chapter one.

service. Although ten of these classifications were based on the occupation of the persons concerned, the first was based on sex: women were exempted from jury service unless they specifically applied to be on the jury register.[26] Walsh J. referred to the cases cited in the previous section and summarised them as follows:

> [T]he effect of these cases is that Article 40 does not require identical treatment of all persons without recognition of differences in relevant circumstances but it forbids invidious or arbitrary discrimination. It imports the Aristotelian concept that justice demands that we treat equals equally and unequals unequally.[27]

Walsh J. concluded that the property qualification failed this Aristotelian requirement as it was not related to any relevant difference of social function or capacity. Although he accepted that the legislature could adopt legislation which differentiated people on the basis of intelligence, impartiality or honesty, he rejected any suggestion that wealth bears on these characteristics.[28] Similarly, he concluded that the exemption of women was unconstitutional on the basis that it was "undisguisedly discriminatory on the ground of sex alone".[29] It did not draw a distinction between the different functions that women may fulfil and simply categorised together one half of the population most of whom only had their sex in common. Being of either sex, without more, was not to have a social function, he reasoned. Although it might be permissible in some circumstances for the law to give due recognition to the fact that certain social functions are more usually performed by one sex rather than by the other, the measure in this case was far too broad: any social function that might plausibly have been at issue was not sufficiently referable to the classification used to be capable of supporting that classification.

The Aristotelian approach here espoused by Walsh J. is a specific instance of a process conception of equality. The Court oversees assessments of difference made within the

---

[25] [1976] IR 38; (1977) 111 ILTR 37.

[26] Despite the fact that there were just over 700,000 women in the age bracket of 20-64 years, only nine had been inserted in the jurors' list under section 16 of the Act. [1976] IR 38, at 70; (1977) 111 ILTR 37, at 53.

[27] *Ibid.*, at 68; at 52.

[28] He raised further questions about the anomalous nature of a property qualification which solely takes into account the rateable valuation of land, but this is not directly relevant to his conclusion on the issue. *Ibid.*, at 69; 52.

[29] *Ibid.*, at 71; 54.

ordinary political process. Walsh J. considered the legislation objectionable because the process of its enactment was polluted by an irrelevant criterion: the legislature should not have taken account of sex in determining who would serve on juries.

Despite the foregoing, Irish law has not fully adopted the Aristotelian conception of equality. Although Walsh J. in *de Búrca* stated that Article 40.1 required the legislature to treat equals equally and unequals unequally, there is no direct authority for the proposition that the Oireachtas is under a constitutional mandate to treat unequals unequally. The courts' interpretation of the equality guarantee shows that, although Article 40.1 is permissive of unequal treatment, it has never been held to require unequal treatment. Hogan and Whyte cite Walsh J.'s dicta from *de Búrca* as support for the proposition that "equality before the law is breached not only by the unlike treatment of like situations but also by the converse, the like treatment of unlike situations".[30] *Cox v. Ireland*[31] is cited as a case in which legislation was struck down because it failed to take account of material differences in two situations. Nevertheless, Article 40.1 was not cited by the Supreme Court in its determination of the issue in *Cox*. Instead the Court relied on Article 40.3 of the Constitution; the failure to take account of relevant differences was relevant to whether a constitutional right had been arbitrarily infringed in breach of the proportionality doctrine. It is doubtful whether this rather limited holding by the Court can be cited in support of a general obligation, on the part of the Oireachtas, to take account of relevant differences and discriminate accordingly.[32]

The limited extent of the Irish courts' adoption of the Aristotelian conception of equality is well stated by O'Higgins C.J. in *Draper v. Attorney General*.[33] Rejecting the plaintiff's claim that the failure to provide her, a person with a disability, with a facility for postal voting amounted to a breach of Article 40.1, O'Higgins C.J., for the Supreme Court, commented:

---

[30] Hogan and Whyte, *Kelly: The Irish Constitution* (3rd ed., Butterworths, 1994), at 725.
[31] [1992] 2 IR 503.
[32] Ryan cites *Cassidy v. Minister for Industry and Commerce* [1978] 297 as an example of an impermissible failure to take into account relevant differences. See Ryan, *Constitutional Law* (2001, Round Hall, Sweet and Maxwell), at 151. The plaintiffs challenged the validity of a maximum prices order which failed to distinguish between lounge bars and public bars. This measure indeed was struck down by the Supreme Court but on the basis that it was unreasonable for the Minister not to recognise the distinction between the two types of bar. The case was decided purely as a matter of administrative law; the Court never referred to the Constitution, let alone to Article 40.1. Accordingly, it cannot be taken as authority for the proposition that the Oireachtas must have due regard to relevant differences in its enactments.
[33] [1984] IR 277; [1984] ILRM 643.

> The case made by the plaintiff in this action rests entirely on the failure of the State to provide special facilities for her and for those similarly situated. In the opinion of the Court, such failure does not amount to an interference by the State in the exercise of the right to vote under Article 16, s 1, sub-s 2, of the Constitution. Nor is it, in the opinion of the Court, a breach by the State of the provisions of s 1 of Article 40. While under this Article the State could, because of the plaintiff's incapacity, have made particular provisions for the exercise by her of her voting rights, the fact that it did not do so does not mean that the provisions actually made are necessarily unreasonable, unjust or arbitrary. For the reasons already stated, the Court could not so find.[34]

From the foregoing one can conclude that the Irish courts have adopted only half of the Aristotelian conception, a sort of "Aristotle-lite" approach to equality.[35] This interpretation coheres better with the text of Article 40.1 than is the fully fledged Aristotelian alternative. For the second sentence of Article 40.1 merely states that "this shall not be held to mean that the State shall not in its enactments have due regard to differences of capacity, physical or moral, and of social function". This wording allows the State to differentiate but imposes no obligation on the State to do so.

Landers v. The Attorney General[36] provides a good illustration of Aristotelian equality. In this case the plaintiff was a young child with a good singing voice. His parents argued that sections 2(b) and 2(c) of the Prevention of Cruelty to Children Act, 1904 were unconstitutionally discriminatory in that they imposed limits on the hours at which the plaintiff could perform, limits which did not apply to older people. Finlay J., citing *O'Brien v. Keogh*,[37] rejected these arguments on the basis that the restriction could not fairly be described as invidious discrimination. Presumably this conclusion rested on the fact that the younger

---

[34] *Ibid.*, at 290-1; 652-3. The reasons included the cost of such a system and the risks of electoral fraud.
[35] The judgment of Fitzgerald C.J. in *McGee v. Attorney General* [1974] IR 284, at 301 also bespeaks an Aristotle-lite approach to equality: "The real basis of [the plaintiff's] complaint is that the [impugned section], in affecting all citizens, fails to make special provision exempting her because of her own particular disability." Fitzgerald C.J. clearly thought that this complaint grounded no constitutional cause of action.
[36] (1975) 109 ILTR 1.
[37] [1972] IR 144.

person was differently situated to an older person and that therefore different treatment was permissible.

Greater consideration was given to the issue in *Somjee v. Minister for Justice*.[38] The plaintiffs claimed, *inter alia*, that sections 8, 15 and 16 of the Irish Nationality and Citizenship Act, 1956 were contrary to Article 40.1 in that they made it more difficult for a male spouse of an Irish citizen to obtain Irish citizenship than it was for a female spouse of an Irish citizen. Although Keane J. accepted that a diversity of arrangements existed, he rejected the contention that it constituted a "discrimination between male and female applicants for citizenship as such".[39] The distinction only concerned aliens who marry Irish citizens. This distinction was permissible as the Legislature was entitled to have regard to the fact that it was much less likely that female aliens would have been involved in activities that might count against a citizenship application. This can be seen as an application of the Aristotelian conception combined with a measure of judicial deference. Keane J. emphasised that the Oireachtas made the primary assessment as to whether persons were so differently situated as to justify different treatment. Once such a conclusion was open to the Oireachtas, the courts would not intervene.

The ideas of difference and deference at the heart of the Aristotelian process conception can clearly be seen in *Norris v. Attorney General*.[40] In considering whether the prohibition on "gross indecency" between males, but not between females, constituted an unconstitutional inequality, O'Higgins C.J. reasoned as follows:

> The legislature would be perfectly entitled to have regard to the difference between the sexes and to treat sexual conduct or gross indecency between males as requiring prohibition because of the social problem which it creates, while at the same time looking at sexual conduct between females as being not only different but as posing no such social problem.[41]

---

[38] [1981] ILRM 324. For further discussion of this case, see chapter seven.
[39] *Ibid.*, at 325.
[40] [1984] IR 36.
[41] *Ibid.*, at 59.

Deference to legislative assessment of difference can also be seen in *MhicMhathúna v. Attorney General*.[42] The plaintiffs, a married couple who were parents, argued that various provisions of the tax and social welfare codes discriminated against them vis-à-vis unmarried persons in similar circumstances. Carroll J. did not accept the contention that a married couple were similarly situated to a single parent, observing that the "parent on his or her own has a more difficult task in bringing the children up single-handedly because two parents living together can give each other mutual support and assistance".[43] Because of this difference in situation, both the tax concessions and the welfare benefits advantageous to the single parent were constitutionally permissible. The Supreme Court endorsed this decision on appeal, emphasising the deference owed by the courts to the legislature in the allocation of resources.[44]

The Neutrality of the Process Conception

In *O'Brien v. Stoutt*,[45] the Supreme Court considered the constitutionality of a discrimination against illegitimate children effected by the intestacy rules contained in sections 67 and 69 of the Succession Act, 1965. Walsh J., for the Court, held that "legislation which differentiates citizens or which discriminates between them does not need to be justified under the proviso if justification for it can be found in other provisions of the Constitution".[46] The provisions were held to be justified by the constitutional protection of the marital family.[47] This suggests that Article 40.1 is a content-free provision, stipulating the process by which legislative measures should be enacted but subject to substantive direction by other provisions of the Constitution. It is considered by the courts to have no substantive, egalitarian content which could weigh against other, inegalitarian provisions of the Constitution.

This point was even more starkly illustrated by *Murphy v. Attorney General*.[48] Kenny J. held that a discrimination in the tax code against married couples vis-à-vis unmarried couples was

---

[42] [1989] IR 504.
[43] *Ibid.*, at 511.
[44] [1995] 1 IR 484; [1995] 1 ILRM 69.
[45] [1984] IR 316; [1985] ILRM 86.
[46] *Ibid.*, at 335; at 95.
[47] In *Johnson v. Ireland* (1987) 9 EHRR 203, the European Court of Human Rights found this discrimination in the Succession Act to be inconsistent with the protection of family life under Article 8 of the Convention.
[48] [1982] IR 241.

justified by reference to the special position accorded to marriage in the Constitution.[49] This identified a ground of difference which could validly be taken into account by the legislature, notwithstanding the fact that the Constitution suggested that married couples should receive favourable treatment.[50] This clearly suggested that the courts, in applying Article 40.1, had no interest in the substantive treatment received by persons; they were solely interested in whether there was a ground of difference which could hypothetically justify differential treatment, without any reference to the quality of that differential treatment.[51]

A further aspect of the courts' concern for neutrality is demonstrated by *Draper v. Attorney General*.[52] As noted above, the plaintiff, owing to a disability, was unable to attend at polling stations to exercise her right to vote. Rejecting the plaintiff's claim, O'Higgins C.J. noted that the "fact that some voters are unable to comply with [the Electoral Act's] provisions does not of itself oblige the State to tailor that law to suit their special needs".[53] He concluded:

> The case made by the plaintiff in this action rests entirely on the failure of the State to provide special facilities for her and for those similarly situated. In the opinion of the Court, such failure does not amount to an interference by the State in the exercise of the right to vote under [Article 16.1.2°]. Nor is it, in the opinion of the Court, a breach by the State of the provisions of [Article 40.1]. While under this Article the State could, because of the plaintiff's incapacity, have made particular provisions for the exercise by her of her voting rights, the fact that it did not do so does not mean that the provisions actually made are necessarily unreasonable, unjust or arbitrary.[54]

---

[49] *Ibid.*, at 284.

[50] Casey describes Kenny J.'s judgment for the Court as a "curious production". Kenny J. had reasoned that the unfavourable tax treatment of married couples could be balanced against other legal discriminations favourable to married couples. Casey correctly describes this proposition as "plainly untenable". See Casey, *Constitutional Law in Ireland* (3rd ed., Round Hall Sweet and Maxwell, 2000), at 456.

[51] To confuse matters further, the Court held that the provisions at issue were unconstitutional by reason of the special protection afforded by Article 41 to the institution of marriage. *Murphy* was followed by Murphy J. in *Greene v. Minister for Agriculture* [1990] ILRM 364. See chapter five for further cases in which the courts justified discriminations by reference to other provisions of the Constitution.

[52] [1984] IR 277; [1984] ILRM 643.

[53] *Ibid.*, at 290; 652.

[54] *Ibid.*, at 290-1; 652-3. A similar case is *O'Shaughnessy v. Attorney General* Unreported, High Court, 16 February 1971, O'Keeffe P. In this case, the plaintiff alleged that the provision, under the Criminal Justice (Legal Aid) Act, 1962 of legal aid to those accused of criminal offences but not to those with a civil claim constituted a breach of Article 40.1. O'Keeffe P. held that assistance to one class of persons would not be held

The judgment appears predicated on a view of Article 40.1 as a neutral guarantee. Because of this posited neutrality, Article 40.1 did not allow the courts to take sides in social struggles. Ms Draper was entitled to make her case for postal voting facilities in the political domain – although her inability to vote could obviously undermine this – but the courts were not entitled, under Article 40.1, to take her side in that struggle by mandating the government to provide the postal voting facilities.

In *Breathnach v. Ireland*,[55] Quirke J. considered a claim that the failure to provide some convenient means of voting for prisoners constituted a breach of Article 16 and Article 40.1. The applicant's claim was strengthened by the fact that, since Ms Draper had taken her case, the Electoral (Amendment) (No. 2) Act, 1986 and the Electoral Acts, 1992 to 1997 had provided a means of postal voting for, amongst others, citizens with certain disabilities, without much administrative difficulty. Quirke J. thus easily rejected the contention that the provision to prisoners of a means of voting would impose undue demands on the prison system. He concluded that the differentiated vindication of Article 16's right to vote, whereby some citizens but not others who were unable to vote in the normal way were provided with a means of postal voting, constituted a breach of Article 40.1. This suggested a greater willingness on the part of the courts to eschew neutrality and require positive action from the other organs of State where Article 40.1 was pleaded in conjunction with another constitutional right. On appeal, however, Keane C.J. implicitly rejected this reasoning, considering Article 16.1 and Article 40.1 separately. Any discrimination was justifiable considering the difference in physical and moral capacity between those detained as a result of breaking the law and others. Denham J. argued that there was no inequality as between the applicant and other prisoners; any inequality as between prisoners and persons not in lawful custody was not unreasonable.

---

unconstitutional simply because assistance was not provided to another class of persons. It was not, he held, for the courts to determine the legislature's priorities.

[55] [2000] 3 IR 467 (HC); [2001] 3 IR 230 (SC).

Indirect Discrimination

A purist account of the process conception focuses entirely on direct discrimination. On this basis, a legislative measure can only be struck down if it contains, on its face, an objectionable classification. The concept of indirect discrimination marks a recognition that there may be measures which, although neutral on their face, effect classifications between individuals. More pertinently, a measure may contain an unobjectionable classification on its face although actually effecting an objectionable classification. [56] For instance, a rule favouring army veterans for state appointments may effect an objectionable classification between men and women, given that the vast majority of army veterans are men.[57] Indirect discrimination can be understood to arise either because of the differential impact of a measure or because of the discriminatory purpose behind a measure.[58] In either form, the concept of indirect discrimination makes it considerably easier for a plaintiff to establish that there has been an unconstitutional restriction of equality. Nevertheless, indirect discrimination does not represent a departure from the process conception of equality; it merely embellishes that concept. As the nomenclature suggests, "indirect discrimination" is a concept derivative of "direct discrimination". The effects of a measure are relevant not in themselves but rather as a suggestion that the measure, despite its neutral façade, is one that differentiates and classifies. The concern of constitutional equality, even on this somewhat broader interpretation, remains whether a legislative measure has unwarrantedly differentiated between two individuals who should have been treated in the same way.

The concept of indirect discrimination can be understood as covering two discrete situations. The first arises where the impugned characteristic is shared by some of each group, but by clearly more of one group than of the other. In this situation, the legislative measure is, to a greater or lesser degree, *salient* to an unstated ground of classification. The second arises where the impugned characteristic is shared by some of one group and none of the other group. In this situation, the legislative measure is *categorically* related to an unstated ground

---

[56] Observing that indirect discrimination can be "as prejudicial and hurtful as direct discrimination to those who are the object of it", the Constitution Review Group recommended that Article 40.1 be amended to include a section prohibiting both direct and indirect discrimination on an illustrative list of proscribed grounds. Although the Group noted that equality before the law could be interpreted in such a way, they felt that cases such as *Draper* made it preferable to insert such a provision explicitly into the Constitution. Report of the Constitution Review Group (Stationery Office, 1996), at 229-30.

[57] See *Feeney v. Personnel Administrator of Massachusetts* 445 US 901 (1980).

[58] These competing conceptions are discussed further in chapter nine.

of classification.[59] The courts have not recognised indirect discrimination in the former instance but have recognised it in the latter instance.

In *Norris v. Attorney General*,[60] the Supreme Court rejected the plaintiff's contention that the criminalisation of anal sex constituted a discrimination between homosexuals and heterosexuals. McWilliam J. reasoned as follows:

> A certain act is declared to be unlawful. It may be performed by either homosexual or heterosexual men with either men or women. Although it is perfectly obvious that such acts will usually be performed between homosexual males, which is probably what the legislature had in mind, that does not constitute an invidious or arbitrary discrimination against homosexual citizens any more than the statutes making theft an offence constitute an invidious or arbitrary discrimination against congenital kleptomaniacs, supposing there were such a group of people.[61]

On appeal, O'Higgins C.J. rejected the argument more tersely, acknowledging neither the discriminatory intent nor the disproportionate impact of the measure on male homosexuals:

> The act which constitutes buggery can only be committed by males. It is designated as a crime whether it is committed with a male or a female. It follows that the prohibition applies to the act irrespective of whether it is committed by a homosexual or by a heterosexual male. No discrimination could be involved.[62]

Section 61 was a classic example of indirect discrimination where the legislative measure was highly salient to an unstated ground of classification; although the criminalisation of buggery applies to all persons, it clearly impacts more on those for whom anal sex is a significant form of sexual intimacy. This group consists mostly of gay men. As noted by McWilliam J., this differential impact was probably intended. That said, the discrimination was not categorically related to male homosexuality; some heterosexuals practise anal sex. The

---

[59] For similar terminology, see Siegel, "Discrimination in the Eyes of the Law: How "Color Blindness" Discourse Disrupts and Rationalizes Social Stratification" 88 *California Law Review* 77 (2000).
[60] [1984] IR 36.
[61] *Ibid.*, at 44.

Court's rejection of the plaintiff's contention amounted to a rejection of the concept of indirect discrimination where the discrimination was salient to a ground of classification, but not necessarily where the discrimination was categorically related to a ground of classification.

A more ambiguous case is *Draper v. Attorney General*.[63] Here, as previously stated, the plaintiff, owing to a disability, was unable to attend at polling stations to exercise her right to vote. She alleged that the provision of postal voting facilities for other classes of voter but not for her constituted a breach of her right to vote, under Article 16, and of the equality guarantee. Rejecting the plaintiff's claim, O'Higgins C.J. noted that the "fact that some voters are unable to comply with [the Electoral Act's] provisions does not of itself oblige the State to tailor that law to suit their special needs".[64] This reasoning recognised the reality of indirect discrimination although being sceptical as to whether it breached Article 40.1. This reticence perhaps lay more in deference to legislative judgment than in any antipathy to a recognition of indirect discrimination itself.[65] The Court may have recognised the indirect discrimination here because it was categorically related to a ground of classification: impaired mobility.

The more recent case of *In re Article 26 and the Illegal Immigrants' (Trafficking) Bill 1999*,[66] suggested that the courts might take cognisance of indirect discrimination where the legislative measure is categorically related to an unstated ground of classification. The Supreme Court considered the constitutionality of section 5 of the Illegal Immigrants (Trafficking) Bill, 1999 which limited to 14 days the time limit for seeking judicial review of certain orders made in respect of non-nationals. Counsel assigned by the Court argued, *inter alia*, that this measure constituted a legislative classification, differentiating nationals from non-nationals, which could only be justified by showing a rational relationship to a legitimate government objective. Keane C.J. observed that section 5 did not "expressly or of itself divide persons into two classes or create a distinction between non-nationals and citizens".[67] Nevertheless, Keane C.J. held that the Act indirectly applied only to certain non-nationals:

---

[62] *Ibid.*, at 59.
[63] [1984] IR 277; [1984] ILRM 643.
[64] *Ibid.*, at 290; 652.
[65] A similar approach can be seen in *Breathnach v. Ireland*, discussed above.
[66] [2000] 2 IR 360.
[67] *Ibid.*, at 401.

> The question still remains whether s. 5 of the Bill by this indirect means imposes conditions or restrictions on the exercise of a right by a certain category of non-nationals in a manner that is unfair, arbitrary or invidious so as to constitute unequal treatment within the meaning of Article 40.1 or whether the same is justified by objective reasons other that (*sic*) the mere fact that they affect only that category of non-nationals.[68]

The Court concluded that Article 40.1 had not been breached. The formulation of its conclusion, however, confirms that it perceived section 5 of the Bill as imposing an indirect discrimination:

> [E]ven though by their very nature each one of the conditions and limitations which s.5 of the Bill seeks to introduce apply only to non-nationals, the court is satisfied that they are justified by an objective legitimate purpose independent of the personal status or classification of the persons affected by them.[69]

The Court thus saw the need to justify the *prima facie* inequality that section 5 created as between nationals and non-nationals. This specific inequality could not have been cognisable to a process conception that perceived only direct discrimination. Accordingly, the case is authority for the proposition that indirectly discriminatory measures may fall foul of constitutional equality doctrine.

Redmond v. Minister for the Environment is a further example of the courts assessing the constitutionality of a categorically related indirect discrimination.[70] Here the plaintiff challenged the constitutionality of section 47 of the Electoral Act, 1992 and section 13 of the European Parliament Elections Act, 1997 on the grounds that the requirement on candidates to pay an electoral deposit of £300 and £1,000 respectively breached Articles 16.1 and 40.1. Herbert J. found for the plaintiff on both grounds. With regard to Article 40.1, he noted that the provisions impacted upon persons differently according to their different means:

---

[68] *Ibid.*, at 402.
[69] *Ibid.*, at 403.
[70] [2001] 4 IR 61.

> In my judgment a law which has the effect, even if totally unintended, of discriminating between human persons on the basis of money is an attack upon the dignity of those persons as human beings who do not have money.[71]

In short, although the measures did not explicitly discriminate on the grounds of wealth (in the manner, say, of the property qualification for jury service, struck down in *de Búrca*), they were categorically related to such a ground of discrimination. The State thus had to justify the use of a wealth discrimination in the scheme regulating who could stand for election.

State Action

An issue of crucial importance which has received little judicial consideration concerns the extent to which, if at all, Article 40.1 applies to non-State actors. The case of *Murtagh Properties v. Cleary*[72] suggested that Article 40.3 had some application to private actors, in that case a trade union. But no suggestion was made as to whether Article 40.1 had like application. Most commentators have argued that Article 40.1 applies only to State action. The Constitution Review Group, by a majority, trenchantly rejected a proposal that Article 40.1 should be amended to allow non-State actors to be covered. This conclusion is consistent with the process conception of equality generally adopted by the Irish courts. If the concern of constitutional equality is the purity of the process by which legislation is enacted, leading to a concern that individuals not be differentiated on the basis of irrelevant characteristics, it follows that private discriminatory action – however objectionable – does not raise constitutional problems.[73]

Many forms of state action are subject to Article 40.1. Clearly, legislation must comply with the guarantee. In *Haughey v. Moriarty*, the Supreme Court implicitly held that the Oireachtas must comply with the guarantee in its non-legislative functions.[74] The discussion of formal

---

[71] *Ibid.*, at 80.

[72] [1972] IR 330.

[73] *In re Article 26 and the Employment Equality Bill 1996* [1997] 2 IR 321, at 346, the Supreme Court expressly reserved its view on whether Article 40.1 applied to non-State action. Of course, as this case demonstrated, the Legislature is not precluded from imposing obligations of non-discrimination on private actors.

[74] [1999] 3 IR 1. In this case, a resolution establishing a Tribunal of Inquiry.

equality above suggests that both the Executive and the courts must apply a law equally to all to whom the law is stated to apply.[75]

Reverse Discrimination

Some conceptions of equality which focus on differentiation distinguish between two types of differentiation: adverse discrimination and reverse discrimination.[76] Under these conceptions, adverse discrimination is treated as the paradigmatic discrimination against which an equality guarantee should protect. Reverse discrimination, because it is not motivated by prejudice or because it is intended to confer advantages on members of previously subordinated groups, is considered either to be a less significant concern to an equality guarantee or not a concern at all. Other conceptions of equality, however, maintain that there is no difference between adverse and reverse discrimination. One's precise understanding of what, if anything, constitutes reverse discrimination depends on one's precise conception of equality. I shall elaborate on this in chapter nine. For present purposes, it suffices to question whether Article the courts' interpretation of Article 40.1 recognises reverse discrimination as a discrete concept. The courts have given little consideration to this issue perhaps because, under the weak process conception of equality commonly employed by the courts, there has been little question of any legislative discrimination, let alone a reverse discrimination, being struck down.

In *Quinn's Supermarket v. Attorney General*,[77] the plaintiffs challenged an Order for evening opening hours which discriminated in favour of Jewish Kosher shops. In the High Court, McLoughlin J. considered the constitutionality of the Order with regard to Article 44.2.3° of the Constitution.[78] He rejected the argument, on the part of the defendants, that "discrimination" in this context referred only to adverse discrimination:

---

[75] For further discussion of specific instances of this, see chapter eight.

[76] Different terminology is often employed, such as "negative" and "positive" discrimination, "malign" and "benign" discrimination. In this thesis, I shall use the terminology of "adverse" and "reverse" because it captures the distinction with fewer connotations than the other terminology.

[77] [1972] IR 1.

[78] "The State shall not impose any disabilities or make any discrimination on the ground of religious profession, belief or status".

> The ordinary meaning of discrimination is to set up or observe a difference between, and it may be adverse or otherwise. As Mr. O'Hanlon has pointed out the Irish text confirms this view; "*aon idirdhealú do dhéanamh*" means to make or set up any discrimination between, whereas the Irish for "to discriminate against" would be "*leatrom a dhéanamh ar dhuine*".[79]

This analysis is not of direct relevance to the interpretation of Article 40.1 which is phrased in terms of "equality" rather than "discrimination".[80] On appeal, a majority of the Supreme Court accepted that the measure was a discrimination based on religious belief but, *per* Walsh J., held that it could be justified by reference to Article 44.2.1° which guaranteed the free profession and practice of religion, except that it went further than was necessary. Although the case is not directly on point, *Quinn's Supermarket* did suggest a judicial view that discrimination is a neutral concept, incorporating both adverse and reverse discrimination. Given that the courts have interpreted Article 40.1 as a prohibition on irrational discrimination, the analysis in *Quinn's Supermarket* suggests that Article 40.1 is *prima facie* applicable to reverse discrimination.[81]

The Preference for Rights over Equality

The courts' restrictive interpretation of Article 40.1 cannot be attributed to concerns over judicial activism. For in many cases in which the plaintiff's equality argument failed, the courts nonetheless ruled for the plaintiff based on an expansive interpretation of other provisions of the Constitution. In *Macauley v. Minister for Posts and Telegraphs*,[82] Kenny J. rejected the argument based on Article 40.1 although finding for the plaintiff on the basis of a newly enumerated right of access to the courts under Article 40.3. Similarly in *Murtagh Properties v. Cleary*,[83] Kenny J. rejected the equality argument but found for the plaintiff on the basis of a newly enumerated right to work under Article 40.3. This preference for rights over equality

---

[79] Quinn's Supermarket v Attorney General [1972] IR 1, at 7.

[80] This is also the case in the Irish text: "Áirítear gurb ionann ina bpearsain daonna na saoránaigh uile i láthair an dlí."

[81] The constitutionality of reverse discrimination now arises in a more urgent form given the possible emergence of a strengthened process conception of equality. See chapters six and nine for a discussion of the implications of this development.

[82] [1966] IR 345.

[83] [1972] IR 330.

has also been prevalent in Supreme Court decisions. For instance in *O'Brien v. Keogh*,[84] the Court rejected the argument based on Article 40.1 but accepted an argument based on the judicially enumerated right of access to the courts.[85] Thus, although restricting Article 40.1 for various reasons, the courts were prepared to expand other constitutional guarantees in unprecedented fashion.[86] In others cases, such as *Cox. v. Ireland*[87] and *de Búrca v. Attorney General*,[88] the courts' reliance on other constitutional rights in preference to equality has been more plausible.

Perhaps the starkest illustration of this preference can be found in the Supreme Court decision in *Murphy v. Attorney General*.[89] There, as noted above, the Court rejected an argument of unfair discrimination against married couples on the basis that Article 41 of the Constitution identified married couples as having a different social function and that it was permissible for the Oireachtas to differentiate on the basis of that difference in social function. This conclusion was reached notwithstanding the fact that, although the Constitution mandated special protection for the institution of marriage, this discrimination was considered by the Court to undermine that institution. Kenny J., speaking for the Court, then held that the tax provisions in question were unconstitutional under Article 41 as they failed to protect the institution of marriage. It is difficult to see how the impugned measure could have been held unconstitutional, even under Article 41, if it had applied equally to married and unmarried couples. The core of the unconstitutionality was thus the differential treatment of married and unmarried couples, a problem to which Article 40.1 would appear to have been an appropriate response.[90]

---

[84] [1972] IR 144.

[85] This approach may be contrasted with that taken in *O'Brien v. Manufacturing Engineering* [1973] IR 334; (1974) 108 ILTR 105, decided on the same day, in which the Supreme Court simply referred to the arguments which had been made to reject the Article 40.1 claim so as to dismiss the claim based on Article 40.3.

[86] A more restrained approach is now taken to the enumeration of constitutional rights. See the decision of Keane J. in *I. O'T. v. B.* [1998] 2 IR 321.

[87] [1992] 2 IR 503. Here the Supreme Court decided the case on the basis of property rights rather than equality.

[88] [1976] IR 38; (1977) 111 ILTR 37. Here Griffin and Henchy JJ. decided the case on the basis of the right to a jury trial rather than equality.

[89] [1982] IR 241.

[90] The preference for rights over equality can be seen in other cases such as *State (M.) v. Attorney General* [1979] IR 73, in which Finlay P. enumerated a right to travel rather than apply Article 40.1, *Norris v. Attorney General* [1984] IR 36, in which Henchy J. relied on a judicially enumerated privacy right rather than Article 40.1 to deal with the differential treatment of homosexual activity, and *Brennan v. Attorney General* [1984] ILRM 355 and *Blake v. Attorney General* [1982] IR 117 in which the Supreme court determined the issues in the plaintiffs' favour by reference to property rights rather than equality.

A number of conclusions may be drawn from this discussion. First, the courts have traditionally preferred to decide cases on the basis of substantive constitutional rights rather than Article 40.1. This proposition holds true even where the rejection of Article 40.1 necessitated enumeration of a new constitutional right in order to decide for the plaintiff. Accordingly, the preference for rights over equality cannot be attributed to any general concern about judicial activism. Secondly, the process conception of equality adopted by the courts has amounted to a double-emasculation of Article 40.1. Not only was a process conception of equality preferred to a substantive conception, but that process conception was then systematically subordinated to other substantive rights contained in the Constitution. Thirdly, the preference for substantive rights as a basis for decision even extended to situations where the alleged infringement of those rights consisted wholly or substantially of differential treatment.

This preference for rights over equality was arguably due to a simple distrust of and distaste for equality on the part of judges in the 1970s and 1980s. Such distrust and distaste no longer seems so prevalent, as the decisions in *Howard v. Commissioners of Public Works*[91] and *McKenna v. An Taoiseach (No. 2)*[92] discussed below suggest. More pertinently perhaps, in *W. v. W.*,[93] the Supreme Court struck down the wife's dependent domicile rule primarily by reference to Article 40.1 as opposed to Article 41.[94] In *An Blascaod Mór Teoranta v. Commissioners of Public Works*,[95] the Supreme Court decided the case solely on the basis of Article 40.1, notwithstanding that Article 40.3 was also cited. Nevertheless, the judicial attitude prevalent in the 1970s and early 1980s has produced a constitutional acquis extremely restrictive of the equality guarantee.

---

[91] [1994] 1 IR 101; [1993] ILRM 665.
[92] [1995] 2 IR 10; [1996] 1 ILRM 81.
[93] [1993] 2 IR 476; [1993] ILRM 294.
[94] For a more detailed discussion of how Article 40.1 has come to supplant Article 41 in spousal equality cases, see chapter six.
[95] [2000] 1 IR 6; [2000] 1 ILRM 401. For discussion, see chapter six.

Remedies for Inequality

In *Somjee v. Minister for Justice*,[96] Keane J., having rejected the first-named plaintiff's substantive argument that there was an unconstitutional discrimination between the wives of male nationals and the husbands of female nationals in the context of naturalisation, perceived a further flaw in the plaintiffs' claim. He noted that the plaintiffs' claim, if successful, would only result in the invalidation of certain sections of the Irish Nationality and Citizenship Act, 1956, a result which would confer no benefit on the plaintiffs.[97] As the courts had no power to direct the Oireachtas to enact legislation so as to remedy an inequality, the plaintiffs' claim should fail. It was not the function of the court to "indulge in an academic exercise which will be utterly futile so far as the plaintiffs are concerned".[98] This situation arises where a legislative provision which confers an advantage is argued to be under-inclusive. *Somjee* has attracted much academic criticism. Casey notes that the Canadian courts have adopted a different approach to the same issue, generally granting a declaration that the impugned legislation is invalid but suspending its effect to give parliament an opportunity to bring the legislation into line with constitutional requirements. This leaves to Parliament the choice whether to "level up" or "level down" but does not deny the plaintiff a remedy for the inequality.[99] This would seem to be an acceptable solution to the dilemma posed by Keane J. For present purposes, what is more interesting is the extent to which *Somjee* deviates from a process conception of equality. For Keane J. seemed more concerned with the net effect of the measure on the plaintiffs than with the process inequality of being unfairly classified. Under a pure process conception of equality, the effect of the measure is irrelevant; the inequality inheres in the unfair classification. That said, the *Somjee* doctrine does not move towards a substantive conception of equality; rather, it circumscribes

---

[96] [1981] ILRM 324.

[97] *Ibid.*, at 327. That is, if the sections were struck down there would be nothing providing citizenship for him, so his constitutional action, and the court's declaration, would have been in vain.

[98] *Ibid.*, at 328. This conclusion has been obliquely approved on a number of occasions by the Supreme Court, most recently in *Lowth v. Minister for Social Welfare* [1998] 4 IR 321, at 342; [1999] 1 ILRM 5, at 14. Although the courts have relied on *Somjee* to hold that their power of judicial review is limited to invalidating legislation (for discussion, see Whyte, *Social Inclusion and the Legal System: Public Interest Law in Ireland* (IPA, 2002), at 19-21), they have not invoked the *Somjee* doctrine to reject the Article 40.1 claim of an otherwise well-qualified plaintiff. Further, the *Somjee* doctrine has not been applied in two cases in which it was clearly applicable: *O'G. v. Attorney General* [1985] ILRM 61 and *An Blascaod Mór Teoranta v. Commissioners of Public Works* [2000] 1 IR 6; [2000] 1 ILRM 401.

[99] Casey suggests that this approach is unlikely to appeal to the Irish courts as "separation of powers considerations would seem to militate against it". He fails to specify, however, what these considerations are and why they differ from those that apply in Canada. See Casey, *Constitutional Law in Ireland* (3rd ed., Round Hall Sweet and Maxwell, 2000), at 468.

the already limited process conception through the introduction of a new requirement that does not cohere with the rest of that conception.

An interesting variation on the *Somjee* doctrine was provided by McWilliam J. and O'Higgins C.J. in *Norris v. Attorney General*.[100] Here the plaintiff argued that the criminalisation of gross indecency between males but not between females constituted a breach of Article 40.1. This could be portrayed as a claim that the legislature had imposed a disadvantage in an under-inclusive way. This did not raise the *Somjee* problem for a declaration of unconstitutionality would undoubtedly have assisted the plaintiff. McWilliam J., having in any event rejected the claim on its merits, noted:

> Furthermore, on this branch of the argument, the plaintiff is saying, in effect, that there would be no complaint if the law were amended by making it an offence for women to commit acts of gross indecency. If this were done, he would not get any benefit and, by analogy to the decision in *Cahill v. Sutton*, his is not an argument on which he is entitled to rely.[101]

This argument denies the plaintiff's claim on the basis that the legislature might later choose to "level up", thus removing the discrimination but not improving the plaintiff's position. This is asserted notwithstanding that the traditional judicial remedy of levelling down would indisputably improve the plaintiff's position. O'Higgins C.J. made the same argument:

> Furthermore, in alleging discrimination because the prohibition on the conduct which he claims he is entitled to engage in is not extended to similar conduct by females, the plaintiff is complaining of a situation which, if it did not exist or were remedied, would confer on him no benefit or vindicate no right of his which he claims to be breached.[102]

For the same reasons, this is a flawed argument. For the Court to presuppose that the legislature's response would be to "level up" undermines the deference to legislative

---

[100] [1984] IR 36.
[101] *Ibid.*, at 50.
[102] *Ibid.*, at 59-60.

judgment which animated *Somjee* itself. Even if the *Somjee* doctrine itself is well-founded, it strains the point too far to refuse a declaration where such declaration will, subject to subsequent legislative intervention, remedy the situation for the plaintiff. Indeed, it raises considerable confusion as to when a declaration of breach of Article 40.1 can ever be made.[103]

Kelly notes the position adopted by the German courts on the same issues as those raised in *Somjee* and *Norris*.[104] Where a provision offends the equality guarantee by means of the express exclusion of a particular group from access to some benefit, the German courts may delete the provision so that the group previously excluded gains access to the benefit. This is the opposite of the approach suggested by O'Higgins C.J. in *Norris*. Where a provision offends the equality guarantee by means of the express identification of a number of groups for favourable treatment, the German courts do not rewrite the provision but rather declare it invalid. This is the opposite of the approach suggested by Keane J. in *Somjee*.

The reasoning of Justice Jackson in the United States case of *Railway Express Agency Inc v. New York* perhaps illustrates the value judgments which lie behind the technical differences of approach between the Irish courts and the German courts.[105] He favourably compared the equal protection guarantee to other more intrusive constitutional provisions, such as the due process clause:

> Invocation of the equal protection clause, on the other hand, does not disable any governmental body from dealing with the subject at hand. It merely means that the prohibition or regulation must have a broader impact. I regard it as a salutary doctrine that cities, states and the Federal Government must exercise their powers so as not to discriminate between their inhabitants except upon some reasonable differentiation fairly related to the object of regulation. This equality is not merely abstract justice. The framers of the Constitution knew, and we should not forget today, that there is no more effective practical guaranty against arbitrary and

---

[103] Perhaps a declaration could be granted where the plaintiff's real concern is with the inequality *per se* rather than the burden or advantage imposed or conferred, or where a levelling up would be absurd: e.g., the dependent domicile rule in *W. v. W.* [1993] 2 IR 476; [1993] ILRM 294.

[104] Kelly, "Equality before the law in Three European Jurisdictions" (1983) 18 (ns) *Ir Jur* 259, at 283-4.

> unreasonable government than to require that the principles of law which officials would impose upon a minority must be imposed generally. Conversely, nothing opens the door to arbitrary action so effectively as to allow those officials to pick and choose only a few to whom they will apply legislation and thus to escape the political retribution that might be visited upon them if larger numbers were affected. Courts can take no better measure to assure that laws will be just than to require that laws be equal in operation.[106]

This is a view of equality implicitly rejected by the Irish courts in *Norris* and *Somjee*. The courts were content to see homosexuals and male non-nationals singled out for treatment which would not have been politically acceptable if accorded to all citizens.

A different approach was taken by the Irish courts in *McKinley v. Minister for Defence*[107] with regard to a discriminatory common law rule. Here the plaintiff challenged the common law rule which allowed an action for loss of consortium to a husband but not to a wife. The Court, by a three-two majority, developed the common law rule so as to allow a right of action to the wife as well. Hogan appears to approve of this decision, although he notes that levelling up would not always be possible.[108] As such, the courts must make a policy decision of sorts as to which common law rules are suitable for expansion and which are suitable for excision. Hogan and Whyte are more critical, questioning why the courts should have this power for common law rules but not for legislation.[109] Given that the House of Lords in *Best v. Samuel Fox & Co Ltd* had viewed this rule as so entrenched that any change was best left to Parliament,[110] the difference between *McKinley* and *Somjee* cannot be explained by the difference between common law rules and statutory rules. To all intents and purposes, the rule extended in *McKinley* had acquired the status of a statutory rule. Following *Somjee*, the Court should have done nothing, as a declaration of invalidity would not have benefited the plaintiff. Following *Norris*, the Court should have done nothing as any benefit to the defendant might have been reversed by the Legislature enacting a non-discriminatory

---

[105] 336 US 106 (1949).
[106] *Ibid.*, at 112-3.
[107] [1992] 2 IR 333.
[108] Hogan, "Constitutional Law – Remedies for Inequality" (1992) 14 *DULJ* 115.
[109] Hogan and Whyte, *Kelly: The Irish Constitution* (3rd ed., Butterworths, 1994), at 714.
[110] [1952] AC 716.

version of the rule. Viewed from either perspective, the decision in *McKinley* marks a difference of approach, the precise ramifications of which are difficult to judge.

Possible Litigants

Given the wording of Article 40.1, two issues arise in this regard. First, can non-citizens invoke the guarantee? Secondly, can non-human persons (i.e. bodies corporate) invoke the guarantee? The first point arose in *Nicolau* although the Attorney General did not contest the prosecutor's standing to argue Article 40.1.[111] The prosecutor in any event argued that Article 40.1 guaranteed equality to citizens because they were human persons. Accordingly, other human persons, even including Greek Cypriots, should be allowed to invoke the guarantee.[112] This would render Article 40.1 coherent with the other fundamental rights provisions which have been interpreted to apply to all human persons by reason of their natural law origins. This interpretation now seems implicitly accepted in that it is generally assumed that non-citizens are guaranteed equality by Article 40.1;[113] discriminations against them must be justified by demonstrating either that they are differently situated to nationals or that the common good requires the discrimination.

A literal reading of Article 40.1 seems to preclude its application to bodies corporate.[114] In *Quinn's Supermarket v. Attorney General*, Walsh J. commented, "under no possible construction of the constitutional guarantee could a body corporate or any entity but a human being be considered to be a human person for the purpose of this provision".[115] In *Abbey Films v. Attorney General*,[116] the Supreme Court reserved its opinion on whether bodies corporate could invoke the guarantee, but held the discrimination against the company

---

[111] *State (Nicolaou) v An Bord Uchtála* [1966] IR 567; (1968) 102 ILTR 1.

[112] This interpretation reads the words "as human persons" as an adjectival phrase qualifying "citizens" rather than as an adverbial phrase qualifying the sense in which citizens must be held equal before the law. The positioning of the phrase in the sentence renders it unclear which was intended.

[113] See, for instance, *In re Article 26 and the Illegal Immigrants (Trafficking) Bill, 1999* [2000] 2 IR 360.

[114] In *The Green Party v. RTE* Unreported, High Court, Carroll J., 24 February 2003, at 9, it was accepted that a political party, made up of individual human persons, could invoke Article 40.1.

[115] [1972] IR 1, at 14. As Mr Quinn himself was also a plaintiff, this comment could be treated as an *obiter dictum*.

[116] [1981] IR 158.

justifiable by reference to its difference in capacity.[117] In *Kerry Co-op Creameries v. An Bord Bainne*,[118] Costello J. also reserved his opinion on this question. It is worth noting, however, that the protection of private property rights, despite its naturalistic wording, has been interpreted to apply to bodies corporate.[119] A similar approach may be taken to the interpretation of Article 40.1, although a process conception of equality does not clearly mandate the fair and rational treatment of bodies corporate in the same way as it does that of individual humans.

A New Direction in Constitutional Equality Doctrine?

The 1990s witnessed the emergence of a new trend in constitutional case law. This was marked by a willingness, on the part of the courts, to utilise Article 40.1 to impose some general norms of fairness on the Government in its dealings with citizens. Denham J. has been to the forefront of this movement. In *Howard v. Commissioners of Public Works*,[120] the Supreme Court considered, *inter alia*, whether there was any presumption, deriving from the Constitution or common law, that a general statute did not apply to the State. In determining that there was no such presumption, Denham J. relied on the concept of equality guaranteed by Article 40.1. She considered that there were two aspects to this guarantee: on the one hand, it guaranteed the personal right of all citizens to be held equal before the law; on the other hand, it includes the following concept:

> [I]n the execution of their power the organs of government shall act with due regard to the concept of equality. Thus while accepting that there may be specific exceptions, in general, the position of a citizen, as a person, should not be lesser than a "person" in the form of a corporate body, of whatever status.[121]

---

[117] A belief in the non-applicability of Article 40.1 to bodies corporate may explain the decision of Walsh J. in *East Donegal Co-operative v. Attorney General* [1970] IR 317; (1970) 104 ILTR 81 which rested on a perceived difference between a distinction between citizens and a distinction between businesses.

[118] [1990] ILRM 664. The issue does not seem to have been considered in *An Blascaod Mór Teoranta v. Commissioners of Public Works* Unreported, High Court, 27 February 1998, Budd J.; [2000] 1 IR 6; [2000] 1 ILRM 401, a case taken by both a limited company and natural person plaintiffs.

[119] See the judgment of Keane J. in *Iarnród Éireann v. Ireland* [1996] 3 IR 321.

[120] [1994] 1 IR 101; [1993] ILRM 665.

[121] *Ibid.*, at 161; 699.

Allying this principle with the doctrine of the separation of powers, Denham J. concluded that when the Oireachtas legislated, it legislated for all, including the Executive. The Oireachtas could have specifically legislated to include or exclude the Executive, but there was no general presumption to the effect that legislation did not apply to the Executive.

In *McKenna v. An Taoiseach (No. 2)*,[122] the Supreme Court considered whether the Government was precluded from spending public funds advocating acceptance of a referendum proposal. Denham J. again relied on the two aspects of the constitutional guarantee of equality which she had posited in *Howard*. She held that the right of the citizen to be treated equally included the concept that "in the democratic process, including referenda, neither side of an issue will be favoured, treated unequally, by the government".[123] Funding the advertising campaign of one side treated unequally those citizens who held the opposite view:

> The spirit and concept of equality applies to the process of a referendum. There is a right to equal treatment in the political process. It is a breach of the concept and spirit of the constitutional right to equality for the Government to spend public monies in funding a campaign to advocate a specific result in a referendum.[124]

It is difficult to perceive the precise nature of the equality infringement on the part of the Government. Denham J. referred to *O'Donovan v. Attorney General*,[125] where Budd J. relied on Article 40.1 to strike down constituency arrangements which gave considerably more weight to the votes of persons living in certain parts of the country. He plausibly reasoned that the Constitution required equality of voting power and representation. There is, however, no sense in which Government funding of one side of an advertising campaign denies equality of voting power.[126] Although it is differential treatment to give money to one side and not to another, mere differential treatment does not amount to inequality. Indeed, I would

---

[122] [1995] 2 IR 10; [1996] 1 ILRM 81.
[123] *Ibid.*, at 52; 112.
[124] *Ibid.*, at 53; 112.
[125] [1961] IR 114.
[126] O'Flaherty J. argued that the expenditure put the voting rights of those in favour of change above the voting rights of those opposed to change, but it is difficult to see why this is the case. The votes of the yes side would have the same weight as those of the no side. Although the aim of the expenditure was to encourage citizens to move from the latter group into the former group, this can scarcely be said to be an unconstitutional equality.

suggest that there can be no obligation of equal treatment independent of any right, attached to an individual or to a group, to be treated equally. For this reason, one must ask who is being treated unequally by the expenditure impugned in *McKenna*. It can scarcely be the undecided voter as the whole purpose of the expenditure is to persuade the undecided voter to support the yes side. Is it the committed no voter whose task of attracting more no voters to the cause is rendered more difficult by the one-sided expenditure? But there are many other ways, including the framing of the question, in which the Government aids the yes side, so it is difficult to see why disadvantage to committed no voters should in itself require court intervention.

The invocation of Article 40.1 in these circumstances is essentially rhetorical cover for the enumeration of a norm of fairness applicable against the Government. There is something instinctively unfair about the Government being immune from legislation or being able to fund its own side in a referendum campaign. Nevertheless, it is difficult convincingly to articulate this unfairness as a problem of inequality and it is unhelpful to do so.

Notwithstanding these conceptual difficulties, *McKenna* is a robust precedent. In *Coughlan v. Broadcasting Complaints Commission*,[127] the Supreme Court held that it was unconstitutional for RTE to give more uncontested air time to one side than the other during a referendum campaign.[128] In *Kelly v. Minister for the Environment*,[129] the Supreme Court held that it was unconstitutional, in assessing the election expenses of Dáil candidates, to exclude the office expenses of sitting TDs, Senators and MEPs.[130] In *Redmond v. Minister for the Environment*,[131] Herbert J. held that the electoral deposit requirement breached Article 40.1,

---

[127] [2000] 3 IR 1.

[128] In *The Green Party v. RTE* Unreported, High Court, 24 February 2003, Carroll J., the Court considered a claim that the respondent's refusal to broadcast live the applicant's conference was a breach of the guarantee of equality established by *McKenna* and *Coughlan*. Carroll J. rejected the argument, holding that the situation was not comparable to that of a referendum and that she was therefore obliged to apply the ordinary test of reasonableness for judicial review.

[129] Unreported, High Court, 16 May 2002, McKechnie J.; Unreported, Supreme Court, 29 November 2002.

[130] The defendants did not contest the constitutional point in the Supreme Court, instead focusing on the interpretation of the statutory provision at issue. In the High Court, McKechnie J. stated the constitutional position as follows: "[The State] cannot therefore by any provision of a statute, or by the manner and way in which it might implement such a provision, cause unjustified advantage to accrue to one person, class or classes of the community as against, or over and above, another person or class of that same community. Equals must be treated equally." *Ibid.*, at 35.

[131] [2001] 4 IR 61.

in addition to Article 16.1.1°. In *Sherwin v. Minister for Environment*,[132] however, Costello P. upheld the constitutionality of section 26 of the Referendum Act, 1994 which allows only members of the Oireachtas to appoint personation agents and agents to monitor the counting of votes. He rejected the plaintiff's arguments on the grounds that such agents were appointed not to advance the cause of one side or the other but rather to assist in the administration of the referendum.

These cases are set aside from the mainstream of constitutional equality doctrine. They are rarely cited in equality cases outside the political arena and they themselves rarely cite other cases. Indeed, apart from *O'Donovan*, which considered Article 40.1 only as a secondary concern and was decided before any case which gave full consideration to the equality guarantee, no case was cited by Denham J. in either *Howard* or *McKenna* to support her interpretation of equality. O'Flaherty J., who also relied on the equality rights of citizens to find for Ms McKenna,[133] did not mention any provision of the Constitution in determining that the one-sided expenditure was unconstitutional.

---

[132] Unreported, High Court, 11 March 1997, Costello P.

[133] *McKenna v. An Taoiseach (No.2)* [1995] 2 IR 10, at 43; [1996] 1 ILRM 81, at 103.

Chapter Five

Legitimate Classification and Standards of Review

Introduction

The courts have adopted a process conception of equality based on the first half of the Aristotelian direction to treat equals equally and unequals unequally. This conception focuses judicial scrutiny on legislative classification. The function of constitutional equality law is then to develop doctrines which distinguish permissible from impermissible legislative classifications. In assessing the legitimacy of legislative classification, one must note a crucial distinction that is generally overlooked in both case law and academic commentary. Some classifications are deemed permissible because they reflect real differences (equality-affirming classification); other classifications derogate from equality but are deemed permissible because they serve another value or interest (equality-derogating classification).[1]

Not perceiving this distinction, the case law recognises three different types of justification for legislative classification. The first type relies mainly on the text of Article 40.1 itself and asserts that classifications are legitimate where they correspond to differences in moral or physical capacity, to differences in social function or to other differences. This is equality-affirming differentiation. The second type relies on other values guaranteed by the Constitution and asserts that classifications are legitimate where they support those constitutionally guaranteed values. This is equality-derogating differentiation. The third type relies on a general sense of good governance and asserts that classifications are permissible where they are rationally related to a legitimate legislative purpose. This is also equality-derogating differentiation.[2]

Having established what types of classification are permissible, constitutional equality law must develop doctrinal tests (standards of review) which allow the courts to assess the constitutionality of specific classifications. The exact phrasing and application of these

---

[1] For an example of the confusion in the case law, see *Redmond v. Minister for Environment* [2001] 4 IR 61, at 80 *per* Herbert J.: "[I]t is clear from the second sentence of Article 40.1 itself that the State in its enactments may discriminate between citizens in the interest of the common good."

standards of review is of enormous practical importance in any constitutional equality doctrine.

I shall first set out examples from the case law of equality-affirming classification and equality-derogating classification. I shall then set out the various standards of review, articulated by the courts, used to test whether a particular classification is permissible. I shall then advert to a number of significant problems with the standards of review commonly employed under the Irish process conception of equality. I shall conclude with an examination of an alternative conception of classifications which has little support in the case law but considerable support in academic commentary.

Equality-Affirming Classification

The Aristotelian conception of equality focuses on the extent and relevance of differences between persons. Does differential legislative treatment, a classification, correspond to a real difference between the persons differentiated? This concern is arguably evident from the second sentence of Article 40.1 which qualifies the guarantee of equality before the law by stating that it "shall not be held to mean that the State shall not in its enactments have due regard to differences of capacity, physical and moral, and of social function".[3] Often the courts have explicitly relied on this sentence to justify a particular classification. On other occasions, however, the courts have relied on other differences between persons to justify classifications, without explicitly invoking the second sentence of the equality guarantee.[4] I shall consider each type of decision in turn.

---

[2] However, there is an alternative methodology, which I shall consider at the end of this chapter, in which purpose plays a different role.

[3] As was seen in chapter one, the original understanding of this phrase was different. Mr de Valera arguably viewed the second sentence as confirming a triparite conception of equality, whereby civil and political equality was guaranteed by Article 40.1, but social equality was not.

[4] There is nothing untoward about this interpretation; the second sentence of Article 40.1 can plausibly be read as illustrative of the meaning of the first sentence rather than an exhaustive list of legitimate grounds of classification. Nevertheless on some occasions, the courts have tended towards the latter view. For instance, see *Murphy v. Attorney General* [1982] IR 241, at 283, *per* Kenny J. (for the Supreme Court): "The second paragraph of Article 40, s.1, is a recognition that inequality may be recognised and provided for, but only if it flows from or is related to a difference of capacity, physical or moral, or a difference of social function."

Differences in Moral and Physical Capacity or Social Function

The first judicial consideration of the second sentence of Article 40.1 came in the relatively early case of *In re Philip Clarke*.[5] The applicant challenged the constitutionality of section 165 of the Mental Treatment Act, 1945 which allowed for the detention of persons believed to be of unsound mind for reasons of public safety and the safety of the persons themselves. The applicant, it appears, relied on Article 40.3 and 40.4, not Article 40.1; nevertheless, the Supreme Court relied on the second sentence of Article 40.1 in dismissing the applicant's claim. O'Byrne J., speaking for the Court, considered that the second sentence of Article 40.1 indicated that the existence of mental infirmity was present to the minds of the drafters of the Constitution,[6] indicating that it was permissible for the Oireachtas, in enacting legislation, to have regard to the difference between the mentally firm and infirm.

In *Abbey Films v. Attorney General*,[7] the plaintiff challenged section 15 of the Restrictive Practices Act, 1972 on the grounds that it effectively required a company to retain a solicitor to act for it in proceedings under the section whereas a citizen could appear in person. The Supreme Court, *per* Kenny J., held that even if Article 40.1 was applicable to a company, "the nature of a company and its difference of capacity from that of an individual" justified the discriminatory requirement.[8]

The question of difference in social function has proven particularly contentious in the context of sex discrimination. In *de Búrca v. Attorney General*,[9] Walsh J. considered that the Oireachtas could properly exclude persons from jury service on the basis of their physical or moral capacity.[10] Nevertheless, he considered that those who satisfied the property qualification under the Juries Act, 1927 did not have any different physical or moral capacity or social function to those who did not satisfy the qualification. Accordingly, the property qualification was held to be an unconstitutional discrimination.[11] Furthermore, he rejected the contention that sex, of itself, was a social function or suggested a difference in moral or physical capacity. Although women might have tended to perform particular functions (such

---

[5] [1950] IR 235.
[6] *Ibid.*, at 247-8.
[7] [1981] IR 168.
[8] *Ibid.*, at 172.
[9] [1976] IR 38; (1977) 111 ILTR 37. For more detailed consideration of this case, see chapter seven.
[10] *Ibid.*, at 67; 52.

as caring for young children) and although a discrimination based on that social function might have been permissible, it was not permissible for the Oireachtas to discriminate baldly on the basis of sex:

> It simply lumps together half of the members of the adult population, most of whom have only one thing in common, namely, their sex. In my view, it is not open to the State to discriminate in its enactments between the persons who are subject to its laws solely upon the grounds of the sex of those persons. If a reference is to be made to the sex of a person, then the purpose of the law that makes such a discrimination should be to deal with some physical or moral capacity or social function that is related exclusively or very largely to that sex only.[12]

In *State (DPP) v. Walsh*,[13] the second-named respondent sought, *inter alia*, to rely on a common law presumption that the act of a wife committed in the presence of her husband was caused by his coercion. Henchy J., speaking for the Supreme Court, held that this rule presupposed such a disparity in status between husband and wife that it was repugnant to the concept of equality before the law. It could not be justified as a discrimination based on any difference of capacity or of social function as between husband and wife and had not survived the enactment of the Constitution.[14]

In *Lowth v. Minister for Social Welfare*,[15] Costello J. rejected the argument of the plaintiffs that the social welfare code effected an unconstitutional discrimination between deserted husbands and deserted wives. In doing so, he relied on a number of grounds, including the ground that it was reasonable for the Oireachtas to have concluded that married women fulfilled in Irish society a different social function to married men.[16]

---

[11] *Ibid.*, at 68-70; 52-3. O'Higgins C.J. reached the same conclusion. *Ibid.*, at 61-2; 48-9.
[12] *Ibid.*, at 71; at 54. O'Higgins C.J. disagreed with this conclusion, partly because he perceived a difference in social function as between men and women and partly because of the import of Article 41.2 of the Constitution.
[13] [1981] IR 412.
[14] *Ibid.*, at 449-50.
[15] [1998] 4 IR 321; [1994] 1 ILRM 378.
[16] *Ibid.*, at 332; 386. The Supreme Court reached the same conclusion but on slightly different grounds. [1999] 1 ILRM 5.

Although there is an apparent contradiction between *Walsh* and *Lowth*, this can be explained if one accepts a further, seemingly attractive, proposition. There must be a correspondence between the alleged difference in social function and the differential treatment. Thus, there is surely no difference in social function between husbands and wives that justifies a presumption at law that a wife acts under the coercion of her husband. There could, however, be a difference in social function between husbands and wives that justifies greater social welfare assistance for the latter in a situation of marital breakdown.

Other Differences

The courts have on occasion relied on differences between persons in justifying legislative discrimination without making reference to the second sentence of Article 40.1.[17] In *Loftus v. Attorney General*,[18] the plaintiff challenged provisions of the Electoral Acts which, in the context of political party registration, distinguished between those political parties already represented in Dáil Éireann and those unrepresented. O'Higgins C.J. rejected the applicant's equality argument on the basis that the very fact of being represented in the Dáil satisfied the general requirement that the party be genuinely political. Unrepresented parties were in a different situation and it was proper for the Oireachtas to require such parties to establish that they were genuinely political.[19]

In *McMenamin v. Ireland*,[20] the applicant challenged a discrepancy between the pension entitlements of District Court and Circuit Court judges on a number of grounds, including Article 40.1. Geoghegan J., in the High Court, held that the discrepancy, which consisted of Circuit Court judges being entitled to a full pension after 15 years while District Court judges were so entitled only after 20 years, was justified by the fact that the average age of a District Court appointee was considerably less than that of Circuit Court appointee.[21] This difference in situation justified the difference in treatment.

---

[17] For further cases illustrating this point, see the general discussion of the Aristotelian conception in chapter four.
[18] [1979] IR 221.
[19] *Ibid.*, at 242-3.
[20] [1996] 3 IR 100; [1994] 2 ILRM 361.
[21] *Ibid.*, 114; at 380. Blayney J. agreed with this reasoning on appeal. *Ibid.*, at 150; [1997] 2 ILRM 177, at 210.

In *Lowth v. Minister for Social Welfare*,[22] the Supreme Court, in considering the constitutionality of a discrimination against deserted husbands in the social welfare code, referred to statistics which showed that there were relatively few women in employment and that those who were employed were at a financial disadvantage to men. The Court concluded:

> [T]here were ample grounds for the Oireachtas to conclude that deserted wives were in general likely to have greater needs than deserted husbands so as to justify legislation providing for social welfare ... to meet such needs.[23]

Again, in the view of the Court, the difference in situation could plausibly justify the difference in treatment.

Finally, in *Murphy v. G.M.*,[24] the Supreme Court rejected a challenge to the Proceeds of Crime Act, 1996. The appellants argued that the Act contravened Article 40.1 in allowing the State, but not the property-owner, to adduce opinion evidence as to the origins of the property. Keane C.J. reasoned: "[T]he respondents to an application under s.2 or s.3 will normally be the persons in possession or control of the property and should be in a position to give evidence to the court as to its provenance without calling in aid opinion evidence."

Equality-Derogating Classification

In some cases the courts have held that a legislative classification was not justified by reference to a difference between the persons distinguished but was nevertheless permissible because it supported either another constitutional value or a legitimate legislative purpose. Although generally treated separately in the case law,[25] a division which I shall

---

[22] [1998] 4 IR 321; [1999] 1 ILRM 5.
[23] *Ibid.*, at 342; 14.
[24] [2001] 4 IR 113, at 155.
[25] Although in the recent case of *Enright v. Ireland* Unreported, High Court, 18 December 2002, Finlay-Geoghegan J., at 30, Finlay-Geoghegan J. did conflate the two categories, characterising the protection of the right to bodily integrity as the pursuit of a legitimate legislative purpose under the *Brennan* test.

respect here, these two grounds of derogation can be conflated if one characterises advancing a constitutional value as an *a priori* stipulated legislative purpose.[26]

Constitutional Values

In *O'Brien v. Stoutt*,[27] a discrimination against non-marital children was justified by reference to the special support given by the Constitution, in Article 41, to the institution of marriage. The position adopted in *O'Brien* may be contrasted with that adopted by Henchy J. in *G. v. An Bord Uchtála*[28] and by Finlay P. in *State (M.) v. Attorney General*.[29] In *G.*, the High Court and Supreme Court considered many legal points arising from the adoption of non-marital children. Alone of the judges, Henchy J. in the Supreme Court gave some consideration to equality arguments. In contrast to the subsequent decision of Walsh J. in *O'Brien*, Henchy J. used the other provisions of the Constitution to inform his interpretation of the second sentence of Article 40.1:

> Because of the central and fundamental position accorded by the Constitution to the family in the social and moral order, there is a necessary and inescapable difference of moral capacity and social function between parents or a parent within a family and the parents or a parent of an illegitimate child.[30]

Nevertheless, Henchy J. rejected the suggestion that non-marital children had a different social function to marital children, asserting that they shared the "common characteristic that they enter life without any responsibility for their status and with an equal claim to what the Constitution expressly or impliedly postulates as the fundamental rights of children".[31] For this reason, Henchy J. concluded that Article 40.3 should be held to afford the same rights to a non-marital child as Article 42 afforded to marital children.

---

[26] If the courts adopt a doctrine of differentiated scrutiny, as I suggest in chapter six, then it probably follows that pursuit of another constitutional value should be treated as the highest species of legislative purpose, providing a compelling justification for a legislative measure.
[27] [1984] IR 316; [1985] ILRM 86. For more discussion of this case, see chapter four.
[28] [1980] IR 32.
[29] [1979] IR 73.
[30] [1980] IR 32, at 86.
[31] *Ibid.*, at 87.

In *The State (M.)*, the prosecutor challenged section 40 of the Adoption Act, 1952 which created certain distinctions between the circumstances in which marital and non-marital children could be removed from the country. Whereas a marital child could be removed from the country with the consent of either parent, a non-marital child could only be removed with the consent of the natural mother and, if under the age of one year, could only be removed for the purpose of residing with the mother or a relative outside the State. In rejecting the argument based on Article 40.1, Finlay P. considered that a non-marital child had a difference in moral capacity or social function, at least in the context of the removal of that child out of the state. The marital child had the protection of a joint decision of its parents; the non-marital child did not have the benefit of being part of a family unit.[32]

These three cases suggest three very different views on the relevance of legitimacy to legislative classification. In the view of Finlay P., legitimacy *simpliciter* constitutes a difference in social function. In the view of Henchy J., other constitutional provisions leads one to conclude that legitimacy constitutes a difference in social function between parents but not between children. In the view of Walsh J., legitimacy never constitutes a difference in social function but the other provisions of the Constitution allow the Oireachtas to discriminate against non-marital children.[33] Walsh J.'s approach views the issues as equality-derogation; Finlay P.'s approach views the issue as equality-affirmation; Henchy J.'s approach has a hybrid status, in keeping with his general preference for a harmonious interpretation of the Constitution.[34]

Article 41.2 is a constitutional provision which has been controversially cited in support of a number of legislative classifications.[35] In *Dennehy v. Minister for Social Welfare*,[36] Barron J.

---

[32] [1979] IR 73, at 78-9. Finlay P. held for the plaintiff, however, on the basis of an unenumerated right to travel.

[33] This possibility was not explicitly considered by Henchy J. in *G.*

[34] See, for instance, his comments in *Dillane v. Ireland* [1980] ILRM 167, at 170:

> Under the doctrine of harmonious interpretation, which requires, where possible, the relevant constitutional provisions to be construed and applied so that each will be given due weight in the circumstances of the case, it would not be a valid form of constitutional interpretation to rule that the immunity given to a Garda by Rule 67 is necessarily permitted by Article 40.1 and in the same breath to hold that it is proscribed by [Article 40.3.2°].... What happened when the plaintiff was denied his costs under the rule was categorically permitted by Article 40.1, so it cannot be part of the injustice which Article 40.3.3° was designed to prevent.

[35] "In particular, the State recognises that by her life within the home, woman gives to the State a support without which the common good cannot be achieved. The State shall, therefore, endeavour to ensure that mothers shall not be obliged by economic necessity to engage in labour to the neglect of their duties in the

considered whether a social welfare measure that discriminated between deserted husbands and deserted wives constituted a breach of Article 40.1:

> Having regard to the provisions of Article 41.2, it does not seem to me that as a matter of policy it would be unreasonable, unjust or arbitrary for the Oireachtas to protect financially deserted wives who are mothers who have dependent children residing with them....[37]

A very similar provision was challenged in *Lowth v. Minister for Social Welfare*.[38] Although finding the measure justified on a number of different grounds, Costello J. also explicitly approved the *dicta* of Barron J. concerning Article 41.2. On appeal to the Supreme Court,[39] Article 41.2 was considered but more as illustrative of a societal attitude which effectively placed women in a different situation than as a direct justification for the difference in treatment. This perhaps indicated a growing unwillingness on the part of the courts to utilise that "dated" provision as justification for legislative classification.[40]

A less contentious example of a constitutional value justifying a (hypothetical) discrimination was provided by Henchy J. in *State (Cussen) v. Brennan*,[41] a case raising a number of administrative law points about an appointments process which gave extra credit to suitable candidates who were found to have a good knowledge of Irish. In the course of his judgment, Henchy J. made the following *obiter* comments:

> It is incontestable that under a Constitution which recognizes Irish as the first official language (Article 8) and which empowers the State in its enactments to have due regard to differences of capacity, physical and moral, and of social function [Article

---

home." Describing Article 41.2 as a "dated provision", the Constitution Review Group recommended that it be replaced with a gender neutral version. *Report of the Constitution Review Group* (Stationery Office, 1996), at 333-4.

[36] Unreported, High Court, 26 July 1984, Barron J.

[37] *Ibid.*, at 19. The defendants argued that Article 41.2 either justified the discrimination *simpliciter* or justified the Oireachtas in concluding that deserted wives had a different social function. It is not quite clear which of these arguments was accepted by Barron J. in his judgment.

[38] [1998] 4 IR 321; [1994] 1 ILRM 378.

[39] [1998] 4 IR 321; [1999] 1 ILRM 5.

[40] For more detail on this case, see chapter seven.

[41] [1981] IR 181.

> 40.1], a law may provide that proficiency in Irish be a qualification for an office when proficiency in Irish is relevant to the discharge of the duties of that office.[42]

In Re Article 26 and the Employment Equality Bill, 1996[43] signalled an interesting development in a cognate area of constitutional law. The Court considered the constitutionality of provisions which prohibited discrimination against persons with a disability and which required the employer to bear the cost of special facilities necessary for that person to carry out the work, unless such provision imposed "undue hardship" on the employer. The Court considered whether this amounted to an unjust attack on the property rights of employers, protected by Article 40.3.2°. The Court held that such measures could *prima facie* be justified by the common good, an aspect of which was the promotion of equality in the workplace. However, the measures in question went too far in imposing a burden on one section of the community to resolve a common problem. The Court's proposition that the promotion of equality was an aspect of the common good may perhaps be justified by reference to Article 40.1. If this is the case, it now seems that equality is a positive value which can justify restriction of other rights, as well as being subject to restriction by reference to other rights. This is a significant development in constitutional doctrine.[44]

In *Enright v. Ireland*,[45] the plaintiff challenged the constitutionality of section 7 of the Sex Offenders Act, 2001 which established the categories of offenders who must sign on to a sex offenders register. The obligation applied to persons convicted before the commencement of the relevant provisions of the Act who were still serving their sentences at the time of commencement, but not to persons who had completed their sentence at that time. The

---

[42] *Ibid.*, at 194. Henchy J.'s approach here was similar to his approach in *G. v. An Bord Uchtála*. The other constitutional provision was seen as informing the meaning of "social function" rather than authorising a derogation from equality. In *Ó Beoláin v. Fahy* [2001] 2 IR 279, at 344 Hardiman J. spoke of "the need to treat persons who wish to use the Irish language in official business on a footing of equality with those using English", but he did not refer to Article 40.1 in support of this conclusion.

[43] [1997] 2 IR 321, at 366.

[44] Nevertheless, given the Court's decision that these provisions in the legislation were repugnant to the Constitution, it is clear that the promotion of equality is not a very compelling aspect of the common good.

[45] Unreported, High Court, 18 December 2002, Finlay-Geoghegan J.. The plaintiff also challenged section 7 by comparison with section 26 of the Act which makes it an offence for any person ever convicted of a sexual offence, as defined, to work in a situation involving unsupervised access to or contact with children or mentally impaired people. Given the high risk of such situations, this difference in treatment was again considered justified by reference to practicality.

plaintiff argued that this was an irrational discrimination which contravened Article 40.1. Finlay-Geoghegan J. upheld the discrimination by reference to the unenumerated right to bodily integrity, protected by Article 40.3. In particular, she relied on the obligation in Article 40.3 to protect rights "insofar as practicable".[46] The Oireachtas had drawn the impugned distinction in the interests of practicality: it was much easier to apply the registration requirement to those still within the criminal justice system than to those who had left it.

As noted in chapter four, the effect of treating Article 40.1 as a guarantee against irrational classifications and then deeming rational classifications which serve other constitutional values is to treat the equality guarantee as a subordinate constitutional value. Only if equality were conceived in a substantive way could it have any traction against other constitutional norms.

Legitimate Legislative Purpose

In *Finnegan v. An Bord Pleanála*,[47] the plaintiff challenged the constitutionality of, *inter alia*, section 15 of the Local Government (Planning and Development) Act, 1976. Section 15 provided that a £10 deposit had to be lodged with any appeal to An Bord Pleanála. In the High Court, McWilliam J. considered that, as the deposit had not been set at a level which prevented all but the very wealthy from appealing, it was not unconstitutional. The Supreme Court, *per* O'Higgins C.J., held that the provision was constitutional, observing that the purpose of the section was to prevent frivolous appeals and that the amount of the deposit was both low and returnable on determination of the appeal.[48]

The proposition that some classifications, although derogating from equality, could be permissible on account of supporting a legitimate governmental objective was formulated as a test by Barrington J. in *Brennan v. Attorney General*.[49] Considering a claim that the Valuation Acts breached the equality guarantee, Barrington J. set out the constitutional

---

[46] *Ibid.*, at 30.

[47] [1979] ILRM 134.

[48] In *Redmond v. Minister for Environment* [2001] 4 IR 61, the High Court struck down laws requiring electoral deposits. Herbert J. distinguished *Finnegan* on the basis (a) that it concerned a statutory right, not a constitutional right, (b) that the deposit of £10 was not so high as to deter genuine appeals and (c) that the deposit was returnable regardless of outcome. *Ibid.*, at 89.

[49] [1983] ILRM 449. This case is also significant for its discussion of the human personality doctrine. See chapter six.

requirement that, in order to be valid, a classification must be for a legitimate legislative purpose, relevant to that purpose and each class must be treated fairly.[50] There are two significant aspects to this formulation. First, the purpose itself must be legitimate. Secondly, there must be an adequate relationship between the purpose and the means adopted to pursue it.[51] Although Barrington J.'s conclusions on the equality arguments of the plaintiffs were overturned on appeal,[52] his legitimate legislative purpose test has since become well-established in the case law.[53]

In re Article 26 and the Illegal Immigrants (Trafficking) Bill, 1999 provides a good illustration of judicial scrutiny of legislative purposes.[54] In considering whether there was a legitimate legislative purpose which justified the discrimination against certain non-nationals, the Court relied on the arguments which it had already used to demonstrate that the impugned provisions did not constitute a disproportionate interference with the right of access to the courts:

> [The section] serves a legitimate public policy objective of seeking to bring about at an early stage legal certainty as regards the administrative decisions in question. It also facilitates the better administration and functioning of the system for dealing with applicants for asylum or refugee status.[55]

Standards of Review and Double Deference

Having outlined the grounds on which the courts hold legislative classification constitutional, it is necessary to consider how these grounds are precisely formulated into standards of

---

[50] *Ibid.*, at 480.

[51] The requirement to treat each class fairly adds little to these two requirements.

[52] [1984] ILRM 355.

[53] It has been cited with approval by the Supreme Court in *Lowth v. Minister for Social Welfare* [1998] 4 IR 321, at 341; [1999] 1 ILRM 5, at 13, in *An Blascaod Mór Teoranta v. Commissioners of Public Works* [2000] 1 IR 6, at 19; [2000] 1 ILRM 401, at 409, and *In re Article 26 and the Illegal Immigrants (Trafficking) Bill, 1999* [2000] 2 IR 360, at 402. One should note in passing, however, the *dicta* of Finlay C.J. in *Hyland v. Minister for Social Welfare* [1989] IR 624, at 645: "[I]f a statutory provision constitutes a breach of a constitutional right or obligation it is irrelevant what the purpose of the legislature was in purporting to enact it." This uses the concept of purpose in a different way to the legitimate purpose test and can properly be set aside from consideration of that test.

[54] [2000] 2 IR 360.

[55] *Ibid.*, at 403.

review. The courts have not been very exact in their formulation of standards of review, a problem well catalogued by Marguiles.[56] The courts seldom advert to differences between the standard of review which they articulate and standards articulated in other cases. Further, they often do not apply the standard which they articulate. It is thus difficult to discern clear trends in the case law. What follows is therefore an account of both judicial formulae and judicial practice. I shall first outline standards of review, articulated by the courts and academic commentators, with regard to equality-affirming classification. I shall then outline standards of review, again articulated by both courts and commentators, with regard to equality-derogating differentiation. Having done that, I shall consider three significant problems with the standards of review generally advanced by courts and commentators.

Before doing that, however, it is necessary to note a subtle way in which the interpretation of Article 40.1 differs from that of other constitutional provisions. It is well established that no constitutional provision is absolute. Standards of review exist to allow the courts to assess whether an apparent infringement of the constitutional provision is justified. Such standards of review demonstrate greater or lesser degrees of judicial deference, as will be elaborated below. The distinctive feature about constitutional equality doctrine, however, is that standards of review are employed twice; i.e. the courts employ standards of review first to establish if a classification is equality-affirming and, if not, secondly to establish if a classification is legitimately equality-derogating. Thus the courts are, to a greater or lesser extent, deferential both to the legislature's assessment of what equality *prima facie* requires and to the legislature's assessment of whether there are good reasons for derogating from equality.

This "double-deference" distinguishes the interpretation of Article 40.1 from other constitutional provisions. For, although the courts are always deferential to the legislature's assessment of whether it is permissible to derogate from a constitutional guarantee, the courts are not usually deferential to the legislature's assessment of what that constitutional guarantee *prima facie* requires. For instance, interpreting the guarantee of private property rights in Article 40.3.2 and Article 43, the courts are deferential to the legislature's

---

[56] Marguiles, "Standards of Review and State Action" (2002) 37 (ns) *Ir Jur* 23.

assessment of what social justice and the common good require, but not to the legislature's assessment of what the protection of private property *prima facie* requires.[57]

Standards of Review for Equality-Affirming Classification

Invidious Discrimination

"Invidious discrimination" first emerged as a formula in *O'Brien v. Keogh*.[58] It did not admit of any distinction between equality-affirming and equality-derogating differentiation, a failure which may have contributed to the general lack of clarity on this point. Rejecting the plaintiff's equality argument Ó Dálaigh C.J. held, "Article 40 does not require identical treatment of all persons without recognition of differences in relevant circumstances. It only forbids invidious discrimination."[59] This suggested that an invidious discrimination was one which based itself on an irrelevant difference, i.e. a discrimination which could not properly claim to be an equality-affirming classification. This view was reiterated by Walsh J. in *O'Brien v. Manufacturing Engineering*,[60] a case decided on the same day.

The standard of invidious discrimination has been criticised on two main grounds. First, it has been argued that it is conclusory. Beytagh comments that the phrase, imported from the US, has "frequently been used as a substitute for thoughtful analysis and, while superficially appealing, is without content and basically meaningless".[61] The term "invidious" does not so much provide a method for establishing the illegitimacy of a classification as a conclusion that the classification in question is illegitimate.

Secondly, it has been argued that the formula "invidious discrimination" renders it too difficult to establish a breach of Article 40.1. Hogan argues that Irish society is unlikely to experience the nakedly discriminatory legislation of the type directed at Blacks in segregation-era America. If the application of Article 40.1 were to be confined to such cases it would be

---

[57] See, for instance, *In re Article 26 and Part V of the Planning and Development Bill 1999* [2000] 2 IR 321; [2001] 1 ILRM 81.
[58] [1972] IR 144.
[59] *Ibid.*, at 156.
[60] [1973] IR 334, at 364; (1974) 108 ILTR 105, at 139.
[61] Beytagh, "Equality under the Irish and American Constitutions: A Comparative Analysis" (1983) 18 (ns) *Ir Jur* 56, at 72.

"virtually emasculated of any force or vigour".[62] The more specific problem with the term "invidious", also recognised by Hogan, is that it suggests that discrimination and inequality is a matter of hostility. This suggestion wrongly extrapolates a general principle about discrimination from a particular genus of racial discrimination, insisting that all instances of discrimination must be understood as less serious examples of a paradigm case – racial hatred. This understanding of equality accords little with the most significant features of inequality (even racial inequality); the fact that it would greatly reduce the scope of Article 40.1 is incidental to this more specific observation.[63]

There is a possible contradiction between the arguments of Beytagh and Hogan. How can a term both be conclusory and set too high or restrictive a standard? This contradiction can easily be resolved. "Invidious discrimination" is a conclusory standard which nevertheless insinuates that it is not easily met. Thus if the standard of review for legislation is "invidious discrimination", it is a standard both restrictive and unsusceptible to rational evaluation.

Some of these arguments have received a sympathetic hearing in the courts. In *Murphy v. Attorney General*,[64] Kenny J., speaking for the Supreme Court, rejected the invidious discrimination standard. He cited a number of dictionary definitions of the word and noted the primary meaning of the word ("incurring or tending to arouse resentment, unpopularity"), concluding that its use in discussion of Article 40.1 was "more likely to mislead than to help".[65] Notwithstanding these strong comments, invidious discrimination still has some doctrinal currency. In *Lowth v. Minister for Social Welfare*,[66] Hamilton C.J., speaking for the Court, cited with approval the *dicta* of Ó Dálaigh C.J. in *O'Brien v. Keogh*, cited above.[67] However, the Court did not refer to the term "invidious discrimination" in disposing of the

---

[62] Hogan, "The Supreme Court and the Equality Clause" (1998) 4 *Bar Review* 116, at 117. Although there is merit in this observation, it begs the question of what is the appropriate level of force or vigour for Article 40.1.
[63] Although Hogan is correct to reject the standard of invidious discrimination, the way in which he does so suggests that he may view invidious discrimination as the paradigm case of inequality. This remains a flawed conception of equality.
[64] [1982] IR 241.
[65] *Ibid.*, at 286.
[66] [1998] 4 IR 321, at 340; [1999] 1 ILRM 5, at 12.
[67] [1972] IR 144.

plaintiff's argument. More considered use of the term was made by Budd J. in *An Blascaod Mór Teoranta v. Commissioners of Public Works*,[68] a point to which I shall return.

Rational Basis

In the early 1980s a new standard of review emerged in the case law, providing a more staged inquiry into the legitimacy of legislative classifications. Although this formula could function as a standard of review for both equality-affirming classification and equality-derogating classification , it emerged in the former context and I shall consider it in that regard. In *Murphy v. Attorney General*[69] again, Kenny J. held:

> Having regard to the second paragraph of [Article 40.1], an inequality will not be set aside as being repugnant to the Constitution if any state of facts exists which may reasonably justify it.[70]

This *dictum* was also cited with approval by the Supreme Court in *Lowth*.[71] A few years earlier a more elaborate version of a rationality test was stated by Henchy J. in *Dillane v. Attorney General*:[72]

> When the State ... makes a discrimination in favour of, or against, a person or category of persons, on the express or implied ground of a difference in social function, the courts will not condemn such discrimination as being in breach of Article 40.1 if it is not arbitrary, or capricious, or otherwise not reasonably capable, when objectively viewed in the light of the social function involved, of supporting the selection or classification complained of.[73]

---

[68] Unreported, High Court, 27 February 1998, Budd J. In *B. v. Governor of Training Unit, Glengarriff Parade* [2002] 2 ILRM 161, at 175, Keane C.J. spoke in terms of invidious discriminations. As the case did not involve any point based on Article 40.1, too much should not be read into this resurrection of the term.

[69] [1982] IR 241.

[70] [1982] IR 241, at 283-4. That Kenny J. referred to the second sentence of Article 40.1 suggested that this standard of review primarily concerned equality-affirming differentiation.

[71] [1998] 4 IR 321, at 340-1; [1999] 1 ILRM 5, at 13. Despite Kenny J.'s rejection of the "invidious discrimination" terminology, the Supreme Court in *Lowth* viewed Kenny J.'s test from *Murphy* as a repetition and extension of the reasoning in *O'Brien*.

[72] [1980] ILRM 167.

[73] *Ibid.*, at 169.

The formulation is somewhat ambiguous in that, when carefully parsed, it suggests that the discrimination must be reasonably capable of supporting the classification. This makes little sense. Perhaps one can assume that Henchy J. meant to say that the social function involved must be reasonably capable of supporting the classification. If this is the correct reading, it is practically identical in effect to Kenny J.'s formulation of requiring a state of facts which can reasonably justify the legislation. Henchy J.'s formulation cites arbitrary and capricious classifications as examples of irrational classification, but little else distinguishes the two tests.

Hogan, however, sees a fundamental difference between the two tests, describing Kenny J.'s formulation as doctrinally unsound.[74] He makes this assertion on two grounds. First, he argues that the test is wrongly borrowed from the jurisprudence of the US Supreme Court on constitutional equality, where it is applied to economic regulation not to gender discrimination. Nevertheless, although it is regrettable that the courts import *dicta* from US constitutional law without fully appreciating their context, this is hardly of itself a basis for saying that Kenny J.'s formulation is doctrinally unsound as a matter of Irish law. Secondly, he argues, seemingly independent of the US position, that gender discrimination should be subject to the "most searching form of examination to examine whether it is objectively justifiable, as opposed to some form of casual inquiry to see whether the section met a basic rationality requirement".[75] This is an argument of greater substance against Kenny J.'s formulation. Essentially, it calls for a "tiers of scrutiny" approach to constitutional equality adjudication, a proposition which I shall consider in greater detail in chapter six. For present purposes it suffices to ask whether Henchy J.'s formulation actually establishes a higher standard of review. The only way in which Henchy J.'s formulation could be stricter than Kenny J.'s formulation is if the words "objectively viewed" strengthen the requirement of reasonable support. It is hard to see how this could be the case; objectivity seems implicit in Kenny J.'s formulation of reasonable justification. Although Henchy J.'s formulation is, if one ignores the grammatical indiscretion, more elaborately phrased, and perhaps more useful on that account, it is not essentially different. It is certainly not more stringent.

---

[74] Hogan, "The Supreme Court and the Equality Clause" (1998) 4 *Bar Review* 116, at 117.
[75] *Idem.*

Proportionality

In *An Blascaod Mór Teoranta v. Commissioners of Public Works*,[76] Budd J. equated "invidiousness" with "disproportionality":

> Implicit in [the term "invidious discrimination"] is the requirement of proportionality. Where there is a difference of treatment this must be in a proportionate relationship to the quality of difference between the two categories of landowners in the situation which is to be regulated.

He concluded that the discrimination at issue here was invidious because it was based to a large degree on pedigree.[77]

Hogan argues that the proportionality doctrine would aid interpretation of Article 40.1:

> If ever there was a case for applying the newly developed doctrine of proportionality to any provision of the Constitution it was surely here, since the very words of the proviso envisage that any legislation enacted by the Oireachtas must be proportionate in the manner in which it takes account of relevant differences.[78]

As noted earlier, the courts have recognised that, although a difference in situation as between husband and wife may justify preferential social welfare treatment for a deserted wife,[79] it does not justify a legal presumption that criminal acts done by a wife are due to coercion from her husband.[80] One could argue that the first classification is proportionate while the second is not. But one wonders whether a requirement of proportionality correctly identifies the difference in treatment of the two situations. The Aristotelian direction to treat like cases alike is better effected by a requirement that classification be *relevant* to one of many differences in social function than by a requirement that classification be *proportionate*

---

[76] Unreported, High Court, 27 February 1998, Budd J. Hereinafter referred to as "the *Great Blasket case*". For more discussion of this case and, in particular, the Supreme Court judgment, see chapter six.
[77] Budd J. also concluded that the narrow application of the Act rendered it a "bill of attainder" and, on that ground also, a breach of Article 40.1. *Ibid.*, at para. 209.
[78] Hogan, "The Supreme Court and the Equality Clause" (1998) 4 *Bar Review* 116, at 117.
[79] *Lowth v. Minister for Social Welfare* [1998] 4 IR 321; [1994] 1 ILRM 378 (HC); [1999] 1 ILRM 5 (SC).
[80] *The State (Director of Public Prosecutions) v. Walsh* [1981] IR 412.

to one unitary difference in social function.[81] The problem with the classification in *Walsh* is not that it was disproportionate to the difference between husbands and wives but that it was irrelevant to any difference between husbands and wives. In contrast, the classification in *Lowth* was, at least arguably, relevant to a difference in financial circumstance between deserted husbands and deserted wives. The discretion of the Oireachtas to have due regard to differences of social function and of moral or physical capacity allows the Oireachtas to legislate in reflection of such differences where relevant, not to take such differences proportionately into account. The "relevant difference" approach has the incidental benefit of avoiding any confusion which might arise from the use of proportionality in this context and the use of proportionality in the equality-derogating context. Although the phrase "due regard" lends some support to a proportionality standard of review, methodological clarity is better served by employing a "relevant difference" standard.

Standards of Review for Equality-Derogating Classification

Legitimate Legislative Purpose

As noted earlier, equality-derogating classifications are legitimate where they effect a legitimate legislative purpose or support another constitutional value. With regard to the former, a classification must, in order to be valid, be relevant to a legitimate legislative purpose. In *Brennan*,[82] Barrington J. had made some attempt to link the legitimate purpose test with a conclusion of invidiousness but, apart from the decision of Budd J. in *An Blascaod Mór Teoranta v. The Commissioners of Public* Works,[83] little has been made of this in subsequent case law. Even used in this way, the term "invidious" is still more likely to mislead than to help.

The legitimate legislative purpose test effectively stipulates a means-end rationality requirement for legislative classification. Where the purpose of the measure is rationally advanced by the measure itself, that measure is legitimate. *In re Article 26 and the*

---

[81] This requirement of relevance seems supported by Budd J.'s reference, in the above extract from the *Great Blasket case*, to "the situation which is to be regulated".

[82] [1983] ILRM 449

[83] Unreported, High Court, 27 February 1998, Budd J.

Employment Equality Bill 1996[84] provides a good illustration of this means-end rationality. The Supreme Court upheld the constitutionality of the removal from the ambit of the Bill of measures to facilitate the integration into employment of people over the age of 50. The Court reasoned that it was legitimate for the Oireachtas to ensure that the legislative objective of employment equality did not defeat the other legislative objective of reducing long-term unemployment.

Legitimate Legislative Purposes and Proportionality

Proportionality standards modify the idea of means-end rationality by recognising that legislative measures can go further than is necessary to advance a particular legislative purpose. In the *Illegal Immigrants Bill Case*,[85] as outlined above, the Court considered the discrimination against certain non-nationals to be justified on the same basis as the interference with the right of access to the courts was justified; i.e. it served the legitimate public policy objectives of early legal certainty and better administration of the asylum system.

The Court had analysed these issues in terms of a proportionality test, approving Costello J.'s statement of the proportionality test in *Heaney v. Ireland*:[86]

> The objective of the impugned provision must be of sufficient importance to warrant overriding a constitutionally protected right. It must relate to concerns pressing and substantial in a free and democratic society. The means chosen must pass a proportionality test. They must:-
>
> (a) be rationally connected to the objective and not be arbitrary, unfair or based on irrational considerations.
>
> (b) impair the right as little as possible, and
>
> (c) be such that their effects on rights are proportional to the objective.[87]

The *Illegal Immigrants Bill Case* thus suggested that equality-derogating classification may in future be tested by a proportionality standard of review and perhaps that the "relevant to a

---

[84] [1997] 2 IR 321.
[85] [2000] 2 IR 360.
[86] [1994] 3 IR 593; [1994] 2 ILRM 420.
[87] *Ibid.*, at 607; 431.

legitimate legislative purpose" standard of review should now be seen as incorporating a proportionality requirement.

Constitutional Values and Proportionality

In assessing whether an equality-derogating classification supports another constitutional value, the courts have in some cases used two stages of analysis, first asking whether the measure seems to support a constitutional value and secondly asking whether it goes further than is necessary to support that value. A good example of this is *Quinn's Supermarket v. Attorney General*,[88] interpreting Article 44.2.3° of the Constitution.[89] Walsh J. held that late night opening hours for Kosher shops was *prima facie* permissible as it aimed to ensure the free profession and practice of religion, as guaranteed by Article 44.2.1°.[90] Nevertheless, he held that the measure in question went too far in that it allowed late night opening on all nights, not just Saturdays. This case suggested that the proportionality standard of review may also have some application in the context of equality-derogating classifications which are argued to support constitutional values. Although Walsh J. did not use the language of proportionality, the case was explained in such terms by Budd J. in the *Great Blasket case*, commenting that the discrimination was "excessive and not proportionate to the need".[91]

That said, in other cases the courts have not considered the extent of measures authorised by the constitutional value. In *O'Brien v. Stoutt*,[92] for instance, Walsh J. considered that discrimination against non-marital children in intestacy rules was justified by the special protection afforded to the marital family by Article 41 of the Constitution. He did not proceed to consider whether the discrimination in question went further than was necessary to support that constitutional value.

---

[88] [1972] IR 1.
[89] "The State shall not impose any disabilities or make any discrimination on the ground of religious profession, belief or status."
[90] "Freedom of conscience and the free profession and practice of religion are, subject to public order and morality, guaranteed to every citizen."
[91] Unreported, High Court, 27 February 1998, at para. 173.
[92] [1984] IR 316; [1985] ILRM 86.

Article 40.1 in Conjunction with a Substantive Right

In *O'Donovan v. Attorney General*,[93] Budd J. read Article 40.1 in conjunction with Article 16 to conclude that the equality mandated by the Constitution was not maintained where the vote of a person in one part of the country had a greater effect in securing parliamentary representation than the vote of a person in another part of the country. In *Breathnach v. Ireland*,[94] Quirke J. held that the applicant's right to vote had been infringed, breaching Article 40.1, in that no provision had been made to allow him to exercise that right to vote while he was in prison. This again suggested a tendency to read Article 40.1 in conjunction with Article 16 thus producing a more stringent standard of review. The proposition that Article 40.1 applies with more force to discriminatory legislation which restricts a constitutional right is attractive. This proposition, however, was implicitly rejected by the Supreme Court on appeal,[95] Keane C.J. giving separate consideration to the argument based on Article 16 and the argument based on Article 40.1.[96]

Problems with Standards of Review

The discussion thus far has taken court decisions at face value, albeit attempting to remedy small inconsistencies and placing more emphasis on some aspects of the case law than on others. It is now necessary to focus on three more significant problems with standards of review, three ways in which the facial presentation of such standards can conceal the reality of their application. These problems are a source of great confusion in constitutional equality law and need to be clarified if the practical application of the process conception of equality is to be fully understood. The first two problems apply both to equality-affirming classification and equality-derogating classification. The last problem applies only to equality-derogating classification.

---

[93] [1961] IR 114.
[94] [2000] 3 IR 467.
[95] [2001] 3 IR 230.
[96] Decided after *Breathnach*, the High Court case of *Redmond v. Minister for the Environment* [2001] 4 IR 61 again suggests a tendency to read Article 16 in conjunction with Article 40.1, perhaps producing a higher standard of review.

Onus of Justification

The discussion of standards of review has focused on the standard of justification. As important a question is the onus of justification. Does the onus lie on the plaintiff to show that the classification is neither rational nor relevant to any legitimate legislative purpose or constitutional value? Or does the onus lie on the State to show that the classification is rational or relevant to a legitimate legislative purpose or constitutional value? The answer to these questions can often have a determinative impact on a case, yet the questions are rarely openly addressed by the courts. Unless the questions are openly addressed, the real bases for a decision will remain obscure. Some recent cases have suggested that in certain circumstances the onus of justification reverses, requiring the State positively to show that the legislative measure is justified.[97] This suggests a greater willingness to confront the crucial issue of onus of justification.

Actual and Hypothetical Justification

There is a crucial distinction between questioning whether something is justified or whether it could reasonably be justified.[98] The latter question imports some deference to the judgment of someone else, in the case of constitutional adjudication that of the Oireachtas. A standard of review is formulated to require either actual justification or hypothetical justification. A requirement of mere hypothetical justification is generally indicated by the use of words such as "reasonably" and sometimes by the use of conditional verbs such as "could" and "might". In the context of equality-affirming classification, both Kenny J.'s formulation and Henchy J.'s formulation mandate this idea of deference to legislative judgment, requiring merely reasonable justification or reasonable capability of support.

Confusion arises if one applies a standard of hypothetical justification as if it were a standard of actual justification. This rejection of the deference requirement makes the test appear stringent, but this stringency lies not in the test itself but in the doctored application thereof. In this vein, Hogan asserts that the Henchy J. formulation requires the courts to ask whether the effect on rights is proportional to the objective. In contrast, I would submit that the Henchy J. formulation – if it incorporates a proportionality requirement at all – requires the courts to ask

---

[97] I shall analyse these cases in more detail in chapter six. Without explicitly adverting to an onus reversal, the decision of Herbert J. in *Redmond* seemed to place the onus on the State to justify the deposit requirement.

[98] This distinction is routinely ignored in academic commentary.

whether the effect on rights could reasonably be seen as proportional to the objective. Hogan's overall assertion, noted above, that the Henchy J. formulation posits a higher standard of justification than does the Kenny J. formulation stems more from Hogan's application of the Henchy J. formulation than from the formulation itself.

The judgment of Walsh J. in *de Búrca v. Attorney General*[99] is arguably an example of a judge, admittedly before the emergence of the rationality tests described above, applying a standard of actual justification to legislation. His reasoning is strongly worded:

> In my view, it is not open to the State to discriminate in its enactments between the persons who are subject to its laws solely upon the ground of the sex of those persons. If a reference is to be made to the sex of a person, then the purpose of the law that makes such a discrimination should be to deal with some physical or moral capacity or social function that is related exclusively or very largely to that sex only.[100]

This evidences little deference to legislative judgment. Although such an approach may be attractive, it differs significantly from the approaches later suggested by the Henchy J. and Kenny J. formulations.

Standards of review which allow for hypothetical justification provide a very low standard of judicial review for it is difficult to know where deference stops. There are very few legislative measures for which one can imagine no reasonable basis. A possible example of one such measure is given by the judgment of McMahon J. in *O'G. v. Attorney General.*[101] The plaintiff challenged section 5(1) of the Adoption Act, 1974 which prohibited him, as a childless widower, from adopting a child in circumstances in which a childless widow would have been permitted to adopt.[102] McMahon J. considered scientific evidence which suggested that widowers were just as capable of being parents as were widows. He noted that, although in the past the culture of Irish society had assigned distinct roles to fathers and mothers, this

---

[99] [1976] IR 38; (1977) 111 ILTR 37.
[100] *Ibid.*, at 71; at 54.
[101] [1985] ILRM 61.

culture appeared to be changing. Furthermore, no medical or psychological evidence had been adduced to explain the difference between the roles. He concluded:

> I am satisfied that the proviso to s. 5 is founded on an idea of difference in capacity between men and women which has no foundation in fact and the proviso is therefore an unwarranted denial of human equality and repugnant to [Article 40.1] of the Constitution.[103]

This reasoning suggests no reasonable person could believe that there was a rational basis for the legislation, a ground which could reasonably justify the differentiation of widows from widowers.

A case which may be contrasted with this is *Lowth v. Minister for Social Welfare*.[104] In this case, the plaintiff challenged a discrimination against deserted husbands vis-à-vis deserted wives in the social welfare code. Referring to statistics that showed that married women were less likely to be employed than married men, and that women in employment had been at a financial disadvantage compared to men, the Supreme Court concluded that the measure was constitutional:

> It is no function of this Court to adjudicate upon the merits or otherwise of the impugned legislation. It is only necessary to conclude, as this Court has done, that there were ample grounds for the Oireachtas to conclude that deserted wives were in general likely to have greater needs than deserted husbands so as to justify legislation providing for social welfare whether in the form of benefits or grants or a combination of both to meet such needs.[105]

This conclusion flows from either the Kenny J. or the Henchy J. formulation. The Court did not question whether the measure was in fact justified. Instead, it questioned whether the measure could reasonably be justified. The statistics outlined by the Court provided such a

---

[102] The adoption plans had been made prior to the death of the plaintiff's wife; the evidence suggested that the best interests of the child in question lay with adoption by the plaintiff.
[103] [1985] ILRM , at 65.
[104] [1998] 4 IR 321; [1999] 1 ILRM 5.

reasonable basis. Hogan, however, vigorously contests the Court's conclusions. He argues that the relevant comparison was the employment prospects not of men and women but of deserted husbands and deserted wives. Even if statistics were not available for the latter comparison, he argues:

> [I]t seems plain that an equally low number of deserted men and women with children would be in paid employment, since almost by definition most of them would find themselves obliged to stay at home to look after such children. Against that background the justification for the discrimination would simply disappear.[106]

But this is not necessarily the case. It could be argued, based on the statistics cited by the Court, that deserted husbands, who at the time of desertion are more likely to be in employment and in better-paid employment, are generally in a better financial position to arrange for childcare and keep their job, thereby reducing the need for social welfare assistance. Although this may not be the conclusion that one would reach, can it really be said that there was no reasonable basis for the Oireachtas to reach this conclusion? In criticising the Court's conclusion, Hogan arguably moves from a position of hypothetical justification to a position of actual justification. Although it might be preferable to apply a higher standard of justification to gender discrimination – and this is perhaps where the main force of Hogan's argument lies[107] – the point here is that the standard of justification applied by the Supreme Court in *Lowth* is fully consistent with the standards of review of both Kenny J. in *Murphy* and Henchy J. in *Dillane*.

The distinction between actual and hypothetical justification also applies in the context of equality-derogating classifications. There is a crucial difference between questioning whether a measure is actually relevant to a legitimate legislative purpose and questioning whether it is reasonable for the Oireachtas to have considered that a measure was relevant to a legitimate legislative purpose. In *In re Article 26 and the Employment Equality Bill 1996*,[108] the Court, as noted above, considered the constitutionality of the removal from the ambit of the Bill of

---

[105] *Ibid.*, at 342; 13-4.
[106] Hogan, "The Supreme Court and the Equality Clause" (1998) 4 *Bar Review* 116, at 118.
[107] I shall consider this argument in greater detail in chapter six.
[108] [1997] 2 IR 321.

measures to facilitate the integration into employment of people over the age of 50. The Court reasoned:

> No doubt in this instance the age limit chosen does not correspond to any recognised threshold. Where, however, as here, the Oireachtas was dealing with a specific problem in ensuring that its legislative goal of equality of employment did not unnecessarily frustrate another objective of eliminating or reducing long-term unemployment, it was entitled, as a matter of social policy, to choose between fixing the relevant age at what was an appropriate level or employing another and more flexible, but it may be a less practicable, yardstick, such as the length of time an individual is registered as being one of the long-term unemployed. While it is possible to argue that the Oireachtas has made the wrong choice, that cannot amount to a finding that the classification for which they have adopted is irrelevant to the objective intended to be achieved or unfair or irrational.[109]

The Court did not question whether the measure was in fact justified but rather whether it was irrational of the Legislature to conclude that it was justified. This may be contrasted with the decision of the Supreme Court in *An Blascaod Mór Teoranta v. Commissioners of Public Works* in which the Court rather tersely concluded that it could, "see no such legitimate legislative purpose in the present case" and that it had "no doubt but that the Plaintiffs are being treated unfairly as compared with persons who owned or occupied and resided on lands on the Island prior to November 1953 and their descendants".[110] In this case, the Court seemed less concerned with whether the Oireachtas might reasonably have thought the measure to be justified and more concerned with whether the measure was actually justified.[111] This difference may be explained, however, by the fact that the Court in the latter case was openly applying a more stringent standard of review, a point to which I shall return in chapter six. A case which may also be explained in this way is *Redmond v. Minister for the*

---

[109] *Ibid.*, at 348-9. It is worth noting in passing that the Court justified this limitation as a permissible derogation from equality whereas it justified the age limits of 18 and 65 as recognition of the ages at which most people entered and left the workforce, i.e. as equality-affirming differentiation.

[110] [2000] 1 IR 6, at 19; [2000] 1 ILRM 401, at 409.

[111] In the High Court, Budd J. had considered the proposition that the purpose of the Act was to preserve and foster the study of the culture of the island and that maintaining relationships with second and third generation inhabitants was a tangible, practical way of demonstrating the experience of emigration which was the dynamic

Environment.[112] Herbert J. rejected a number of proferred justifications for the electoral deposit requirement, given the existence of an alternative – the nomination and signatures system – which could meet the same objectives without excluding so many from the ballot paper. Reading Article 16.1 in conjunction with Article 40.1 may have produced a higher standard of review which, in Herbert J.'s view, required actual justification.

The Tautology of Means-End Rationality

The standards of review which focus on legitimate legislative purpose or other constitutional values, whether or not they incorporate a proportionality requirement, turn on means-end rationality: in order to be valid, the classification must be rationally related to the legitimate objective. I shall illustrate the tautology primarily by reference to the proportionality test, but my comments also apply to the more straightforward legitimate legislative purpose test.

At first glance, there appear to be three stages to a proportionality inquiry. First, one identifies the purpose of the classification as a matter of fact. Secondly, one normatively questions whether that purpose is legitimate.[113] Thirdly, if the purpose is legitimate, one questions whether the measure goes further than necessary to serve that purpose. This staged inquiry purports to bring objectivity to judicial scrutiny of legislative classification. The belief in this objectivity derives from the view that, as the courts would no longer be simply applying conclusory labels such as "invidious", their reasoning would be subject to greater scrutiny and, therefore, would seek to be more convincing.

The tautology of means-end rationality in general, and of the proportionality test in particular, derives from the character of "purpose". The courts understand the purpose of a statute to be that state of affairs which is rationally likely to be advanced by the statute:

> [I]t is not necessary for the court to search the parliamentary debates to ascertain the arguments used to justify the enactment of the measure – it will usually be possible

---

of the culture. Unreported, High Court, 27 February 1998, at para. 181. Budd J. considered that this rationale stretched credulity; his consideration of the rationale was in terms of actual rather than hypothetical justificaiton.

[112] [2001] 4 IR 61.

[113] This follows as a matter of course if the purpose is to advance another constitutional value.

> for the court to make reasonable inferences from the provisions of the statute itself and the facts of the case.[114]

Once one has identified the purpose in this way, one then questions whether that purpose is legitimate. If it is, the final question is whether the measure goes further than necessary to give effect to the legitimate purpose. Given the way in which one has identified the purpose of the statute, however, the final question is meaningless. That is, given that the purpose was identified as the state of affairs rationally likely to be advanced by the terms of the legislative measure, that measure cannot but be rationally connected or proportionate to the legislative purpose.[115] It is tautology to assert that a measure is proportionate to its purpose where that purpose is itself derived from the measure.[116]

This reduces the proportionality inquiry to two questions: what is the purpose of this measure and is it legitimate? But legislation can, and usually will, have more than one purpose. The courts do not proceed by factually identifying all purposes and then questioning whether they are legitimate. Instead, they proceed by imagining purposes which may be legitimate. In a very real sense, judicial review of legislative classification is an exercise of imagination on the

---

[114] *In re Article 26 and the Illegal Immigrants Bill 1999* [2000] 2 IR 360, at 392, approving the *dicta* of Costello J. in *Molyneux v. Ireland* [1997] 2 ILRM 241, at 244. Indeed in *Crilly v. Farrington* [2001] 3 IR 267, at 280-4; [2002] 1 ILRM 161, at 178-82, the Supreme Court, *per* Denham J., sounded a note of caution about the use of parliamentary statements to assist in the construction of a statute. In *Controller of Patents v. Ireland* [2001] 4 IR 229 at 246, the Supreme Court, *per* Keane C.J., specfically applied these concerns to the testing of the constitutionality of a statute. In *An Blascaod Mór Teoranta v. Commissioenrs of Public Works* [1994] 2 IR 372, Murphy J. for similar reasons refused the plaintiffs' application for discovery of documents relating to the manner in which the relevant Minister's decision to sponsor the An Blascaod Mór National Historic Park Act, 1989 was made, and to the preparation and drafting of the Act. Nevertheless, in *An Blascaod Mór Teoranta v. Commissioners for Public Works (No. 3)* [2000] 1 IR 1, Budd J., distinguishing this point, allowed the plaintiffs to adduce as evidence the An Blascaod Mór National Historic Park Bill, 1989 in order to assist in the interpretation of the subsequent Act, the constitutionality of which has challenged.

[115] If one finds that the measure goes further than is necessary to achieve the purpose, then one has inaccurately identified the purpose in the first instance.

[116] For a similar argument in the US context, see Note, "Legislative Purpose, Rationality and Equal Protection" 82 *Yale Law Journal* 123 (1972). This problem could be avoided if there were a rule requiring the courts to take the purpose of the statute as that stated in the long title as this would allow for a methodological division of ends and means. However, any such rule would be inconsistent with the *dicta* of Costello P. in *Molyneux* approved in the *Illegal Immigrants Case* quoted above. Once the possibility of inferring the purpose from the terms of the measure is open, the problems are not resolved by taking the purpose as stated in the long title because then the question simply becomes why choose the long title purpose over the purpose to be inferred from the general terms of the statute. In a similar vein, one might argue that a particular provision of a statute is inconsistent with the other provisions and therefore with the overall purpose; for this reason, one might argue that the particular provision is not rationally related to the purpose of the statute. This argument, however, begs the question of why one has defined the purpose of the statute in a way that does not take account of the state of affairs likely to be advanced by the provision in question.

part of the courts; the constitutionality of legislation thus depends not on the outcome of a three-stage proportionality inquiry but rather on the willingness of the courts to ascribe a legitimate purpose to a legislative classification.[117]

This is evidenced from the judgment of Costello J. in *Heaney v. Ireland*,[118] identified as the *locus classicus* of the proportionality test by the Supreme Court in the *Illegal Immigrants Bill Case*.[119] Costello J. considered whether section 52 of the Offences Against the State Act, 1939, which made it an offence for a person arrested under Part IV of the Act not to give a full account of her movements and actions on request from a Garda, was a disproportionate restriction of the right to silence. Costello J. considered from a perusal of the long title and the general provisions of the Act that section 52 was designed to "assist the police in their investigation into serious crimes of a subversive nature involving the security of the State".[120] He was sure that this was a legitimate legislative purpose for a parliament in a democratic state. With little analysis, apart from considering other protections afforded to a person detained under Part IV of the Act, Costello J. concluded that the restriction of the right to silence was not excessive and was proportionate to the objective sought to be achieved. This, however, is a conclusion which follows almost automatically from the way in which the purpose was identified in the first place. Having deduced the purpose of section 52 by asking what state of affairs it was rationally calculated to bring about, it would have been perverse to conclude that section 52 was disproportionate to its purpose.

Nevertheless, it would be wrong to assert that the proportionality test renders judicial scrutiny illusory. For there is a tension between the identification of the purpose and the legitimacy of that purpose; this tension may sometimes oblige the courts to find legislation unconstitutional.[121] This tension manifests itself in the following way. The closer the relationship between the purpose and the measure, the easier it is to say that the measure is

---

[117] It is worth noting, parenthetically, that equivalent problems arise where the legislative measure is justified by reference to another constitutional value. In *Quinn's Supermarket v. Attorney General* [1972] IR 1, as noted above, Walsh J. suggested that the Ministerial Order was a disproportionate response to Article 44.2.3°; one could just as easily argue, however, that the purpose of the Order could not have been to give effect to a constitutional value on the basis that it did more than was necessary to achieve that.

[118] [1994] 3 IR 593; [1994] 2 ILRM 420.

[119] [2000] 2 IR 360.

[120] [1994] 3 IR 593, at 608; [1994] 2 ILRM 420, at 432.

[121] Similar arguments have been made in the US context. See Note, "Interest Definition in Equal Protection: A Study of Judicial Technique" 108 *Yale Law Journal* 439 (1998).

rationally related or proportionate to the purpose. However, this also renders it more difficult to say that the purpose is legitimate. The converse is also the case. The more loosely the purpose is related to the measure, the easier it is to say that the purpose is legitimate, but the harder it is to say that the measure is rationally related or proportionate to the purpose.[122] Consider the example of *Heaney*. Now if Costello J. had identified the purpose of section 52 as being to facilitate Garda coercion of witnesses, that purpose would have been very closely related to the measure. There could be no question of a lack of proportionality, but its legitimacy would have been questionable. Conversely, had Costello J. identified the purpose of section 52 as being to promote a peaceful society, its legitimacy would not have been in question but it would have been doubtful whether section 52 was proportionate or rationally related to achieving that end. The constitutionality of section 52 was upheld because Costello J. could identify a state of affairs which would rationally and legitimately be advanced by section 52.

This analysis also suggests how the proportionality or legitimate legislative purpose formulations could be strengthened. By requiring either a closer rational connection or more compelling legitimacy, the courts would heighten the tension between the two, making it more difficult to articulate a purpose which satisfied both aspects of the standard of review. For example, if *necessity* were substituted for *relevance*, there would be less scope for imagination as the courts would have to infer a purpose which could not be achieved in any other, less objectionable, way.[123] Similarly, if the *legitimate* purpose requirement were changed to *compelling* purpose, the courts would have to infer a very substantial purpose from the legislation. Put together, the Court would have to articulate a purpose both compelling and so closely related to the legislative measure that it could not be achieved in any other, less intrusive, way. Such requirements would significantly circumscribe the scope

---

[122] In many cases, a closely related purpose will be perfectly legitimate. The point is rather that in contentious cases, it is easier to identify a legitimate purpose if that purpose does not have to be very closely related to the impugned measure.

[123] Such a requirement is implicit in the courts' formulation of the proportionality test but not in their application of it. Consider the following comments of Keane C.J. in the *Illegal Immigrants Bill Case* concerning the time period within which applications for judicial review had to be lodged: "It is a matter of policy and discretion for the legislature to choose the appropriate limitation period. The legislature is not obliged to choose the longest possible period that might be thought consistent with the policy objective concerned." [2000] 2 IR 360, at 393. This seems inconsistent with his prior summary of Costello J.'s statement of the proportionality test: "The application of this principle means that the right of access to the courts should only be limited to the extent necessary to achieve the objective in question." *Ibid.*, at 392.

for judicial imagination.[124] That the courts have not, subject to a number of *dicta* in recent cases which I shall consider in chapter six, adopted these limitations on judicial imagination explains why so little legislation has been struck down by reference to Article 40.1.

This discussion perhaps illustrates how the courts should treat ostensibly purposeless legislation. This issue arose in the licensing case of *Doyle v. Hearne (No. 2)* in which the applicant complained of the different treatment accorded to holders of converted licences in comparison to holders of other licences by section 27 of the Intoxicating Liquor Act, 1960 and section 20 of the Intoxicating Liquor Act, 1962.[125] The Supreme Court, *per* Finlay C.J., stated that it could see no reason for the discrimination, but avoided the problems which this finding created by relying on formal equality to reject the applicant's claim. That is, as all those with converted licences were treated in the same way by the rule, there was no unconstitutional discrimination.[126] It is a flawed proposition to state that a legislative provision is purposeless. Most legislative provisions have a number of possible purposes which they serve to a greater or lesser extent. The most basic purpose of the legislative provision is the purpose which restates the terms of the legislative provision. In this vein, the most basic purpose of the relevant sections of the Liquor Licensing Acts is to effect a discrimination between holders of converted licences and holders of other licences. The unusual feature of these provisions, however, is that it is not possible to identify any further purpose. This means that the legislative provisions at issue can only pass constitutional muster if the purpose to discriminate in this way is itself sufficient to satisfy whichever standard of review the Court chooses to apply. If that standard of review requires the purpose to have any weight whatsoever, it cannot be satisfied by this purpose. Because of this, the Supreme Court could only uphold the constitutionality of the provisions by reverting to formal equality which does not require any examination of the reasons for discrimination.

Conclusions

Under the process conception of equality adopted by the Irish courts, classifications are legitimate where the legislature might reasonably think that they are rationally related to a

---

[124] One could also strengthen the standard of review by reversing the onus of justification and by moving from hypothetical to actual justification. I shall consider these techniques in more detail in chapter six.

[125] [1988] IR 317.

[126] For further discussion of this, see chapter four.

relevant difference between the persons classified or that they are relevant to a legitimate legislative purpose (including a constitutional value). The onus generally lies on the plaintiff to prove that neither of these justifications exists. Courts and commentators are often unclear as to where the onus lies and as to the differences between hypothetical and actual justification. With regard to legitimate legislative purpose, the reality of the standard of review's application differs significantly from the presentation of the standard of review. The combined effect of these sources of confusion is to conceal the largely discretionary value judgments made by the courts in assessing the legitimacy of classifications.

An Alternative Conception of Classification: Under and Over Inclusion

Whereas the above approaches to equality-derogating classifications focused on the question of whether the differentiated persons are differently situated, the over- and under-inclusion approach asks whether the differentiated persons are similarly situated. Although an answer to this question clearly answers the converse question also, the change of focus is interesting. Casey and Forde argue that constitutional doctrine on equality is and should be rationalised as an examination of the over- and under-inclusiveness of legislative classifications. Casey suggests that a classification is over-inclusive when it is too widely drawn, covering persons who ought reasonably to be excluded.[127] As an example, Casey cites the sex discrimination in *de Búrca v. Attorney General*.[128] Although it would have been permissible to exempt young mothers from jury service, it was not permissible to exempt all women from jury service. Too many people were included in the classification: it was over-inclusive. In contrast, an under-inclusive classification is one which is essentially too narrow, where the class benefited or burdened is unreasonably small.[129] As an example, Casey cites the sex discrimination in *Norris v. Attorney General*.[130] Although it would have been permissible to criminalise all same-sex gross indecency, this measure was under-inclusive in that it only criminalised gross indecency between males.

---

[127] Casey, *Constitutional Law in Ireland* (3rd ed., Round Hall, Sweet and Maxwell, 2000), at 462.
[128] [1976] IR 38; (1977) 111 ILTR 37.
[129] Casey, *op. cit.*, at 464.
[130] [1984] IR 36.

The question arises as to how one assesses whether two persons are similarly situated. Casey does not explore this point but appears to adopt a "natural classes" view. This assumes that there are natural classes in society (men and women, for example) and that legislative classifications can be measured against the naturally occurring classes to assess their legitimacy. Forde eschews this natural classes approach in favour of a purposive approach:

> Truly objective criteria for determining whether individuals and groups are similar do not exist. Conclusions about essential similarity and dissimilarity tend to be founded on assumptions; but concepts of "natural groups" can degenerate into offensive stereotyping. Thus, in many situations, the criterion by which the equal or unequal nature of the legal provision can be determined is its purpose; whether, given the law's purpose, the groups it excludes are essentially the same as those included or the groups it includes are essentially different from those excluded.[131]

The concept of "purpose" is here used in a different way to the legitimate legislative purpose and proportionality requirements considered above. It is not derogation from but rather equality-affirming differences that are tested by reference to purpose. Once one assesses the legitimacy of classification by reference to legislative purpose, one encounters problems which parallel those of the proportionality doctrine considered above. Presumably Forde's approach mandates some scrutiny of the legislative purpose itself. The purpose must be legitimate; otherwise every classification could be presented as an adequate realisation of an invidiously discriminatory purpose.[132] This is clearly equivalent to the legitimate purpose requirement in the proportionality inquiry. Forde's test is one of means-end rationality. The question of whether two persons are similarly situated by reference to the purpose of the measure essentially asks whether the measure is rationally related to achieving the purpose. Yet, for the same reasons as outlined with regard to the proportionality requirement, this is a meaningless question. Given how one identifies the purpose of a legislative measure, all legislative measures are rationally related to their purpose. It is a tautology. There are only two questions: What is the purpose of a legislative measure? Is that purpose legitimate? In

---

[131] Forde, "Equality and the Constitution" (1982) 17 (ns) *Ir Jur* 295, at 316.

[132] For instance, a law requiring Jews to wear a yellow star could be justified on the basis that its purpose was to discriminate against Jews.

the same way as above, the courts would answer this question by attempting to imagine a legitimate purpose which can plausibly be inferred from the legislative provision in question.[133]

Apart from the High Court judgment in *An Blascaod Mór Teoranta v. Commissioners of Public Works*,[134] a case in which Dr Michael Forde himself was counsel for the plaintiffs, I am aware of no case in which the courts have analysed an equality claim in terms of over- and under-inclusion. Although many cases may perhaps be explicable in those terms, this cannot be counted as judicial support. In contrast, the relevant differences and proportionality approaches, although not firmly established in the case law, are more consonant with the bulk of the case law. Consistent with the widely supported Aristotelian conception, both these approaches analyse equality from the perspective of differentiation. They thus cohere better with the existing precedents in the area and are more likely to be developed by the courts as the standards of review for the legitimacy of legislative classification.

Conclusion

As noted in chapter two, two of the central tenets of the process conception are objectivity and neutrality. Yet these seem difficult to find when one works out the process conception. The legitimacy of legislative differentiation is determined not by an objective and neutral inquiry but rather by the predisposition of the courts to imagine legitimate legislative purposes or differences in social situation. What motivates the courts' decisions is not open to analysis because the presentation of the standard of review does not reflect the reality of its application. For this reason, one must question whether the process conception so clearly achieves the objectivity and neutrality which it claims.

---

[133] Forde does not consider the justification of legislative classification independently of his consideration of over- and under-inclusive classification. This suggests that he views under and over inclusion as an exhaustive illustration of judicial equality scrutiny. In contrast, Casey does consider the justification of discrimination separately to over and under inclusion. This suggests a recognition of derogation from equality as a separate category to equality-affirming classification . Nevertheless, the cases cited by Casey as illustrative of justifications for discrimination might more easily be categorised as cases which allowed for equality-effecting differentiation. For this reason, no firm conclusions can be drawn as to his position.

[134] Unreported, High Court, 27 February 1998, Budd J.

Chapter Six

The Human Personality Doctrine and Differentiated Review

> There is a good one at 40(1): "All citizens shall, as human persons, be held equal before the law." What distinction is intended by calling persons human? Are there also inhuman persons, or is this an attempt to deny the vote to incarnate ghosts, leprechauns or demons?[1]

Introduction

The interpolated phrase "as human persons" is the most significant textual novelty in the equality guarantee. Its interpretation by the courts has attracted more criticism than almost any area of constitutional doctrine. This interpretation, which has generally circumscribed the scope for constitutional equality arguments, has been described as "unnecessarily begrudging and unpersuasive".[2] The Constitution Review Group has recommended that the phrase be deleted.[3] In two recent cases,[4] the Supreme Court has noted the controversy over the interpretation of the phrase but expressly set aside consideration of the matter. Yet, on closer inspection examination, much of the academic criticism seems misdirected. Reflecting the two general understandings of human equality, noted in chapters one and three, the courts have interpreted the phrase "as human persons" in two very different ways. Although the predominant interpretation has indeed been restrictive, the alternative offers the potential for an expansive constitutional equality doctrine. In the past number of years, there has been a number of hints from the Supreme Court that this potential might be realised. Although a more expansive equality doctrine poses its own problems, its potential should cause one to query the arguments of commentators, advanced from an egalitarian perspective, for the popular removal or judicial emasculation of the phrase "as human persons".

---

[1] Myles na Gopaleen, "An Cruiskeen Lawn" *The Irish Times*, 13 February 1957.

[2] Beytagh, "Equality Under the Irish and American Constitutions: A Comparative Analysis" (1983) 18 (ns) *Ir Jur* 56, at 70.

[3] *Report of the Constitution Review Group* (Stationery Office, 1996), at 224. Casey seems to support this recommendation; see Casey, *Constitutional Law in Ireland* (3rd ed., Round Hall Sweet and Maxwell, 2000), at 458.

[4] *In re Article 26 and Part V of the Planning and Development Bill 1999* [2000] 2 IR 321, at 357; [2001] 1 ILRM 81, at 117 and *Riordan v. An Taoiseach* [2000] 4 IR 537, at 548-9.

Competing Interpretations

The phrase "as human persons" is best understood as a constitutional commitment to the political ideal of human equality. Human equality, a crucial concept in natural law thinking since before the time of Christ, can be understood in a narrow or broad way. The narrow understanding perceives human equality as a transcendental attribute of human beings. All are equal in their rationality and/or as children of God, depending on whether one adopts a purely secular or religious conception of the natural law. The narrow understanding goes no further than this: humans are equal but that basic equality does not require any political recognition in this world. The broad understanding of human equality uses the metaphysical acceptance of equality to justify an egalitarian political programme: because humans are basically equal, they should be treated as equals.[5] The judicial debate over the meaning of the phrase "as human persons" has reflected these two understandings of human equality.

Once Article 40.1 began to receive significant judicial consideration in the 1960s, the courts quickly adverted to the interpretative significance of the human personality phrase, Walsh J. describing Article 40.1 as an acknowledgement of the "human equality" of citizens.[6] But it was not immediately clear how the word "human" was understood to qualify the concept of equality guaranteed by the Constitution. In *Macauley v. Minister for Posts and Telegraphs*,[7] Kenny J. rejected an equality argument on the basis that "the guarantee in the Constitution of equality before the law relates to the position of the citizen as a human person".[8] This comment suggested that the human personality phrase restricted the application of constitutional equality to legislation that bore on the citizen as a human person, but it remained unclear what the courts understood by that restriction.

---

[5] One could adopt this political position on the basis of constructive morality without necessarily subscribing to the metaphysical conception of human equality. This is essentially the position of Ronald Dworkin outlined in chapter one.

[6] *State (Nicolau) v. An Bord Uchtála* [1966] IR 567, at 639; (1968) 102 ILTR 1, at 40.

[7] [1966] IR 345, at 355. The plaintiff had argued that the fact that the fiat of the Attorney General was necessary before proceedings could be initiated by a citizen against a Minister, whereas a Minister could institute proceedings against a citizen without obtaining such a fiat, constituted an impermissible inequality as between a Minister and a citizen. He failed in his equality argument, but succeeded on the basis that his unenumerated constitutional right of access to the courts had been infringed.

[8] *Ibid.*, at 355.

During the 1970s, as noted by Whyte, two competing interpretations of the human personality phrase emerged.[9] I shall state these in outline before moving to a consideration of the case law. The first and predominant approach correlates with the narrow understanding of human equality and may be characterised as a "context of discrimination" interpretation. This supposes that the human personality phrase limits the constitutional concept of equality by reference to the context in which the discrimination occurs. Discriminations contravene the equality guarantee only if they are made in a context that implicates an essential attribute of one's human personality. The second approach correlates with the broad understanding of human equality and may be characterised as a "basis of discrimination" interpretation. This supposes that the human personality phrase limits the constitutional concept of equality by reference to the basis of the discrimination. Discriminations contravene the equality guarantee only if they are based on a criterion which suggests the assumption that certain individuals are inferior to other individuals by reason of their human attributes. By way of illustration, a discrimination in the context of the tax code on the basis of race does not breach the equality guarantee under the context of discrimination approach, as the essential attributes of one's human personality are not at issue in the context of tax law. However, such a discrimination arguably breaches the equality guarantee under the basis of discrimination approach, as the legislative criterion of race suggests an assumption that some people are inferior to others because of one of their human attributes (i.e. race).

Kenny J. was the leading judicial exponent of the context of discrimination approach. In *Quinn's Supermarket v. Attorney General*,[10] the Supreme Court considered a challenge to the provisions of a Ministerial Order which exempted the proprietors of Kosher shops from a

---

[9] Whyte, "A Comment on the Constitution Review Group's Proposals on Equality" in Duncan and Byrne (eds.), *Discrimination Law in Ireland and Europe* (ICEL, 1997), at 101-2. Nevertheless, Whyte characterises the context of discrimination approach as a temporary aberration arguably now abandoned by the courts. Although the context of discrimination approach is not as prevalent as it used to be, I believe that both approaches are well-established in the case law; the conflict between the two is persistent and of continuing significance. O'Dowd has also adverted to this distinction. See O'Dowd, "The Principle of Equality in Irish Constitutional and Administrative Law" (1999) 11 *European Review of Public Law* 769, at 808-23.

[10] [1972] IR 1. The plaintiffs challenged the provisions of the Victuallers' Shops (Hours of Trading on Weekdays) (Dublin, Dun Laoghaire and Bray) Order, 1948 made by the Minister for Industry and Commerce under section 25 of the Shops (Hours of Trading) Act, 1938. Article 2 of the Order effectively exempted Kosher butcher shops from a ban on evening opening.

ban on evening opening. Kenny J. offered the following interpretation of the human personality phrase as a justification for his rejection of the plaintiff's claim:

> This guarantee, however, is one of equality before the law in so far as the characteristics inherent in the idea of human personality are involved: it does not relate to trading activities or to the hours during which persons may carry on business for neither of these is connected with the essentials of the concept of human personality.[11]

Kenny J. focused not on the basis of the discrimination (religion) but on the context of the discrimination (trading activities). As that context did not implicate any essential attribute of the human personality, the equality guarantee was not breached. In *Murtagh v. Cleary*,[12] Kenny J. elaborated on what was meant by "essential attributes of human personality", asserting that the guarantee of equality related only to the plaintiffs' "essential attributes as persons, those features which make them human beings";[13] it thus had, in his view, no application to trading activities or conditions of employment. Kenny J. thus rendered restrictive the context of discrimination approach by adopting a naturalist interpretation of the human personality. One's human personality was considered a shorthand for the essence of one's existence as a human being. More peripheral and transient aspects of one's personality, such as the ability to work, the liability to pay tax and the entitlement to receive social welfare benefits, were not considered part of one's human personality. As such, a legislative discrimination could only be subjected to judicial equality scrutiny if it were made in a context that implicated the essential attributes of one's human personality. If it were made in a context that merely implicated more peripheral aspects of one's life, judicial equality scrutiny was not appropriate as "human equality" was not at stake. The equality guarantee was similarly restricted by reference to the human personality phrase in a number of cases from the 1970s to the 1990s.[14]

---

[11] *Ibid.*, at 31.
[12] [1972] IR 330.
[13] *Ibid.*, at 335.
[14] For instance, *Devaney v. Minister for Agriculture* Unreported, High Court, 22 March 1979, McWilliam J.; *Murphy v. Attorney General* [1982] IR 241 (Supreme Court); *Brennan v. Attorney General* [1984] ILRM 355 (Supreme Court); *Madigan v. The Attorney General* [1986] ILRM 136 (Supreme Court); *O'Reilly v. Minister for Environment* [1986] IR 143; [1996] 3 IR 100; [1987] ILRM 290 (Murphy J., High Court); *Browne v. Attorney*

The "basis of discrimination" interpretation of the human personality phrase also emerged in *Quinn's Supermarket*. In a memorable and oft-cited passage, Walsh J. elaborated on the equality guarantee:

> [Article 40.1] is not a guarantee of absolute equality for all citizens in all circumstances but it is a guarantee of equality as human persons and (as the Irish text of the Constitution makes quite clear) is a guarantee related to their dignity as human beings and a guarantee against any *inequalities grounded upon an assumption*, or indeed a belief, that some individual or individuals or classes of individuals, by reason of their human attributes or their ethnic or racial, social or religious background, are to be treated as the inferior or superior of other individuals in the community.[15]

This conception of equality focused not on the context of discrimination (in this case, trading activities), but on the basis of discrimination (in this case, religion). Wherever discrimination was based on an impermissible assumption that some individuals were inferior to others, the guarantee of human equality was breached. Impermissible assumptions were understood to be those that assumed inferiority by reference to the human attributes of the people so distinguished. Once again, there were naturalist overtones to this conception of equality.[16] However, the effect of the naturalist influence was not as restrictive of equality argumentation here as it was in the context of discrimination approach. For, although it is difficult to imagine a legislative context that impinges on the essential attributes of the human personality, it is relatively easy to imagine a legislative basis of discrimination that rests on an assumption that some individuals are inferior to others by reason of their human attributes. The following example illustrates this point. As part of a general campaign mounted against Jews, it is stipulated that all Jews should wear a yellow star on their clothes for ease of identification. The Kenny J. approach could, if pursued to its logical conclusion, hold that this is merely

---

General [1991] 2 IR 58 (Murphy J., High Court); *McMenamin v. Ireland* [1994] 2 ILRM 368 (Geoghegan J., High Court).

[15] [1972] IR 1, at 13-4. Emphasis added.

[16] Walsh J.'s enumeration of human attributes suggests that he is concerned with characteristics considered fundamental to human personality – such as sex, race, religion and ethnic origin – not with more transient features of a citizen's personality, such as employment status.

discrimination within the context of clothing and fabric design and, as such, does not prejudice the essential attributes of the human person. In contrast, the Walsh J. approach could conceivably hold that the discrimination in question implicitly rests on an assumption that Jews are intrinsically inferior to others in the community. Because religion is considered to be a human attribute, the constitutionally guaranteed ideal of human equality is subverted by such an assumption.

Unfortunately, the clear distinction between the context of discrimination approach and the basis of discrimination approach was then confused by the actual decision of Walsh J. in *Quinn's Supermarket*. Walsh J. rejected any application of Article 40.1 to the case, stating simply that no question of human equality or inequality arose. This conclusion perhaps followed from Walsh J.'s assertion that his list of human attributes was intended to show that the equality guarantee referred to human persons for what they were in themselves rather than to any lawful activities, trades or pursuits which they might engage in or follow.[17] This concluding assertion was redolent of the Kenny J. context of discrimination approach and, as such, was wholly incompatible with the basis of discrimination approach cogently outlined by Walsh J.[18] Walsh J.'s conclusion thus regrettably dulls the clarity of the distinction between the context of discrimination and the basis of discrimination approach.

In *Brennan v. Attorney General*,[19] Barrington J. provided the most considered analysis of the difference between the context of discrimination approach and the basis of discrimination approach:

---

[17] The decision cannot be explained simply by reference to Walsh J.'s assertion that a limited company, not being a human person, could not invoke the equality guarantee, because Mr Quinn himself was also a plaintiff to the action.

[18] Whyte does not seem to agree with this reading of Walsh J.'s judgment. He accepts that the sentence in question "might have been more happily phrased", but does not perceive any serious difficulty for the basis of discrimination approach. See Whyte, *loc. cit.*, at 102.

[19] [1983] ILRM 449. The plaintiffs, all holders of agricultural land, challenged the constitutionality of the Valuation Acts which valued their lands on the basis of the Griffith Valuation. This valuation had taken 14 years to complete and worked on a county-by-county basis from south to north. The valuation given to agricultural land in the south of the country was significantly less than that given in the north of the country, partly because of the recovery after the great famine. As the rateable valuation determined a number of revenue matters for farmers, the plaintiffs challenged the Valuation Acts as an alleged breach of the equality guarantee and an unjust attack on their property rights.

> Article 40.1 is not dealing with human beings in the abstract but with human beings in society. There may be differences and distinctions made between individuals in society in the course of their trading activities or otherwise which are not based upon an assumption that those individuals are superior or inferior to other people. With such distinctions Article 40.1 is not normally concerned. But a law can be based upon an assumption that some individuals are inferior to others as human persons and yet manifest itself, in the social or economic sphere, in some superficially trivial regulation, such as who may or may not sit on a park bench; who may or may not own a horse worth more than five pounds; or who may or who may not serve drink in a public bar.[20]

For Barrington J., therefore, the context of the discrimination was irrelevant. The controlling question was whether the basis of the discrimination suggested an assumption that some individuals were superior or inferior to others. Such an assumption could have existed even where the context of the legislation was wholly socio-economic. It is important to emphasise that Barrington J.'s judgment did not expand from a naturalist conception of the human personality to a social and economic conception. Article 40.1 applied to "human beings in society", but only where there was legislation based on an assumption that some individuals were inferior to others by reason of their human attributes, a requirement that still had naturalistic overtones.

Citing the judgment of Walsh J. in *de Búrca v. Attorney General*,[21] Barrington J. implicitly concluded that discrimination on the basis of property ownership prejudiced the constitutionally guaranteed human equality.[22] Nevertheless, it is questionable whether Barrington J.'s conclusion correctly followed from the basis of discrimination approach. The discrimination at issue was based on differences between parcels of land, not on differences between the human persons who owned the land. All possible owners of a particular piece of

---

[20] *Ibid.*, at 481.

[21] [1976] IR 38; (1977) 111 ILTR 37. In this case, the Supreme Court held unconstitutional a discrimination against persons who were excluded from jury service on the basis that they did not own property with a sufficiently high rateable valuation.

[22] In contrast to Barrington J., the Supreme Court focused on the context of the discrimination (property tax) and held that the equality guarantee was not at issue because human equality was not affected. [1984] ILRM 355, at 365. Nevertheless, the Court upheld the judgment of Barrington J. on the basis that the property rights of the plaintiffs had been unjustly attacked.

property would be treated in the same way. Indeed, given that Barrington J. accepted that the discrimination in the legislation was inadvertent – more of a historical accident than anything else – it is difficult to see how it could have been described as resting on an assumption of the inferiority of some humans to other humans. The discrimination at issue was not referable to any distinction drawn between persons by reason of their human attributes; accordingly, human equality, even under the basis of discrimination approach, was not at issue. Although Barrington J.'s theoretical elaboration of the human personality doctrine was welcome as an elaboration of a coherent equality argument, it is arguable that it did not apply to the facts of the case.

This discussion illustrates the important point that, even when the basis of discrimination doctrine is applied, many discriminations will be found not to prejudice human equality and so not merit equality inquiry. As such, the basis of discrimination approach is also restrictive of equality argument. This point is supported by a number of cases during the 1980s and 1990s.[23] In *Molyneux v. Ireland*,[24] the plaintiff challenged section 28 of the Dublin Police Act, 1842 which allowed a constable belonging to the Dublin police to arrest a suspect without warrant if he was accused of committing an aggravated assault, where the officer had reason to believe that the assault had been committed and, by reason of the recent commission of the assault, a warrant could not have been obtained. This potential for differing treatment was challenged as being inconsistent with Article 40.1. Costello P., relying on the *dicta* of Walsh J. in *Quinn's*, noted that the plaintiff was not differentiated on the basis of some basic human attribute but rather on considerations of public policy relating to the incidence of crime in the Dublin area and the need to apprehend suspects speedily. Because of this, the first sentence of Article 40.1 was not breached by the statute and there was no need to consider whether the measure was justified by reference to differences in social function or moral and physical capacity. Thus Costello P. focused not on the context of the discrimination (crime

---

[23] See for instance, *Madigan v. Attorney General* [1986] ILRM 136 where O'Hanlon J. argued that, although the law discriminated between the plaintiffs and the rest of the community, it did so not by reference to their attributes as human persons but merely by reference to the value of the premises occupied by them. This is arguably the conclusion which Barrington J. should have reached in *Brennan*. See also, *Tormey v. Attorney General* [1984] ILRM 657 (High Court, Costello J.); *McHugh v. The Garda Commissioner* [1985] ILRM 606 (High Court, Costello J.); *W. v. W.* [1993] 2 IR 73; [1993] ILRM 294 (Supreme Court, Blayney J.); *Bloomer v. Incorporated Law Society of Ireland* [1995] 3 IR 14.; *Sherwin v. Minister for the Environment* Unreported, High Court, 11 March 1997, Costello P., and possibly *Condon v. Minister for Labour* Unreported, High Court, 11 June 1980, McWilliam J.

[24] [1997] 2 ILRM 241.

prevention) but on the basis of the discrimination (the police force to which a constable belonged). This basis did not implicate a basic attribute of the human personality (indeed the distinction was not referable to any difference between the plaintiff and other persons) and so the human equality guaranteed by Article 40.1 was not prejudiced. Had the statutory provision in question distinguished not between police officers but between some basic attribute of suspects, such as their nationality (or perhaps even their city of origin), then it would have been arguable that Article 40.1 applied as the basis of differentiation implicated a basic attribute of the human personality. This conclusion could not be reached under the context of discrimination doctrine as the context of the discrimination would remain crime control.

In concluding the discussion about the competing interpretations of the phrase "as human persons", it is worth noting an argument about judicial deference. Advocates of judicial restraint and deference to legislative judgment might prefer the Kenny J. interpretation of the human personality phrase, on the basis that it circumscribes the scope for judicial activism. The judicial inactivity engendered by the Kenny J. approach, however, is achieved not through deference to legislative judgment but rather through the initial interpretation of the constitutional guarantee itself.[25] Thus, independent of any issue of judicial scrutiny, the human equality to which the Oireachtas must have regard is very limited. Under this approach, Article 40.1 can be invoked only in an adjudicative context that implicates the essential attributes of the human person. As legislation rarely, if ever, intrudes on such areas, it is difficult to imagine any context in which the equality guarantee could apply; the courts have certainly had no suggestions to make in that regard.[26] The judicial restraint of the Kenny J. approach is thus the product of a substantive interpretation which reduces the guarantee of equality to an illusion. This conception of equality, which applies to both the legislature and the courts, must be defended on its merits; it cannot be justified by an obligation of deference.

---

[25] Indeed, Kenny J. himself had no qualms about judicial activism. The interpretative counterpart to his circumscription of Article 40.1 was an extraordinarily activist approach to Article 40.3. See for instance *Macauley v. Minister for Posts and Telegraphs* [1966] IR 345 and *Murtagh v. Cleary* [1972] IR 330.

[26] This reflects the narrow general understanding of human equality: the basic equality of humans does not require any measure of equal treatment in this life. Therefore, there is never, by definition, any legislation which violates the equality guarantee.

Critical Assessment

As noted at the outset, the courts' interpretation of the human personality phrase has been the subject of much academic criticism. Three basic types of criticism have been made. The first may be described as the "anti-naturalist critique". Lynch and Connelly argue as follows:

> [The courts' interpretation of the phrase] is based on a highly essentialist and biologically determinist view of human nature. Human persons are social, cultural and economic entities, as well as biological entities, and there does not appear to be any clear reason why equality provisions in the Constitution should not recognise this.[27]

Lynch and Connelly's argument is more cogent as an argument for the amendment of the Constitution than for the re-interpretation of it. Given the general natural law ethos of Articles 40-44, a naturalist interpretation of "human persons" is almost inevitable. If the suggested deletion of the human personality phrase were effected, both the context of discrimination approach and the basis of discrimination approach, as outlined in this Article, would be redundant.[28]

The second critique may be described as the "coherent naturalist critique". Beytagh observes that, "[e]mployment and more generally commercial activities engaged in by persons are hardly irrelevant to their humanity".[29] Hogan and Whyte argue that the courts' interpretation, "seems to attribute to human personality an unrealistically small ambit".[30] They note that the courts have recognised rights such as the right to work as natural personal rights, and suggest that this is because the ordinary conditions of the world impose necessities on the human personality to which working (for example) is a response. They conclude:

---

[27] Lynch and Connelly, "Appendix 18 to the Report of the Constitution Review Group" in *Report of The Constitution Review Group* (Stationery Office, 1996), at 586.

[28] Such an argument may have merit, but it lies somewhat beyond my present concern which is to identify the most plausible egalitarian interpretation of the Constitution. From an egalitarian perspective, Lynch and Connelly's argument might lead to the undesired result of an undifferentiated (and probably lax) standard of review.

[29] Beytagh, *loc. cit.*, at 70.

[30] Hogan and Whyte, *Kelly: The Irish Constitution* (3rd ed., Butterworths, 1994), at 722.

> If all such matters are subtracted from the concept of "human person", not much remains; so that it seems more satisfactory to understand that expression in Article 40.1 as visualising the complex of activities which human existence for most people involves.[31]

Hogan and Whyte's complaint lies not with the context of discrimination approach but rather with the way in which that context is circumscribed by, in their view, an unduly crabbed delineation of the "human personality". The impulse for this critique seems to be an egalitarian concern that the courts' interpretation of the human personality phrase is too restrictive of constitutional equality. In this vein, Kelly notes that it is an "exceedingly narrow view of the equality guarantee".[32] Whatever its motivation, the critique is phrased as an attack on the coherence of the courts' vision of the human person.

The third critique may be described as the "functional critique" as it is concerned not with the rationale of the human personality doctrine but solely with the function of that doctrine in restricting the scope for equality argument. Thus Scannell, for instance, notes the restrictive effect of the courts' interpretation and ruefully observes that if the courts in the early 1970s had outlawed sex discrimination under Article 40.1, "they would have provided the women's movement in its heyday with the encouragement to undertake a systematic challenge to all unjustifiable sex discriminations".[33] Similarly, Bolger and Kimber argue that "a narrow interpretation limits the potential of the equality guarantee to challenge many of the discriminatory practices in Irish society".[34]

The disappointing feature of much of this academic commentary is its failure to distinguish between the competing interpretations of the human personality phrase.[35] Judgments which

---

[31] *Idem.*

[32] Kelly, "Equality Before the Law in Three European Jurisdictions" (1983) 18 (ns) *Ir Jur* 259, at 265.

[33] Scannell, "The Constitution and the Role of Women" in Farrell (ed.), *De Valera's Constitution and Ours* (Gill & Macmillan, 1988), at 132.

[34] Bolger and Kimber, *Sex Discrimination Law in Ireland* (Round Hall Sweet and Maxwell, 2000), at 33.

[35] Although, for notable exceptions, see Whyte, *loc. cit.* and Connelly, "The Constitution" in Connelly (ed.), *Gender and the Law in Ireland* (Oak Tree Press, 1993), at 25: "Some of this case law suggests a conflation of what are in fact two separate considerations: the essential attributes of the human being, such as sex and physical features, and aspects of human existences, such as parenting and employment.... The Supreme Court should overrule earlier restrictive interpretations of Article 40.1, and allow that its material scope extends to all aspects of human existence – even if the bases of discrimination covered by the provision are limited, by virtue of the phrase 'as human persons', to the essential attributes of the human being."

reject the context of discrimination approach in favour of the basis of discrimination approach are wrongly interpreted as being merely watered down applications of a unitary, naturalist human personality doctrine. Thus Hogan and Whyte note that Barrington J. in *Brennan* used some "oblique expressions" to point out that Article 40.1 is "concerned with human beings in society".[36] They interpret this as a judicial hint that "too much might be read from the phrase 'as human persons'".[37] This misunderstands Barrington J.'s basis of discrimination approach as being simply a less restrictive context of discrimination approach. Moreover, it implicitly (and mistakenly, in my view) seeks to claim Barrington J.'s judgment as support for their preferred interpretative resolution of the human personality controversy: namely, the adoption of a less naturalist interpretation of "human attributes" so as to broaden the adjudicative context in which constitutional equality arguments may be made. This interpretative resolution is less appealing than the basis of discrimination approach because it has little explicit grounding in the case law, instead relying for support on cases where the human personality phrase is simply not considered by the courts as a restriction of the equality guarantee.[38] In contrast, the basis of discrimination approach provides an interpretative resolution of the problem that is both supported by authority and theoretically coherent. The interpretative choice, properly understood, is between a basis of discrimination approach and a restrictive context of discrimination approach. Arguments for a less restrictive context of discrimination approach are not sufficiently grounded in case law to count as a convincing interpretation of Irish constitutional doctrine.

The failure to recognise and distinguish between the basis of discrimination and context of discrimination approaches to the human personality phrase is particularly disappointing for the following reason. As noted, much of the academic criticism is motivated by an egalitarian concern that the courts' interpretation of the human personality phrase drastically reduces the scope of the equality guarantee. Most commentators would be prepared to accept a quasi-naturalist interpretation of Article 40.1 provided that the equality guarantee was given

---

[36] Hogan and Whyte, *op. cit.*, at 721.

[37] *Ibid.*

[38] The recent case of *Kelly v. Minister for the Environment* Unreported, High Court, 16 May 2002, McKechnie J. may, however, provide some support for this type of approach. McKechnie J., without exploring the intricacies of the human personality doctrine, concluded that the restrictive version of that doctrine could not apply in the context of political equality, given cases such as *McKenna* and *Coughlan*. On appeal, the State contested McKechnie J.'s interpretation of the relevant provisions, not his conclusion that the provisions, as interpreted,

meaningful substance. The basis of discrimination approach, although certainly somewhat restrictive of equality argumentation, would give the equality guarantee a meaningful existence. As such, academic commentary motivated by an egalitarian concern would be better directed towards support for (and elaboration of) the basis of discrimination interpretation of the equality guarantee.

The Original Understanding

As already discussed in chapter three, the original understanding of the phrase "as human persons" was somewhat ambiguous. Although one can be reasonably certain that Catholic social teaching was the inspiration for the phrase, it is not certain that Mr de Valera understood the phrase in quite so restricted a manner. Catholic social teaching of the time apparently understood the phrase purely in the narrow, transcendental manner noted above: humans were basically equal, this equality would be realised in the next life, no inequalities were precluded in this life. A strong advocate of an original understanding of the Constitution could plausibly argue that the courts should also confine themselves to the narrow interpretation of the phrase, the context of discrimination approach. Ironically, however, the Catholic Church appears to have modified its teaching on this issue. The document *Gaudium et Spes* now invokes basic human equality to justify an egalitarian political programme opposed to discrimination on certain grounds. In broad outline, this closely resembles the basis of discrimination approach.[39]

A Differentiated Standard of Review

The basis of discrimination interpretation of the human personality phrase focuses judicial scrutiny on the basis of discrimination or the criterion of classification. It demands that legislation not discriminate on the basis of human attributes. In *Quinn's Supermarket*, Walsh J. asserted that the following were among the attributes proscribed as a basis of

---

were unconstitutional. The constitutional issues were therefore not squarely addressed by the Supreme Court. Unreported, Supreme Court, 29 November, 2002.

[39] See chapter one for discussion of this document.

discrimination: ethnic or racial, social or religious background.[40] Curtin describes Walsh J.'s *dicta* as "an important, and powerful, statement of the circumstances in which discrimination occurs" which "relates discrimination directly to the effect of impairment of human dignity".[41] She argues that the core of dignity is that people should be treated for what they are and, in particular, that they should not be discriminated against on the basis of insignificant and irrelevant characteristics. It is an approach that emphasises people's common humanity as the justification for equality; equality is breached where the State denies human equality by treating some people as inferior on account of their human attributes. Realised in constitutional law, this approach would give meaning to the equality guarantee by focusing the attention of the courts on certain offensive bases of discrimination.[42] It would require that, in the legislative process, all persons should be treated as equals and particular groups should not be *a priori* targeted for legislative disadvantage on the basis of their alleged inferiority to other groups of individuals in the community. Recent *dicta* of the Supreme Court, without explicitly reconsidering their interpretation of the human personality phrase, suggest that such a development of constitutional equality doctrine may be taking place in Irish law.

Before considering the impact of these recent cases, it is useful to reconsider, in brief, the basic aspects of a standard of review. First, there is the onus of justification. Does the onus lie on the State to justify the measure or on the plaintiff to show that there is no justification for the measure? Until recently, it was considered that the plaintiff bore the onus of justification at all stages. Secondly, there is the standard of justification. What quality of purpose must the legislature have and how close must its relationship to that purpose be? The test established by Barrington J. in *Brennan* tended to be deferential to the legislature's judgment: the purpose need only be *legitimate* and the means need only be *relevant* to that purpose. Thirdly, there is the difference between actual and hypothetical justification. Does the court question whether, in its own judgment, the measure is in fact justified or does it

---

[40] It is not clear whether the enumerated characteristics are additional to or an elaboration of the concept of "human attributes", but little turns on this distinction. In *The Green Party v. RTE* Unreported, High Court, 24 February 2003, Carroll J., at 9, political belief was analogised to the grounds of classification listed by Walsh J.

[41] Curtin, *Irish Employment Equality Law* (Round Hall, 1989), at 23.

[42] This imposes limits, which some might find objectionable, on the scope of constitutional equality, as only the quasi-naturalist human attributes would be proscribed as bases for discrimination. But this merely illustrates the point that all doctrines of constitutional equality exercise a limiting function in drawing the line between justiciable and non-justiciable inequalities. The argument here is simply that the basis of discrimination approach is the most plausible pro-egalitarian interpretation of Irish constitutional doctrine.

question whether the measure might reasonably be justified? The Irish courts have generally adopted the deferential approach of hypothetical justification.

In *In re Article 26 of the Constitution and the Employment Equality Bill, 1996*,[43] the Supreme Court considered, *inter alia*, a number of statutory provisions which dealt with age discrimination in the context of employment. Section 6 of the Bill provided, *inter alia*, that discrimination would be taken to occur where one person was treated less favourably than another on the basis of age. However, there were two age-based exceptions to the prohibition of age discrimination. Section 6(3) provided that treating a person over the age of 65 or under the age of 18 more or less favourably than another, whatever that person's age, would not be regarded as discrimination on the age ground. In addition, section 33(1) provided that the anti-discrimination measures of the Bill were not to be taken as preventing measures for the integration into employment of persons over the age of 50, among others. Counsel assigned by the Court to argue against the constitutionality of the Bill challenged these three cut-off ages (18, 50 and 65) as themselves being unconstitutional discriminations on the basis of age. Hamilton C.J., for the Court, having cited Walsh J.'s views that Article 40.1 guaranteed human equality, expressed the view that, having regard to Article 40.1, a number of forms of discrimination were *prima facie* invalid:

> The forms of discrimination which are, presumptively at least, proscribed by Article 40.1 are not particularised: manifestly, they would extend to classifications based on sex, race, language, religious or political opinions.[44]

This *dictum* parallels Walsh J.'s comments in *Quinn's Supermarket* to the effect that human attributes could not be used as a basis of discrimination. However, although Walsh J. had suggested that discriminations based on such attributes were wholly prohibited, in this case the Supreme Court more subtly stipulated that such discriminations were presumptively

---

[43] [1997] 2 IR 321. Hereinafter referred to as "the *Employment Equality Bill Case*".

[44] *Ibid.*, at 347. Casey downplays the significance of this *dictum* of the Court, observing that it does not mean that some classifications will be subject to a higher degree of scrutiny than others. Casey, *op. cit.*, at 455. Although this is a correct interpretation of the *dictum* itself, later comments of the Court, discussed below, suggest that as well as reversing the onus of justification, a higher standard of justification may apply. Whyte perceptively notes that the very fact that the Court did not simply reject the equality argument on the basis that "conditions of employment" did not implicate the essential attributes of the human personality, as Kenny J. had

invalid. This shifts the onus of justification onto the State. In addition, the Court expanded somewhat on the list of human attributes to cover sex, language and political opinions. The attribute of age raised greater analytical difficulties. In considering whether age should also be considered a presumptively proscribed ground, the Court referred to the US case of *Murgia*,[45] and in particular to the judgment of Justice Marshall.[46] Although the Irish Supreme Court's analysis was not as rigid or formalised as that currently employed by the United States Supreme Court,[47] it clearly suggested that certain classifications were to be treated as *prima facie* invalid, thus reversing the onus of proof and imposing an onus of justification on the State. Further support for this proposition can be derived from the subsequent reasoning of the Court. In upholding the exclusion from the Bill's provisions of employment in the Defence Forces, the Garda Síochána and the prison service, the Court made the following observation:

> Once, however, it is accepted that discrimination on the grounds of age falls into a different constitutional category from distinction on grounds such as sex or race, the decision of the Oireachtas not to apply the provisions of the Bill to a relatively narrowly defined class of employees in the public service whose duties are of a particular character becomes more understandable.[48]

This further suggests that a differentiated standard of review applies to legislative classifications. Although classifications based on age are subject to Article 40.1, requiring justification under the legitimate purpose test, they are easier, in the view of the Court, to justify than classifications based on race or sex. By implication, classifications based on race or sex are subject to a standard of review more difficult to meet than that contained in the legitimate purpose test. It is not quite clear in what way this new standard of review is more onerous. At the very least, given that these classifications are "presumptively invalid", it

---

done in *Murtagh v. Cleary*, demonstrated that the Court did not approve of the context of discrimination approach. See Whyte, *loc. cit.*, at 103.

[45] *Massachusetts Board of Retirement v. Murgia* 427 US 307 (1976).

[46] Hamilton C.J. concluded that the "aged are thus entitled as human beings to protection against laws which discriminate against them, unless the differentiation is related to a legitimate objective and is not arbitrary or irrational". [1997] 2 IR 321, at 347-8. In the instant case, the Court held that there was a rational relationship to a legitimate objective.

[47] But the relevant point is that the basis of discrimination (here age) is evaluated in the abstract so as to provide a framework for approaching the facts of the particular case.

[48] [1997] 2 IR 321, at 349.

would seem that the onus of proof lies on the State to show that the measure is justified. However, it may be that there is also a move from hypothetical to actual justification and that a closer relationship to a more compelling purpose is also required. In this regard, it is worth noting that the Court considered the standard of review stipulated by Justice Marshall in *Murgia* not to be essentially different from the legitimate purpose test of Irish constitutional law. Justice Marshall's test required the State to show a "reasonably substantial interest" and a scheme "reasonably closely tailored to achieving that interest". With respect, this is clearly a higher standard than mere relevance to a legitimate legislative purpose. The purpose or interest, for Justice Marshall, must not merely be "legitimate" but "reasonably substantial"; the means must not merely be "relevant" to that purpose but "reasonably closely tailored". The use of the word "reasonably" suggests that this standard of review is still about hypothetical justification but a higher standard of hypothetical of justification. If this is the standard of review that applies to age based classifications under Article 40.1, the standard for race and sex based classifications must be higher still.

My suggestion is that the basis of discrimination interpretation of the human personality phrase is the unspoken justification of this doctrinal development in Irish constitutional law. That justification also identifies the limits of the doctrine: proscribed as presumptively invalid are those (and only those) classifications based on an assumption that certain individuals are inferior to other individuals in the community by reason of their human attributes. Even if the only change effected by the *Employment Equality Bill Case* is a reversal of the onus of proof, the significance of this should not be underestimated. In *Lowth v. Minister for Social Welfare*[49] the plaintiff's claim failed largely because of his own inability to provide statistics to illustrate that he, as a deserted husband, was similarly situated to a deserted wife, thereby grounding a claim that he should receive the same treatment.[50] Had the onus been on the State to justify the discrimination, it would have been necessary for them to produce the statistics to demonstrate the difference in situation. However, the fact that *Lowth* was decided after the *Employment Equality Bill Case* does cast some doubt on whether any change has been effected in constitutional doctrine.

---

[49] [1998] 4 IR 321; [1994] 1 ILRM 378 (HC); [1999] 1 ILRM 5 (SC).
[50] See Hogan, "The Supreme Court and the Equality Clause" (1998) 4 *Bar Review* 116, at 120 (fn 28).

That said, the more recent case again of *An Blascaod Mór Teoranta v. Commissioners of Public Works*[51] provided further support for a new constitutional doctrine that some legislative classifications would *a priori* be treated differently by the courts. An Blascaod Mór National Historic Park Act, 1989 provided for the delegation to the OPW of the power to acquire land compulsorily on the Great Blasket Island, for the purpose of establishing and maintaining a national park. However, section 4(2)(a) of the Act provided that this power did not apply to land owned or occupied by a person who had owned or occupied it since 17 November 1953 and was ordinarily resident on the island before that date, nor to land owned or occupied by a relative of such a person.[52] Barrington J. (speaking for the Supreme Court) again cited the basis of discrimination human personality *dicta* of Walsh J. in *Quinn's*, as well as his own legitimate purpose test from *Brennan*. He concluded:

> In the present case the classification appears to be at once too narrow and too wide. It is hard to see what legitimate legislative purpose it fulfils. It is based on a principle – that of pedigree – which appears to have no place (outside the law of succession) in a democratic society committed to the principle of equality. This fact alone makes the classification suspect. The Court agrees with the learned trial judge that a Constitution should be pedigree blind just as it should be colour blind or gender blind except when those issues are relevant to a legitimate legislative purpose. This Court can see no such legitimate legislative purpose in the present case and has no doubt but that the plaintiffs are being treated unfairly as compared with persons who owned or occupied and resided on lands on the island prior to November 1953 and their descendants.[53]

The reference to suspect classifications and the idea of constitutional blindness to certain irrelevant legislative criteria were clear echoes of US constitutional equality doctrine. Although Barrington J. did not use the language of "presumptive invalidity", he was clearly suggesting that some "suspect" legislative criteria should be evaluated more closely than

---

[51] [2000] 1 IR 6; [2000] 1 ILRM 401. Hereinafter referred to as "the *Great Blasket Case*".

[52] Section 4(4) defines relative as a parent, lineal ancestor, spouse, widow, widower, child, lineal descendant, uncle, aunt, brother, sister, nephew or niece.

[53] [2000] 1 IR 6, at 19; [2000] 1 ILRM 401, at 409. In *Enright v. Ireland* Unreported, High Court, 18 December 2002, Finlay-Geoghegan J., at 28, it appears that the State accepted that Barrington J.'s statement of the law in the *Great Blasket case* was correct.

others.[54] Again, it is arguable that the basis of discrimination interpretation of the human personality phrase is the basis of this development and should be used to identify those suspect criteria. The *Great Blasket Case* thus strengthens the contention that the Irish Supreme Court is adopting a doctrine whereby objectionable legislative criteria are identified in the abstract and accorded special treatment. However, the exact parameters of the new doctrine remain unclear.[55]

It is perhaps useful to summarise the development in constitutional equality doctrine that has occurred over the last few years. A number of *dicta* of the courts have suggested a move, analogous to that undergone in the US, whereby some legislative classifications would impose an onus of justification on the State. The doctrinal and rhetorical underpinning for such a development has arguably been the basis of discrimination interpretation of the human personality phrase, extant in Irish law since the early 1970s, identified earlier. The value of human equality, guaranteed by Article 40.1, mandates that the organs of the State treat its citizens with equal respect and esteem. This is not a demand of mechanical equal treatment, but it does preclude classifications which are based on an assumption that some individuals are inherently inferior or superior to other individuals in the community by reason of their human attributes. Any such assumption is incompatible with the constitutional command of human equality. The justification for legislation which appears to be based on such assumptions must therefore be evaluated more closely, through the expedient of reversing the onus of justification and, possibly, through raising the standard of justification.

Although the *Employment Equality Bill Case* and the *Great Blasket Case* have not signalled any move from hypothetical to actual justification on the part of the courts, they have suggested three possible changes to the standard of review of objectionable legislative classifications. First the onus of justification is reversed. Secondly but less likely, the legislative measure may have to be closely tailored to achieving the purpose as opposed to being merely relevant to that purpose. Thirdly but also less likely, the purpose may have to

---

[54] The Court's conclusion that it could see no legitimate legislative purpose for the discrimination suggests that it thought it incumbent on the State to show a legitimate purpose. This corresponds with the approach taken in the *Employment Equality Bill Case* and contradicts the traditional approach of requiring the plaintiff to show that there was no justification for the measure.

[55] See chapter nine for a discussion of the directions in which a new doctrine might develop.

be compelling as opposed to being merely legitimate.[56] However, one must be careful not to overstate the doctrinal development effected by these decisions. What I have described is not rigid doctrine,[57] but rather a suggestion of the direction in which the Supreme Court might be moving. Following the *Great Blasket Case*, the Supreme Court is poised on the brink of an egalitarian development. It remains to be seen whether the current Court, the composition of which has altered substantially since these two cases, determines to fulfil this egalitarian potential.

Evaluation of a Differentiated Standard of Review

It was noted in the previous chapter that the standard of review adopted by the courts in relation to Article 40.1 has been very low. Although it seems unlikely that a generally applicable higher standard of review will be adopted, there is at least a hint that the courts might apply a differentiated standard of review, subjecting most classifications to fairly lax scrutiny while requiring a higher standard of justification for other classifications. Questions arise as to the desirability of this development. The first type of question focuses on the appropriateness of judicial scrutiny of legislative decisions. For those worried about judicial activism, the undifferentiated lax standard of review could be attractive as it reduces the number of situations in which the courts are likely to overturn legislation on the basis of Article 40.1. For precisely the same reasons, those worried about judicial over-deference would welcome a heightened standard of review. Any answer to this question is bound to be contentious. At one level it depends on the complex elaboration of theories about the proper role of the courts. I concluded in chapter two that the judicial power under the Irish Constitution allows for the enforcement of a substantive conception of equality; *a fortiori* it must allow for the enforcement of a strong process conception such as that sketched in this chapter. Whether or not such a conception should be adopted thus turns solely on its merits as an understanding of equality. I shall consider this issue in more detail in Part III.

---

[56] If one accepts the comments made in chapter five about the tautology of means-end rationality, it follows that the effect of the *dicta* in the *Employment Equality Bill case* and the *Great Blasket case* is to circumscribe the scope of the courts to imagine legislative purposes.

[57] Cases such as *Lowth*, decided by the Supreme Court between the *Employment Equality Bill Case* and the *Great Blasket Case*, suggest an approach, on the part of the courts, far more deferential to the legislature.

The next type of question focuses on the issue of differentiated review. Is this in principle justified and, if so, how are the courts to identify which bases of classification should receive heightened scrutiny? If one accepts that the concern of constitutional equality is legislative classification, it is undoubtedly the case that some forms of classification are generically more troubling to one than others. In the language of Article 40.1, if human equality is to be achieved by prohibiting certain classifications, one is and should be more wary of those classifications that come closer to denying people's common humanity. It thus seems acceptable to impose a more onerous standard of justification on such classifications. However, not all commentators agree with this.

Some would object to the necessity, under the new approach, for the courts to select *a priori* some classifications for special treatment. It could be argued that, in making such a selection, the courts would be implementing value judgments that go beyond the judicial function. For instance, Polyviou argues that an equality guarantee must assure total neutrality in adjudication, which can only be achieved if no distinction is drawn between the rights and interests it protects.[58] However, Polyviou's argument fails convincingly to explain how, in the US context, a neutral equality guarantee is consonant with special consideration for racial classifications.[59] Moreover, it ignores the intuitive truth, alluded to above, that some classifications are a greater cause for concern than others. Wholly independent of the possible justification for a particular classification, one is generically more suspicious of classifications based on race than of classifications based, for instance, on age. In turn, one is generically more suspicious of classifications based on age than one is of classifications based, for instance, on height. Arguably, therefore, if one conceives of equality in terms of classifications, one must be *a priori* more dubious of some classifications than of others. This intuitive conclusion is also legally plausible given that the Irish Constitution guarantees human equality and is therefore implicitly less concerned with other forms of inequality.[60] To

---

[58] Polyviou, *The Equal Protection of the Laws* (Duckworth, 1980), at 187. Polyviou's remarks are made in the context of an analysis of the equal protection clause of the US Constitution. Nevertheless, given the parallels between US constitutional equality law and the suggested developments in Irish constitutional equality doctrine, his comments are apposite to the Irish context.

[59] In assessing the validity of such classifications, the US courts reverse the onus of proof and raise the standard of justification, typically requiring that the classification be closely tailored to meet a compelling governmental interest.

[60] The intense debate as to what is meant by human equality reinforces rather than undermines this point.

preclude the courts from distinguishing between species of classification is arguably to thwart the vision of human equality enshrined in the Constitution.

The more interesting question in this regard is not *whether* the courts should select some classifications for special treatment but rather *how* they should make that selection. How are the courts to ascertain the grounds of classification that rest on the impermissible assumption that some groups of individuals are inferior to other individuals? Criticising *Lowth v. Minister for Social Welfare*,[61] Hogan has argued that "rational basis" scrutiny is inapposite to cases where there is *prima facie* discrimination on gender grounds:

> On any view, this sort of discrimination calls for the most searching form of examination to examine whether it is objectively justifiable, as opposed to some form of casual inquiry to see whether the section met a basic rationality requirement.[62]

This does not explain why gender classifications should receive more onerous scrutiny. Although one may strongly feel that this should be the case, it has proven difficult to provide a coherent articulation of this moral intuition. Some have suggested abstract formulae which can be applied to all cases in order to work out whether the classification is impermissible. For instance, Curtin, developing her argument of equality based on human dignity,[63] asserts that people should be treated for what they are and should not be discriminated against on the basis of irrelevant characteristics. Immutable characteristics, such as skin colour, religious affiliation, social or ethnic background, constitute irrelevant bases of discrimination and should be proscribed. But Curtin's list is defective: religious affiliation, although objectionable as a basis for discrimination, is clearly mutable and thus is not properly caught by her formula. Another frequently proposed formula requires that classifications directed against a "discrete and insular minority" should be treated suspiciously.[64] However, women

---

[61] [1998] 4 IR 321; [1994] 1 ILRM 378 (HC); [1999] 1 ILRM 5 (SC).

[62] Hogan, "The Supreme Court and the Equality Clause" (1998) 4 *Bar Review* 116, at 117.

[63] Curtin, *op. cit.*, at 23.

[64] For this, see the famous footnote (fn.4) of Justice Stone in *Carolene Products Co.* 304 US 144, at 152 (1938): "Prejudice against discrete and insular minorities may be a special condition, which tends to curtail the operation of those political processes ordinarily relied upon to protect minorities, and which may call for a correspondingly more searching judicial inquiry." This viewpoint has gained some currency in the Irish academic commentary. For instance, see Forde, "Equality and the Constitution" (1982) 17 (ns) *Ir Jur* 295, at 310. He argues that although the usual standard for review in equality disputes is rationality, a higher standard is required where "a group that tends to be excluded from legislative consideration is affected by a law…".

are not a minority and homosexuals, although a minority, are neither discrete nor insular. Yet one is intuitively more suspicious of discriminations on the basis of gender or sexuality than one is of discriminations on many other grounds. The problem lies in the fact that abstract formulae have tended to be extrapolations from the most pressing contemporary equality issue. As a result, they fail to capture the full range of classifications that one may find objectionable.[65]

Arguably, these problems stem from the basic process conception which stipulates that constitutional equality is formally concerned with the legitimacy of legislative classifications. It is this conception that creates the analytical requirement to distinguish generically between species of classification in order to capture one's intuitions about equality. In the American context, Balkin has argued that the concern of constitutional equality doctrine should be subordination, not classifications.[66] He argues that the US Constitution demands equality of social status and commits the law to dismantling unjust forms of social subordination. The courts must make morally critical value judgments as to whether a particular social group is the subject of unjust subordination. The anti-subordination critique raises many fundamental issues about traditional constitutional equality which I shall consider in Part III. For present purposes, it suffices to note that it may offer a more intellectually honest way than the classification-based approach of capturing one's intuition that some discriminations are generically of more concern to equality than other discriminations.

---

[65] An interesting example is a discrimination based on wealth. The poor are not a discrete and insular minority; wealth is a relatively mutable characteristic. Yet the courts have treated discriminations on the basis of wealth with some scepticism. *State (McIlhagga) v. Governor of Portlaoise Prison* Unreported, Supreme Court, 29 July 1971 suggested that discrimination on the basis of wealth was troublesome, but not made out on the facts of the case. In *de Búrca v. Attorney General* [1976] IR 38; (1977) 111 ILTR 37, the Supreme Court unanimously struck down a property qualification for jury service. Indeed, in *Redmond v. Minister for Environment* [2001] 4 IR 61, at 80, Herbert J. spoke of discriminations on the basis of wealth in a way that reflected concern for human equality:

> In my judgment a law which has the effect, even if totally unintended, of discriminating between human persons on the basis of money is an attack upon the dignity of those persons as human beings who do not have money.... The history of poverty and of social deprivation in Ireland, but by no means exclusively in Ireland, demonstrates overwhelmingly the extent to which the essential dignity of persons as human beings is involved. In my judgment this is exactly the type of discrimination for which the framers of the first sentence of Article 40.1 were providing.

Conclusion

The courts' interpretation of the phrase, "as human persons", has been much maligned. Unfortunately much of the academic commentary has failed to observe an important distinction in the case law between a "context of discrimination" approach and a "basis of discrimination" approach. Although the former conception, buttressed by a highly essentialist view of the human personality, is rightly criticised as denying all scope for equality inquiry, the latter conception creates the potential for an egalitarian moment in Irish constitutional law by establishing a heightened standard of review where objectionable grounds of classification are implicated. Some recent cases suggest that this potential might be realised, although it is too early to say whether the suggestions in those cases will be seen by the courts as founding a constitutional doctrine. In chapter nine I shall consider the different ways in which such a doctrine might develop.

---

[66] See Balkin, "The Constitution of Status" 106 *Yale Law Journal* 2313 (1997). See also Fiss, "Groups and the Equal Protection Clause" 5 *Philosophy and Public Affairs* 107 (1976).

Chapter Seven

Sex and Sexuality

Introduction

Sex inequality is the most significant area of substantive inequality to have been constitutionally addressed in a real and ongoing way by the Irish courts. It is also an area which has attracted a lot of theoretical criticism. For this reason, it provides a useful illustration of the process conception of equality. The case law can be divided into a number of discrete topics. In chapter ten, I shall consider a critique of some of this case law from the perspective of substantive equality.

The Feudal Relics

The traditional common law view of marriage stipulated that the legal existence of the wife was incorporated into that of the husband. Although this rationale and explanation of marriage had clearly collapsed by 1937, a number of common law rules based on this rationale subsisted. These rules made assumptions about the roles of husband and wife which were incompatible with any idea of equality within marriage. The Constitution has been successfully invoked to challenge such rules, initially by reference to the constitutional support for family and marriage but increasingly by reference to the equality guarantee.

In re Tilson, infants[1] concerned a dispute between an estranged couple. The Protestant husband had signed an undertaking that any children of the marriage would be brought up as Roman Catholics. However, following the estrangement, he removed three of the four children from the house of the mother's parents, where the family had been residing, and took them to live with his own parents. He subsequently moved them to a Protestant institution. The common law rule applicable to this case had been stated by Lord O'Hagan L.C. in *re Meades, minors.*[2] The Lord Chancellor held that a father's authority to guide and govern the education of his children was of paramount importance and that an ante-nuptial

---

[1] [1951] IR 1; (1952) 86 ILTR 49. For a general discussion of this case see Hogan, "A Fresh Look at *Tilson's* Case" (1998) 33 (ns) *Ir. Jur.* 311.
[2] (1870) IR 5 Eq 98.

agreement that the children should be Catholics was not of binding force in law. In the High Court, Gavan Duffy P. considered the common law doctrine to be incompatible with the spirit and purpose of Articles 41, 42 and 44 but did not make any specifically equality-related points.

In the Supreme Court, Murnaghan J. delivered a judgment with which Maguire C.J., O'Byrne J. and Lavery J. agreed. He relied on Article 42.1 which refers to the "inalienable right and duty of parents to provide ... for the ... education of their children". He argued that the fact that the word "parents" was in the plural meant that it should include both father and mother: the duty of education was a joint duty:

> In my opinion the true principle under our Constitution is this. The parents – father and mother – have a joint power and duty in respect of the religious education of their children. If they together make a decision and put it into practice it is not in the power of the father – nor is it in the power of the mother – to revoke such decision against the will of the other party.[3]

Black J. dissented. Although he considered that it would be highly desirable to construe Article 42 of the Constitution so as to alter the common law rule, which he described as a "relic of barbarism", he concluded that such a construction was not open. He read Article 42.1 as a guarantee to respect a right and duty, on the part of parents, that already existed. Article 42.1, therefore, merely recognised a mother's pre-existing right, i.e. a right "subordinate in the last resort to the father's overriding dictatorship as recognised by the common law".[4]

Tilson is a significant, early demonstration of the reach of the Constitution. The majority derived from Articles 41 and 42 a principle of spousal equality capable of overturning many out-dated common law rules. The Court did not rely on Article 40.1 which appears not to have been cited in argument. Although too much should not be read into this omission, it does suggest an early preference for thinking in terms of the family rather than equality.

---

[3] [1951] IR 1, at 34; (1952) 86 ILTR 49, at 66.
[4] *Ibid.*, at 40; 70.

Nevertheless, as the potential of the rule of spousal equality was realised in a number of later cases, Article 40.1 began to be called in aid as a rationale for the rule.

In *State (DPP) v. Walsh*,[5] the Supreme Court considered the common law defence of coercion which had been available to a wife in regard to certain offences if the act in question was done by her in the presence of her husband. It was a *prima facie* presumption rebutted by evidence of initiative on the part of the wife. Henchy J. decided that, even though there was evidence of such initiative in the present case, he would consider the constitutional point. He considered that such a rule presupposed a disparity in status and capacity between husband and wife which ran counter to the normal relations between a married couple in modern times:

> A legal rule that presumes, even on a *prima facie* and rebuttable basis, that a wife has been coerced by the physical presence of her husband into committing an act prohibited by the criminal law, particularly when a similar presumption does not operate in favour of a husband for acts committed in the presence of his wife, is repugnant to the concept of equality before the law guaranteed by the first sentence of [Article 40.1] and could not, under the second sentence of that Article, be justified as a discrimination based on any difference of capacity or of social function between husband and wife.[6]

This reasoning is notable primarily for its reliance on Article 40.1 in place of Article 41. This is relevant in that it suggests a greater willingness, on the part of the courts 30 years after *Tilson*, to think in terms of equality. The style of reasoning is also interesting. It is not explained why precisely Article 40.1 is breached; it seems almost to be taken as self-evident. One does not see the sort of detailed probing of the second sentence undertaken by Walsh J. in *de Búrca v. Attorney General*,[7] considered below; instead, there is just a ringing declaration that Article 40.1 is breached. Although this ringing declaration was perhaps appropriate to the character of the rule under consideration, it did deprive the courts of guidance in future cases where the inequality was more contestable.

---

[5] [1981] IR 412.
[6] *Ibid.*, at 450.
[7] [1976] IR 38; (1977) 111 ILTR 37.

In *S. v. S.*,[8] the High Court considered a rule of law, extant in 1937, that prohibited the admission of the evidence of a wife to prove that a child borne to her during wedlock was not the child of her husband. O'Hanlon J. concluded that the rule had not survived the enactment of the Constitution as it breached the fair procedures implicitly guaranteed by Article 40.3. Equality arguments were not considered, although some sense of equality must presumably have informed the decision.

In *M. v. M.*,[9] Barr J. concluded that the dependent domicile rule, whereby a wife was deemed to have the domicile of her husband, had not survived the enactment of the Constitution. He relied on equality principles in this regard:

> I would have no hesitation whatever in holding that the old rule was a relic of matrimonial female bondage which was swept away by principles of equality before the law and equal rights in marriage as between men and women which are enshrined in the Constitution – see in particular [Article 40.1 and 40.3 and Article 41].[10]

At a later stage in the litigation, Barr J. reiterated his views on the constitutional aspects of the case.[11] He stated that the dependent domicile rule was inconsistent with the philosophy of Article 41 as to the status and rights of married women. In his view, the rule breached Article 40.1 and, a more novel proposition, an unenumerated right to an independent domicile under Article 40.3. This conclusion that the dependent domicile rule was unconstitutional was approved by the Supreme Court in *W. v. W.*[12] Nevertheless, members of the Court adopted different approaches to this issue.

Hederman J. decided the issue on the basis of Article 40.1. His judgment is useful as it provides a somewhat more detailed analysis of the equality guarantee, in particular the second sentence thereof:

---

[8] [1983] IR 68.
[9] [1990] 2 IR 52; [1988] ILRM 456.
[10] *Ibid.*, at 63; 470.
[11] [1991] ILRM 268.

> Although the married state could be regarded as a social function for the purposes of the second paragraph of [Article 40.1], it is equally so for both spouses and there can be no sex discrimination between equals. The former rule judge-invented of dependent domicile of a wife discriminated against, (or distinguished between the spouses) on the grounds of sex only. In the second paragraph of [Article 40.1] a distinction on the grounds of social function is reserved by the Constitution to "enactments". A common law rule does not so qualify.[13]

Hederman J. thus advanced two independent grounds for his decision: first, marriage is a union of equals and, accordingly, there can be no discrimination as between husband and wife; secondly, even if there were a difference in social function, common law rules may not have due regard to such differences. This latter proposition coheres with the *dicta* in *East Donegal Cooperative v Attorney General*,[14] but has not been stated elsewhere in the case law. It can be justified by reference to the word "enactments" in the second sentence of Article 40.1.[15] The former proposition, more relevant to the current context, is consistent with the general approach of the courts to these discriminatory social rules: the equality of spouses is derived from the guarantee of equality and not from the protection of the family and marriage. Hederman J. confirmed that Article 41 consequently did not arise for decision in the case.

Blayney J. also considered that the rule was inconsistent with Article 40.1. It put married women in a position of inequality both by comparison with their husbands and by comparison with unmarried women. Again, Blayney J. felt that it was not necessary to consider the impact of Article 41. Egan J. took a slightly more expansive view of the issue, holding that the dependent domicile rule resulted in married women not being held equal with single women or with men, whether single or married. This inequality, in his view, had nothing to do with differences of capacity, physical or moral, or social function, although he did not elaborate on

---

[12] [1993] 2 IR 476; [1993] ILRM 294.

[13] *Ibid.*, at 485; at 300. (There is a number of differences between the version of this extract in the Irish Reports and the Irish Law Reports Monthly. I have cited the version from the Irish Reports.)

[14] [1970] IR 317; (1970) 104 ILTR 81.

[15] By operation of the maxim *expressio unus est excuiso alter*. It is questionable, however, whether such a maxim is appropriate to constitutional interpretation.

why that was not the case. He then considered Article 41 as a potential restriction on Article 40.1 but concluded that there was "nothing whatever in Article 41 which could or ought disentitle a married woman to the equality which is guaranteed to her by Article 40."[16]

The judgments in *W. v. W.* are noteworthy for two things. First, in contrast to some of the other judgments in which feudal relics were excised from the common law, some arguments – as opposed to just declarations – of equality were made. Secondly, Article 40.1 rather than Article 41 was seen as the rationale for the equality of spouses. Indeed Egan J. even considered Article 41 as potentially restrictive of equality in this regard. This change of rationale has arguably shifted the focus from spousal equality to sex equality generally.[17] Thus Egan J. recognised that the dependent domicile rule effected an inequality not just between a wife and her husband but also between married women and all men, and indeed between married women and single women.

In *McKinley v. Minister for Defence*,[18] the plaintiff challenged as unequal the common law tort of loss of consortium which allowed a husband to sue for loss of consortium where injuries were suffered by his wife, but afforded no corresponding cause of action to the wife where injuries were suffered by the husband. It was agreed by the parties to the case that this cause of action breached the guarantee of equality in Article 40.1, a view with which some members of the Court expressly agreed. Again Article 40.1 was the main basis for the decision, although Hederman J. expressed the view that the case was not about a discrimination in favour of men but about the "status which the Constitution gave to marriage and to married women in particular".[19]

Given the change in rationale, the spousal equality cases can be seen as support for a general principle of sex equality.[21] Nevertheless, these cases each concerned a fairly clear

---

[16] [1993] 2 IR 476, at 493; [1993] ILRM 294, at 316.
[17] There are perhaps parallels with the doctrinal shift from marital privacy to individual privacy.
[18] [1992] 2 IR 333.
[19] The issue for decision in the case – whether the cause of action should be removed or extended to women – is not relevant here. For discussion, see chapter four.
[21] *L. v. L.* [1992] 2 IR 77; [1992] ILRM 115, in which the plaintiff spouse argued for a beneficial interest in the family home on account of her work done in the home, is notable as a recent case in which the courts considered spousal equality without citing Article 40.1.

cut denial of civil equality. The difference in treatment was both obvious and archaic. The concept of difference becomes more problematic in other cases. It is these cases which illustrate the character of the courts' constitutional commitment to sex equality.

Fatherhood

Apart from a rhetorical reference in the Preamble, fathers are not explicitly mentioned in the Constitution. Article 43 refers to "man" but apparently in a neutral sense. Men are referred to in Article 45, but in the context of asserting their equality to women. This contrasts with the situation concerning women. Article 41.2 posits an idealised notion of women and mothers, which terms seem interchangeable, contributing to the welfare of the State through their work in the home. No corresponding image of men is provided and the concept of men as fathers, in the parental rather than ancestral sense, is missing from the Constitution. This is not to say that fathers do not have rights under the Constitution. As noted above, Article 41 pledges the State to guarantee and guard the family and the institution of marriage on which it is founded. Within this model, parents are given equal rights and responsibilities as regards the upbringing of their children. Duly married fathers thus have many rights under the Constitution. Problems arise, however, where that "natural order" is disturbed and a single father presents himself to the courts. The courts have generally adopted an unsympathetic view of such fathers; their attempts to deal with this problem provide a telling insight into judicial views on appropriate gender roles.[22]

In *State (Nicolau) v. An Bord Uchtála*,[23] a divisional High Court and the Supreme Court considered the rights of a non-national, unmarried father of a child whom the mother had placed for adoption. The divisional High Court did not give much consideration to the substantive argument under Article 40.1, instead focusing on the capacity of the prosecutor, a non-citizen, to invoke the equality guarantee. Henchy J., however, did give some consideration to the substantive equality argument. This argument asserted that the denial of any rights to the father of an illegitimate child in adoption proceedings amounted to an

---

[22] For general discussion of the courts' views on gender roles see Flynn, "To be an Irish Man – Constructions of Masculinity in the Constitution" in Murphy and Twomey (eds), *Ireland's Evolving Constitution* (Oxford, 1998) and Flynn, "Missing Mary McGee: The Narration of Woman in Constitutional Adjudication" in Quinn, Ingram and Livingstone (eds), *Justice and Legal Theory in Ireland* (Oak Tree Press, 1995).

unconstitutional discrimination vis-à-vis the mother and vis-à-vis other persons who were given rights. The rights concerned were the right to be heard and the right to veto an adoption (i.e., the consent requirement).

Henchy J. rejected the argument on the following basis. Sections 14(1) and 16(1) of the Adoption Act, 1952 excluded all persons from the adoption process except the specified persons. Section 14(1) provided that the consent of the child's mother, guardian or any person having charge of or control over the child had to be obtained prior to the making of an adoption order, save in specified circumstances. These specified persons also had a right, under section 16(1), to be heard before the making of the order as did the applicant adoptive parents, a relative of the child on the mother's side, a representative of a registered adoption agency which was or had been concerned with the child, a priest or minister of a religion recognised by the Constitution where the child or parent is claimed to be of that religion,[24] an officer of the Board and any other person whom the Board, in its discretion, may decide to hear. On this basis, Henchy J. rejected the argument that there was any sex discrimination at issue:

> There is, therefore, no exclusion of, or discrimination against, the natural father as such. If he is excluded, it is because, in common with other blood relations and strangers, he happens not to fall within one of the categories of persons who are given rights. The question, therefore, is: was it a compliance with Article 40.1 to give those rights to the persons specified while withholding them from the persons not specified?[25]

Henchy J. considered that all persons granted rights under the sub-section had, or were capable of having, as regards adoption, a "capacity, physical or moral, or a social function which the Legislature could fairly say differentiates them from the persons who are not accorded those rights".[26] Although a "more nearly ideal differentiation" might have been possible, the prosecutor had not established that Article 40.1 had been breached.

---

[23] [1966] IR 567; (1968) 102 ILTR 1.
[24] This is a reference to Article 44.3 of the Constitution, deleted by referendum in 1972.
[25] [1966] IR 567, at 620; (1968) 102 ILTR 1, at 30.
[26] *Idem.*

A close perusal of the sections demonstrates that an unmarried father might have rights in the adoption process as he might be a person having control over or charge of the child. As "relative" is defined in section 3 to be limited to relatives on the mother's side,[27] the unmarried father could not have rights under that heading unless some form of incest had led to the pregnancy. That an unmarried father may have rights, however, does not preclude the existence of sex discrimination. For the mother is given an automatic right to be heard and the father is given no such right. Although sections 14 and 16 effected a distinction between those closely involved with the child and those not so closely involved, they also effected a distinction between mothers and fathers. Henchy J. side-stepped this issue.

The judgment of the Supreme Court, on appeal, was delivered by Walsh J. He posited a view of Article 40.1 already considered in chapter four: Article 40.1 was not a guarantee of absolute equality; instead it was a guarantee of human equality. Further, it did not "envisage or guarantee equal measure in all things to all citizens".[28] That would have been inequality, given the special abilities, needs or deficiencies which people might have had. Walsh J. adopted the same analysis, almost word for word, of the discrimination as had Henchy J.[29] However, he offered a more detailed examination of the difference of capacity and social function which distinguished unmarried fathers from those granted rights under the section:

> When it is considered that an illegitimate child may be begotten by an act of rape, by a callous seduction or by an act of casual commerce by a man with a woman, as well as by the association of a man with a woman in making a common home without marriage in circumstances approximating to those of married life, and that, except in the latter instance, it is rare for a natural father to take any interest in his offspring, it is not difficult to appreciate the difference in moral capacity and social function between the natural father and the several persons described in the sub-sections in question.[30]

---

[27] This definition of relative seems to be further evidence of the sex discrimination effected by sections 14 and 16.
[28] [1966] IR 567, at 639; (1968) 102 ILTR 1, at 40.
[29] *Ibid.*, at 641; 41.

This portion of Walsh J.'s reasoning perhaps illustrates what Henchy J. had meant by his suggestion that sections 14 and 16 effected a less than ideal differentiation. Walsh J. relied on a very broad category of unmarried fathers to justify the difference in treatment. A more focused differentiation which took cognisance of the differences between unmarried fathers to which Walsh J. alluded might have better satisfied a general principle of sex equality. By justifying the difference in treatment by reference to such an unfocused difference in situation, Walsh J. was implicitly approving a very low standard of review. Differences in treatment could be justified by reference to very generalised differences in the situations of men and women.

In *K. v. W.*,[31] the Supreme Court revisited the question of the rights of unmarried fathers, this time in the context of a guardianship application. In assessing Barron J.'s interpretation of section 6A of the Guardianship of Infants Act, 1964, Finlay C.J. followed *Nicolau* and rejected the contention that an unmarried father had a constitutional or natural right to the guardianship of his child,[32] although he conceded that there might be rights of interest or concern arising from the blood link. Resiling from Walsh J.'s broad category of unmarried father in *Nicolau*, Finlay C.J. added:

> The extent and character of the rights which accrue arising from the relationship of a father to a child to whose mother he is not married must vary very greatly indeed, depending on the circumstances of the individual case.
>
> The range of variation would, I am satisfied, extend from the situation of the father of a child conceived as the result of casual intercourse, where the rights might well be so minimal as practically to be non-existent, to the situation of a child born as the result of a stable and established relationship and nurtured at the commencement of his life by a his father and mother in a situation bearing nearly all of the characteristics of a constitutionally protected family, when the rights would be very extensive indeed.[33]

---

[30] *Idem.*

[31] [1990] 2 IR 437; [1990] ILRM 121.

[32] McCarthy J. dissented on this point, holding that an unmarried father, who formed part of a stable, loving relationship, did have a natural right to the society of his child. *Ibid.*, at 449; 128-9.

[33] *Ibid.*, at 447; 126. When the case returned to the High Court, Barron J. held that to take account of socioeconomic factors in determining a custody dispute "would be to favour the affluent as against the less well-

This suggested that, although the conclusion in *Nicolau* stood, some of the reasoning necessary to justify that conclusion no longer found favour with the courts.[34] In *O'R. v. H.*,[35] the Supreme Court again considered the proper construction of section 6A. Hamilton C.J. agreed with Finlay C.J.'s endorsement, given in *K.. v. W.*, of Walsh J.'s decision in *Nicolau*. The case is perhaps most interesting for the attack of Barrington J., who had been counsel for Mr. Nicolau 30 years previously, on the reasoning in *Nicolau*. Describing the reasoning of Walsh J. as "fundamentally flawed" and "inadequate", Barrington J. focused on the way in which the Court had chosen to side-step the issue of sex discrimination:

> The Adoption Act, 1952, does expressly exclude the natural father from the category of "parent". Under these circumstances it is hardly sufficient to say to him that he is not excluded; he merely fails to come within the category of persons who are included. This was particularly relevant to [*Nicolau*] where the evidence showed that the category of persons included was not wide enough to catch the prosecutor whom the Court accepted to be a concerned and caring parent. Moreover, once the Court had accepted that the prosecutor was a concerned and caring parent it was not logical to justify his exclusion by a reference to natural fathers who had no interest in the welfare of their children. This was to fall into the logical trap [which the Court had identified] by treating equally persons who were in different situations, and amounted therefore to unfair discrimination.[36]

Barrington J. was correct to observe that Mr Nicolau was excluded from consideration and that this was a sex discrimination. Nevertheless, his criticisms of Walsh J.'s use of the undifferentiated unmarried father only make sense if one interprets Article 40.1 as an obligation on the Oireachtas to take into account relevant differences and not simply as permission to do so where they wish. The latter version, Aristotle-lite, is generally preferred

---

off which does not accord with the constitutional obligation to hold all citizens as human persons equal before the law". *K. v. W. (No. 2)* [1990] ILRM 791, at 799. For a discussion of the implications of this dictum, see Byrne and Binchy, *Annual Review of Irish Law 1990* (Round Hall, 1991), at 320-2.

[34] In *Keegan v. Ireland* (1994) 18 EHRR 342, an appeal of this case to the European Court of Human Rights, it was held that some paternal rights to custody were guaranteed by the Convention. This demonstrated that it was possible for courts to differentiate within the category of "unmarried father" in a manner not adopted by Walsh J. in *Nicolau*.

[35] [1996] 2 IR 248.

by the courts, as I argued in chapter four. For Mr Nicolau to have succeeded, consistently with other cases, he would have had to have persuaded the court that he was similarly situated to the unmarried mother, not simply that he was differently situated to unworthy fathers who, all would agree, should not be given rights in the adoption process. In order to receive equal treatment from the courts, one must show that one is similarly situated to the person who is treated in the way which one claims to be one's due.

The courts' treatment of unmarried fathers contrasts with the treatment of an adopting widower in *O'G. v. Attorney General*.[37] The plaintiff and his wife had obtained custody of a little boy but, prior to the making of an Adoption Order, the plaintiff's wife died in a car accident. Although evidence was adduced that the child's welfare would be best served by his remaining with the plaintiff, section 5(1) of the Adoption Act, 1974 precluded adoption orders from being made in favour of childless widowers. Even if the plaintiff had had another child in his custody, section 5(1) rendered his right to an adoption order subject to renewed consent from the boy's mother. The plaintiff argued that this constituted an unconstitutional discrimination between widowers and widows, as the latter were not subject to the restrictions set out in section 5(1). McMahon J. did not accept that there was any difference between widowers and widows, or between men and women, which justified this sex discrimination:

> Widowers as a class are not less competent than widows to provide for the material needs of children and their exclusion as a class must be based on a belief that a woman by virtue of her sex has an innate capacity for parenthood which is denied to a man and the lack of which renders a man unsuitable as an adopter. This view is not supported by any medical evidence adduced before me and the fact that s. 5 permits a widower who already has custody of a child to adopt another appears to be an admission that a man may acquire skills or capacities necessary to be an adopter.[38]

---

[36] *Ibid.*, at 279-80.
[37] [1985] ILRM 61.
[38] *Ibid.*, at 64.

Having rejected the possibility of any scientific basis for the discrimination, McMahon J. considered an argument based on the second sentence of Article 40.1. Counsel on behalf of the Attorney General argued that although being of either sex was not of itself to have a social function, the law "may have regard to the fact the certain functions are more usually performed by one person and the functions of widow or widower are motherhood or fatherhood and adoption legislation recognises this difference".[39] McMahon J., however, noted that, although the culture of Irish society had traditionally assigned distinct roles to father and mother, this appeared to be changing, particularly among the younger generation. Again, no scientific or medical evidence had been adduced to explain the difference between the posited roles, their significance for the welfare of the child and whether they were mutually exclusive. He thus rejected the argument based on Article 40.1. He further rejected an argument based on Article 41.2 for, although that article recognised the value of a mother's work in the home, it did not involve "a denial of the capacity of widowers as a class to be considered on their merits as suitable adopters".[40] He concluded that Article 40.1 had been breached.

McMahon J.'s judgment is interesting for a number of reasons. In contrast to Walsh J. in *Nicolau*, McMahon J. was very quick to conclude that section 5(1) effected a discrimination on the basis of sex between widowers and widows. It is of course the case that section 5(1) explicitly excluded widowers whereas the sections at issue in *Nicolau* excluded unmarried fathers only by omission. Nevertheless, it could surely have been argued that there was not a discrimination between widowers and widows but rather a discrimination between certain persons who could adopt and other who could not, including childless widowers and unmarried persons of both sexes. This may not be the most convincing argument, but it does point up a difference of approach as between *Nicolau* and *O'G.*

Also noteworthy is McMahon J.'s reliance on scientific evidence, and indeed the lack thereof presented on behalf of the Attorney General. McMahon J.'s faith in the scientific evidence is used to discount both an argument that widowers are not well equipped for parenting and that there are distinct parenting roles ascribed to men and women. Given the emphasis

---

[39] *Idem.*
[40] *Ibid.*, at 65.

placed on the failure of the State to adduce supporting scientific evidence, one wonders whether the constitutionality of section 5(1) could have been established had the State defended the case more strongly. Surely there is some scientific support, albeit contested, for the notion of distinct parenting roles and for the importance of a maternal figure? Admittedly, such evidence would perhaps be better support for a rigid two-parent rule in adoptions as opposed to a rule which allows widows but not widowers to adopt. Nevertheless, one suspects that the defence of section 5(1) may not have been argued as vigorously as possible.[41] If this is the case, *O'G.* may not be as strong a judicial statement against sex discrimination as it is sometimes taken to be.

A further interesting point in the judgment is the reference to changing social attitudes. McMahon J. referred to the fact that traditional gender and parenting roles were breaking down. This implies that if social attitudes had been strongly against fathers as lone parents, the discrimination would have been permissible. This implication supports the further proposition that the more deeply entrenched an inequality is, the more it looks like a real "difference in situation", and the less likely it is to be remedied by the courts. This discussion raises the important question of what the courts' role should be in a time of social change. *O'G.* suggests that the courts need not wait for the Oireachtas to decide that change is appropriate and may sometimes participate in that process of change, thus accelerating the pace at which change occurs. This is somewhat out of step with the generally deferential approach of the courts as seen in cases such as *Nicolau* and *Lowth v. Minister for Social Welfare*,[42] discussed below. On the other hand, if the courts accept the general proposition that difference in situation is (largely) a matter of social attitudes and that those social attitudes can change, should the courts ever be deferential to the assessment of the Oireachtas as to what is a difference in situation?

Civil Equality in a Legislative Context

As well as considering feudal relics, the courts have addressed a number of legislative infringements of civil equality on the grounds of gender. Their approach in this regard has

---

[41] It is perhaps worth noting that the case was argued by only one junior counsel and that the decision was not appealed.

[42] [1998] 4 IR 321; [1994] 1 ILRM 378 (HC); [1999] 1 ILRM 5 (SC).

been more circumspect. In *de Búrca v. Attorney General*,[44] the plaintiff challenged provisions of the Juries Act, 1927 which ostensibly discriminated against non-landowners and against women. The latter discrimination is relevant here. Section 5 of the Act exempted women from jury service, but section 16 allowed women to apply to have their names inserted on the jury list, rendering themselves liable for jury service. Within the ten years prior to the trial of the action, only two women had served on juries. Civil equality is seriously prejudiced by such a rule. Voting and jury service are the two ways in which one most closely partakes in the political and civil structures of the State. They are essential badges of citizenship and any discrimination in this regard undermines, at the most basic and formal level, civil equality before the law.

In the High Court, Pringle J. upheld section 5 referring to the context of discrimination human personality doctrine, the fact that there was no absolute exclusion, and Article 41.2.[45] On appeal, O'Higgins C.J. agreed with the conclusion of Pringle J. Although he thought it immaterial whether one viewed jury service as a right or obligation, he held that it was neither incongruous nor inappropriate for the State under Article 40.1 to "temper or cushion obligations generally imposed in so far as they affect women".[46] He cited Article 41.2 as support for this conclusion: special provision for women was permissible under the second sentence of Article 40.1 and almost mandatory under Article 41.2. This reasoning depends on jury service being seen as an obligation. With regard to jury service as a right, O'Higgins C.J. concluded that the right, if there was one, was adequately vindicated by allowing women to "opt in" to jury service. The decision was left to the woman herself and the right to serve was preserved for her. O'Higgins C.J. also rejected arguments based on Article 38.5 of the Constitution, which guarantees the right to a jury trial subject to certain exceptions. Such arguments focus on the rights not of those excluded from jury service but of those who are tried before juries drawn from a jury list that is not representative of the population. Although

---

[44] [1976] IR 38; (1977) 111 ILTR 37.

[45] "In particular, the State recognises that by her life within the home, woman gives to the State a support without which the common good cannot be achieved. The State shall, therefore, endeavour to ensure that mothers shall not be obliged by economic necessity to engage in labour to the neglect of their duties in the home." Describing Article 41.2 as a "dated provision", the Constitution Review Group recommended that it be replaced with a gender neutral version. *Report of the Constitution Review Group* (Stationery Office, 1996), at 333-4.

[46] [1976] IR 38, at 59; (1977) 111 ILTR 37, at 47.

O'Higgins C.J. accepted that the Juries Act effectively resulted in woman-less juries, he did not see this as problematic in terms of Article 38.5:

> The right to jury trial means the right to be tried by a jury drawn indiscriminately from those eligible for jury service. This does not entitle an accused person to have a jury of a particular composition or of a particular suitability (in his or her view) in relation to the offence charged.[47]

This reasoning views the pool of possible jurors as a discrete issue from the guarantee of jury trial. Once jurors are drawn indiscriminately from the pool of those eligible, there is no infringement of the right to a jury trial. Pursued to its logical conclusion, this could produce some troubling results. O'Higgins C.J.'s reasoning here would deem constitutional a law which prescribes that only employees of the Chief State Solicitor's Office could be eligible for jury service, provided that jurors were drawn indiscriminately from that select group of people. Such reasoning seriously circumscribes the scope of Article 38.5.

The remaining judges of the Court disagreed with the Chief Justice. Budd J. offered no reasons for his conclusion. Henchy and Griffin JJ. decided on the basis of Article 38.5 whereas Walsh J. decided on the basis of Article 40.1. I shall consider first the judgment of Walsh J. before considering the alternative approach.

Some consideration has already been given to Walsh J.'s judgment in chapter four. I shall here focus on how he characterise the sex discrimination at issue. Although he recognised that Article 41.2 stressed the importance of women's life within the home, he considered that women fulfilled many other functions in society. Accepting that jury service could be viewed either as a privilege or as a burden, he held that discrimination on either count would be problematic. He considered that the reference to social function and moral and physical capacity in Article 40.1 applied both to men and to women. The flaw with the legislation was that it presumed a unitary social function on the part of women and differentiated on that basis:

---

[47] *Ibid.*, at 61; 48.

> There can be little doubt that the Oireachtas could validly enact statutory provisions which could have due regard, within the provisions of Article 40, to differences of capacity both physical and moral and of social function in so far as jury service is concerned. For example, it could provide that all mothers with young children could be exempt from jury service. On virtually the same considerations, it could provide that all widowers, husbands with invalid wives, and husbands deserted by their wives would be entitled to a similar exemption if they were looking after their young children....
>
> However, the provision made in the Act of 1927, is undisguisedly discriminatory on the ground of sex only. It would not be competent for the Oireachtas to legislate on the basis that women, by reason only of their sex, are physically or morally incapable of serving and acting as jurors. The statutory provision does not seek to make any distinction between the different functions that women may fulfil and it does not seek to justify the discrimination on the basis of any social function. It simply lumps together half of the members of the adult population, most of whom have only one thing in common, namely, their sex. In my view, it is not open to the State to discriminate in its enactments between the persons who are subject to its laws solely upon the ground of the sex of those persons. If a reference is to be made to the sex of a person, then the purpose of the law that makes such a discrimination should be to deal with some physical or moral capacity or social function that is related exclusively or very largely to that sex only.[48]

Walsh J. referred to the fact that whereas ten of the eleven exempted categories in the Act were in some way referable to social functions, one was not. It referred simply to "women":

> To be of either sex, without more, is not *per se* to have a social function within the meaning of Article 40 of the Constitution.... Clearly some social functions must necessarily depend upon sex, such as motherhood or fatherhood. In the proper context, due recognition may also be given by the law to the fact that certain social

[48] *Ibid.*, at 71; 53-4.

> functions are more usually performed by one sex rather than by the other. The essential test in each such case is the function and not the sex of the functionary.[49]

If one relates these comments to Walsh J.'s earlier general analysis of equality, one can perhaps draw some more general conclusions as to his understanding of sex equality. As will be recalled, Walsh J. suggested that Article 40.1 endorsed the Aristotelian conception of equality; it did not require identical treatment of all persons without recognition of relevant differences, but it required that one treat equals equally and unequals unequally. His view that sex *per se* did not amount to a social function and was thus not in itself a legitimate ground of differentiation suggests that he viewed men and women as equals who must be treated equally under the Aristotelian conception. Women and men may perform different functions and those functions may be treated differently, but the differential treatment must always be justified in terms of the function and never simply in the terms of the sex of the functionary. This in turn implied that sex should not be used as a proxy for other more particular functions, thus requiring that some legislation should be closely tailored to reflect the difference in social function. Sex may be a convenient proxy but it is not a constitutionally acceptable proxy.[50] If a woman can demonstrate that she is similarly situated to a man, she should receive the same treatment as a man. Mere difference in sex is insufficient reason to justify difference in treatment.

Henchy and Griffin JJ. approached the issue in terms of Article 38.5. Henchy J. considered Article 38.5 to be a more appropriate ground of decision as the plaintiffs came before the Court as accused persons, not as would-be jurors. He considered that a jury "must be drawn from a pool broadly representative of the community so that its verdict will be stamped with the fairness and acceptability of a genuinely diffused community decision".[51] This did not require that the Oireachtas establish the widest possible pool of jurors, but it did require that the Courts scrutinise all limitations imposed on that pool. In his view, the Act was the foundation for the all-male jury. Such a jury failed the test of representativeness in that it excluded half of the adult population from jury service. Furthermore, this excluded women's

---

[49] *Ibid.*, at 72; 54.

[50] It is questionable whether this approach coheres with that taken in *Nicolau*. In that case, Walsh J.'s use of the broad, unfocused category of "unmarried father" treated all unmarried fathers as one category, disregarding the real differences between them. This reasoning practically viewed sex *per se* as a difference in function.

"experience, understanding, and general attitude" from jury processes leading to a verdict.[52] Griffin J. reached the same conclusion based on similar concerns for representativeness.[53]

Somjee v. Minister for Justice[54] posed a more basic issue about access to citizenship in the first instance. The first-named plaintiff had married his wife, the second-named plaintiff, an Irish citizen and applied for Irish citizenship one year later. This application was refused, but the Minister, in his discretion, reduced the residency requirement from five years to two years. This procedure was followed pursuant to sections 15 and 16 of the Irish Nationality and Citizenship Act, 1956. In contrast, section 8 of the Act provided that women who married Irish citizens could acquire Irish citizenship immediately, once they made and lodged a declaration.[55] This discrimination was challenged by the plaintiffs as a breach of Article 40.1 and of Article 9.1.3°.[56]

Keane J. accepted that a diversity of arrangements existed but stated that the plaintiffs had to show that the discrimination was arbitrary. He noted that there was no discrimination between male and female applicants for citizenship *per se*. The discrimination only arose in the context of aliens becoming married to Irish citizens. Keane J. then proferred a number of reasons as to why this discrimination was not unconstitutional. First, he observed that the distinction drawn was really the conferral of a privilege on female aliens rather than being invidiously discriminatory against male aliens. He presumed that the Oireachtas, in drawing this distinction, which was not necessarily invidious, was having regard to the social, economic and political conditions prevalent in some of the States from which alien applicants for citizenship might come. Secondly, viewing the law as a discrimination against the second-named plaintiff, the Irish citizen, he considered it inappropriate terminology to say that an Irish male citizen could confer citizenship on his spouse by marrying her. Having regard to the language of Article 9.1.2°, he concluded that citizenship was conferred by law and that,

---

[51] [1976] IR 38, at 75; (1977) 111 ILTR 37, at 56.
[52] *Ibid.*, at 78; 57.
[53] Griffin and Henchy JJ.'s reliance on Article 38.5 in preference to Article 40.1 is not as questionable as the courts' preference for rights over equality, as demonstrated in cases such as *Murphy v. Attorney General*. In this case, given that the plaintiff was a person who was to be tried by a jury rather than a person who had been excluded from jury service, Article 38.5 may have been the more appropriate ground of decision.
[54] [1981] ILRM 324.
[55] Section 8 was amended by section 3 of the Irish Nationality and Citizenship (Amendment) Act, 1986 to impose a three year waiting period on all persons marrying Irish citizens, irrespective of their sex.
[56] "No person may be excluded from Irish nationality and citizenship by reason of the sex of such person."

accordingly, the second-named plaintiff had no right in law to confer citizenship on her spouse. If she did have a right and it was abridged, he was satisfied that such was done in the interests of the common good. Thirdly, he considered that the first-named plaintiff was not excluded from citizenship on the basis of his sex; accordingly, there was no breach of Article 9.1.3° nor of Article 40.1. The presumption of constitutionality entailed a presumption that the Minister would exercise his discretion under sections 15 and 16 in accordance with the Constitution and, accordingly, would not discriminate on the basis of sex.

This reasoning is open to question on a number of points. First, in the context of a discrimination, the imposition of a burden on one group can always be construed as the conferral of a privilege on the other group, and *vice versa*. The inequality lies in the differential treatment and is not avoided by the characterisation of the issue in terms of privileges. Such characterisation adds little to the analysis. More significantly, it is questionable whether Keane J. showed too much deference to the Oireachtas in justifying the measure. It is not clear what relevance the social, political and economic conditions in the home countries of applicants may have to a discrimination between male and female applicants for citizenship. To the extent that one's country of origin connotes a social function or capacity, it does so equally for men and women. It is difficult to imagine any relevant difference in social function here which is so close to a difference in sex as to allow sex properly to be used as a proxy, particularly given the strong *dicta* of Walsh J. in *de Búrca*. Secondly, as regards discrimination against the second-named plaintiff, the point is not that she has a right to confer citizenship on her spouse but rather that the law treats an act done by an Irish woman (marriage to a non-citizen) radically differently to the same act done by an Irish man. This is a discrimination on the basis of sex. Thirdly, it is a narrow, although perhaps justifiable, reading of Article 9.1.3° to say that it is not breached by differential rules on naturalisation, provided such rules do not amount to an absolute exclusion from citizenship. The force of Article 9.1.3° combined with Article 40.1, however, given Walsh J.'s comments in *de Búrca*, would preclude any difference in treatment on the basis of sex in this context.[57] Although the presumption of constitutionality does entail a presumption that the Minister for Justice will not discriminate on the basis of sex, sections 8, 15 and 16 require the

[57] It would be begging the question to argue that the first-named plaintiff could not make such an argument on the basis that he was not a citizen and therefore not covered by the language of Article 40.1.

Minister to discriminate on the basis of sex in that he must treat male spouses of Irish citizens differently to female spouses of Irish citizens. It is thus difficult to see how the presumption of constitutionality saves the provision.

The courts' approach to civil inequality in the legislative domain has been somewhat more tentative than its approach to the common law rules that infringed civil equality. Whereas *de Búrca* provided a very strong statement of civil equality, *Somjee* was equivocal. The strong deference to legislative judgment which characterises the courts' approach to social and economic legislation was applied – perhaps wrongly – in *Somjee*.

Social Equality

The courts have traditionally been more deferential to the judgment of the Oireachtas in the social domain. In the context of sex equality this can be clearly seen in the cases of *Dennehy v. Minister for Social Welfare*[58] and *Lowth v. Minister for Social Welfare*.[59] Both of these cases challenged discriminations in the social welfare code against deserted husbands, vis-à-vis deserted wives. In each case, the courts were satisfied that there was a basis for the justification. It is, however, interesting to note how the perceived justification alters over time. In *Dennehy*, Barron J. proffered two bases for his decision. First, he suggested that it was not "unreasonable, unjust or arbitrary" as a matter of policy, having regard to Article 41.2, for the Oireachtas to protect financially deserted wives with dependent children. Secondly, he suggested that it was not unreasonable for the Oireachtas to recognise that mothers who had had to care for children would have lost out in the labour market and should therefore receive similar protection when deserted. The first of these justifications perceives a discrimination as between men and women which is justified by reference to another constitutional value. The second perceives a difference in treatment which responds to a difference in situation and accordingly is not, even *prima facie*, unequal.

In *Lowth* the same discrimination was challenged but, on this occasion, the case reached the Supreme Court.[60] In the High Court, Costello J. held that it was reasonable for the Oireachtas

[58] Unreported, High Court, 24 July 1984, Barron J.
[59] [1998] 4 IR 321; [1994] 1 ILRM 378 (HC); [1999] 1 ILRM 5 (SC).
[60] Mr Dennehy had died before the High Court decision in his case.

to conclude that "married women fulfil in Irish society a different social function to married men".[61] Also, the Oireachtas could reasonably have concluded that "married women who were deserted by their husbands require greater income support than married men who were deserted by their wives".[62] These justifications perceive a difference in situation both between wives and husbands and between deserted wives and deserted husbands. The discriminatory legislation was thus perceived as an Aristotelian response to a dissimilarity and not an inequality in itself. Nevertheless, Costello J. also approved the comments of Barron J., in *Dennehy*, as regards Article 41.2.[63] As noted above, this perceived the discrimination as a legitimate derogation from equality, justified by reference to other constitutional values.

The Supreme Court dismissed the appeal. Again, reference was made to statistical evidence which showed that fewer women were employed at the material times and, in general, received much less remuneration for the work they did do. Hamilton C.J., delivering the judgment of the Court, also made reference to Article 41.2:

> Moreover the provisions of the Constitution dealing with the family recognise a social and domestic order in which married women were unlikely to work outside the family home.[64]

The point of this reference, however, was not to justify the discriminatory legislation but rather to illustrate the context in which fewer women worked, and at lower rates of pay where they did work, to men. It assisted in establishing the difference in situation which, in the view of the Supreme Court, justified the difference in treatment. He concluded:

> It is no function of this Court to adjudicate upon the merits or otherwise of the impugned legislation. It is only necessary to conclude, as this Court has done, that there were ample grounds for the Oireachtas to conclude that deserted wives were in general likely to have greater needs than deserted husbands so as to justify

---

[61] [1998] 4 IR 321, at 332; [1994] 1 ILRM 378, at 386.
[62] *Idem.*
[63] *Ibid.*, at 333, 386-7.
[64] [1998] 4 IR 321, at 341; [1999] 1 ILRM 5, at 13.

> legislation providing for social welfare whether in the form of benefits or grants or a combination of both to meet such needs.[65]

The relaxed standard of review adopted in this case has already been noted.[66] It can usefully be contrasted with the decision of Walsh J. in *de Búrca*:

> To be of either sex, without more, is not *per se* to have a social function within the meaning of Article 40 of the Constitution.... Clearly some social functions must necessarily depend upon sex, such as motherhood or fatherhood. In the proper context, due recognition may also be given by the law to the fact that certain social functions are more usually performed by one sex rather than by the other. The essential test in each such case is the function and not the sex of the functionary.[67]

Both *Lowth* and *de Búrca* turn on the willingness of the courts to perceive a similarity of situation between the plaintiff and deserted wives or male jurors respectively. In the former case, the Supreme Court was willing to allow the Oireachtas treat difference in sex as a different in social function; in the latter case, the Supreme Court was not so willing.

The differences between the two types of case are explicable by reference to the deference shown the legislature in the social domain. This deference is explained in terms of respect to democratically elected representatives in making decisions about the allocation of resources. In *MhicMathúna v. Ireland*, Finlay C.J. suggested that such decisions were "peculiarly matters within the field of national policy to be decided by a combination of the executive and the legislature that cannot be adjudicated upon by the courts".[68] Such a view does not preclude equality in the social domain but does virtually remove the courts from adjudicating on equality in that domain. Nevertheless, it is consonant with the belief, which can be attributed to the drafters of the Constitution, that Article 40.1 guaranteed civil and political equality but did not guarantee social equality, leaving the State free to legislate its own social

---

[65] *Ibid.*, at 342; 14. There are some differences between the version of this extract in the Irish Reports and the version of this extract in the Irish Law Reports Monthly. I have quoted from the Irish Reports.
[66] See chapter five.
[67] [1976] IR 38, at 72; (1977) 111 ILTR 37, at 54.
[68] [1995] 1 IR 484, at 499; [1995] 1 ILRM 69, at 80.

programme.[69] The irony is that, although the courts have lost the tripartite conception of equality, they have developed legal doctrine that gives effect to that conception.

The context of discrimination interpretation of the phrase "as human persons", considered in chapter six, also indicates the unwillingness of the courts to vindicate equality in the social sphere. This is illustrated by the judgment of Kenny J. in *Murtagh Properties v. Cleary*.[70] Here the plaintiffs challenged the restrictive work practices of a trade union in excluding women from bar work. Kenny J. found for the plaintiffs on the basis of an unenumerated right to work, but rejected the equality argument on the basis that working did not implicate the essential attributes of human equality. Although this restrictive version of the human personality doctrine has fewer adherents in recent times, it is perhaps noteworthy that the more expansive equality cases, such as *McKenna*,[72] *Great Blasket*[73] and *Redmond*,[74] have occurred in the civil and political domains, not the social.

Marriage

In a number of cases, the courts have considered discriminations both in favour of and against married couples. Although these are not sex discriminations as such they have had implications for sex equality and do require some consideration at this point. In *Murphy v. Attorney General*,[75] as discussed in chapter four, the plaintiffs alleged a discrimination in the tax code against cohabiting married couples, vis-à-vis both cohabiting unmarried couples and married couples who did not live together. Employing rather tortuous reasoning, the Supreme Court rejected the contention that the discrimination breached Article 40.1 but accepted that it breached Article 41. Scannell has argued that this was a major victory for sex equality. The effect of the tax code had been that a married woman's income was deemed to be that of her husband's and that the husband was liable for tax in respect of that income.[76] In striking

---

[69] See chapter three.
[70] [1972] IR 330.
[72] [1995] 2 IR 10; [1996] 1 ILRM 81.
[73] [2000] 1 IR 6; [2000] 1 ILRM 401.
[74] High Court, Unreported, 31 July 2001, Herbert J.
[75] [1982] IR 241.
[76] See Scannell, "Taxation of Married Women. Murphy" in O'Dell (ed.), *Leading Cases of the Twentieth Century* (Round Hall, Sweet and Maxwell, 2000).

down the relevant portions of the tax code, albeit for reasons unconnected to equality let alone sex equality, the Court provided a significant boost for the cause of women's equality.[77]

In *MhicMhathúna v. Ireland*,[78] a claim of discrimination against the marital family failed. The plaintiffs claimed that provisions of the tax and social welfare codes discriminated against married parents vis-à-vis unmarried parents. In the High Court, Carroll J. considered whether there was a difference in situation between single parents and cohabiting parents:

> The position of a single parent is different to the position of two parents living together. The parent on his or her own has a more difficult task in bringing the children up single handedly because two parents living together can give each other mutual support and assistance. I have no doubt that the role of a single parent is more difficult than that of two parents and that in giving a tax-free allowance to a single parent, the Oireachtas recognised that and attempted to alleviate it.[79]

This difference in situation constituted a state of facts which reasonably justified the differential treatment. On appeal, the Supreme Court approved of this reasoning. In affirming the constitutional validity of tax and social welfare benefits for single parents, most of whom are probably women, the Court advanced sex equality to a certain extent.

The treatment of children who do not form part of the marital family perhaps merits consideration here. Detailed consideration has already been given to this area in chapter five. For present purposes, a summary of observations already made suffices. In *O'Brien v. Stoutt*,[80] the Supreme Court, implicitly overruling the analysis of Finlay J. in *State (M.) v. Attorney General*,[81] held that being illegitimate did not amount to a difference in social function or moral or physical capacity. Nevertheless, discriminations against illegitimate children were justified by reference to the special support given by the Constitution, in Article 41, to the institution of marriage. This position may be contrasted with that adopted in *G. v.*

---

[77] The *Murphy* principle was applied by the Supreme Court to section 12(4) of the Social Welfare (No. 2) Act, 1985 in *Hyland v. Minister for Social Welfare* [1989] IR 624; [1990] ILRM 213.
[78] [1989] IR 504 (HC); [1995] 1 IR 484 (SC); [1995] 1 ILRM 69 (SC).
[79] [1989] IR 504, at 511.
[80] [1984] IR 316; [1985] ILRM 86.
[81] [1979] IR 73.

An Bord Uchtála[82] where Henchy J. used the other provisions of the Constitution (in this case Article 41) not to derogate from but to inform his interpretation of the second sentence of Article 40.1. He concluded that there was a difference in social function and moral capacity between the parents of an illegitimate child and the parents of a legitimate child, but he did not accept that illegitimate children had a different social function to legitimate children. However, given that Walsh J.'s decision in *O'Brien* was the decision of the Supreme Court, it constitutes the law on this area: discrimination against illegitimate children is permissible. The fact that this has ceased to be a live issue in this country is due to the decisions of the European Court of Human Rights, not those of the Irish Supreme Court.[83]

Sexual Orientation

The constitutional issues that arose out of the State's criminalisation of homosexual activity between males were considered in *Norris v. Attorney General*.[84] Two equality arguments arose for consideration in this case. First, the plaintiff argued that the criminalisation of anal sex amounted to discrimination against gay men. As has been considered in chapter four, the Court's rejection of the concept of indirect discrimination meant that this could not even be considered as an equality issue. Secondly, the plaintiff argued that the criminalisation of gross indecency between men, but not between women, amounted to a discrimination against males. Both the High Court and the Supreme Court perceived this as an issue of equality but rejected the claim.

The reasoning of McWilliam J. on this point in the High Court is somewhat unclear. He focused on the facts that no other constitutional right was infringed and that gross indecency would take different forms if performed by men as opposed to women in concluding that there was nothing unconstitutional about the legislative discrimination. On appeal, O'Higgins C.J., for the majority of the Court, expanded somewhat on this reasoning:

> The legislature would be perfectly entitled to have regard to the difference between the sexes and to treat sexual conduct or gross indecency between males as

---

[82] [1980] IR 32.
[83] *Johnson v. Ireland* (1987) 9 EHRR 203.
[84] [1984] IR 36.

> requiring prohibition because of the social problem which it creates, while at the same time looking at sexual conduct between females as being not only different but as posing no such social problem.[85]

This reasoning was lacking as it did not explain what the difference between the sexes is; nor did it identify what social problem was created by sexual conduct or gross indecency between males. For this reason, it is difficult to assess whether O'Higgins C.J. allowed sex to be used as an impermissible proxy for other sex-related traits as rejected by Walsh J. in *de Búrca*. In any event, the majority's willingness to deal in characteristics categorically related to sex is inconsistent with the tenor of Walsh J.'s judgment in *de Búrca*. Henchy J. elaborated further on the reason why the differential criminalisation was not unconstitutional:

> What the sections have done is to make certain conduct between males criminal, while leaving unaffected by the criminal law comparable conduct when not committed exclusively by males. Therein lies the reason why in my view unconstitutional discrimination under [Article 40.1] has not been shown. The sexual acts left unaffected are for physiological, social and other reasons capable of being differentiated as to their nature, their context, the range of their possible consequences and the desirability of seeking to enforce their proscription as crimes. While individual opinions on the matter may differ, it was and is a matter of legislative policy to decide whether a compulsion of the common good is capable of justifying the distinction drawn. I would hold that the proviso contained in the second sentence of [Article 40.1] makes constitutionally acceptable under that Article the line of demarcation between the acts made criminal by the impugned sections and those which the plaintiff complains are left unproscribed by the criminal law.[86]

Again, however, the elaboration does not go quite far enough to justify its conclusion, for it does not identify the "psychological, social and other reasons" which differentiate the acts. Nor does it explain the nature, context and range of possible consequences of the acts. For this reason, it is impossible to assess whether Henchy J.'s judgment call on the issue is

---

[85] *Ibid.*, at 59.
[86] *Ibid.*, at 70-1.

correct. Finding for the plaintiff on the basis of an unenumerated right to privacy, McCarthy J. saw no need to consider the case based on Article 40.1. Nevertheless, he expressly stated that he was not to be taken as agreeing with the opinion that the plaintiff's claim under Article 40.1 implied an over-broad interpretation of that constitutional guarantee.

The willingness of the various judges to validate the sex discrimination at issue in *Norris*, without specifying the difference in situation between gay men and lesbians, is somewhat troublesome.[87] It contrasts with cases, such as *Lowth*, where some effort was made to explain the way in which men and women were differently situated. Such efforts may not always be successful but they at least suggest that the courts have tried to reach a reasoned conclusion. The failure of the judges in *Norris* fully to elaborate their reasons raises the worry that sex discrimination is being justified by reference to the very sexual stereotypes against which an equality guarantee could be a bulwark. As illustrated by the earlier discussion of *O'G.*, the more entrenched a discrimination is, the more it appears like a difference in situation, and the less likely the courts are to address it under the equality guarantee. This observation is supported by the fact that the Supreme Court in *Norris* did not see the need to explain the differences between men and women.

Sexual Identity

In *Foy v. An t-Ard Chláraitheoir*,[88] the applicant, a male to female transsexual, sought a finding that she was born female and, pursuant to such a finding, an order in effect correcting the original entry in the Register of Births to record her sex as female and her forenames as "Lydia Annice". McKechnie J. held that the Registrar General had complied with the relevant statutory provisions and proceeded to consider whether those provisions were constitutional. With regard to the claim under Article 40.1, McKechnie J. analysed the issue in terms of difference of situation:

> Despite advances in surgery, a male to female transsexual can never shed entirely that person's male biological characteristics and likewise can never acquire, in many

[87] This omission might be due to embarrassment on the part of the judges.
[88] Unreported, High Court, 9 July 2002, McKechnie J.

> material respects, vital characteristics of the female sex. A difference therefore between a male to female transsexual and a biological male [*sic?*] unquestionably exists. This difference in my view in the context of the core issues in the case justifies what is I feel claimed incorrectly to be an inequality of treatment with regard to birth registration as between such individuals. What difference of treatment there is, it should be pointed out, does not apply within male to female transsexuals as a group, or within female to male transsexuals as group. In either of these groups if the post surgical transsexual was to seek the same rectification as the applicant does, the Register General would respond in precisely the same way. Therefore I do not believe that there is any breach of this article.[89]

McKechnie J. thus made three points in his dismissal of the plaintiff's claim. First, he considered incorrect the characterisation of the issue as an "inequality of treatment", implying that he did not accept the concept of indirect discrimination. Although the birth registration rules do not explicitly discriminate against transsexuals, they do so discriminate indirectly. It is only transsexuals who are compelled, as they see it, to lie about their sexual identity. Secondly, if there was any inequality of treatment he viewed it as justified by reference to the biological differences between a male to female transsexual and a natural-born female. McKechnie J.'s approach on this point highlights the general problem with the Aristotelian approach to inequality. In the context of sexual identity, societal discrimination manifests itself in society's stipulation of who is the same, who is different. To legitimise difference in treatment where society perceives a difference in situation is to legitimise the inequality itself.[90] Thirdly, relying on purely formal equality, McKechnie J. concluded that there was no discrimination because all male to female transsexuals would be treated in the same way and all female to male transsexuals would be treated in the same way.

Conclusion

The approach of the Irish courts to sex equality may appear to be a curious mixture of conservative and liberal-progressive judgments. However, much of the case law can be

---

[89] *Ibid.*, at 129-30.

[90] This is not to argue that the discrimination against Ms Foy was unjustified but rather that the conceptual framework of Aristotelian equality does not allow one squarely to address the equality issues.

explained if one bears in mind the distinction between civil/political equality and social equality, present to the minds of the drafters in 1937. Further anomalies appear more rational if one bears in mind that the courts, as mandated by the Constitution, have a world view which establishes the marital family as the essential unit of society. In the context of civil and political equality, the courts have generally taken a dim view of sex inequalities. This predisposition finds its most forceful exposition in the cases dealing with feudal relics. The courts have swept such relics away, almost in a frenzy of egalitarian indignation. However, the ease with which the courts concluded that such relics were unconstitutional undermined the need for careful analysis and, perhaps, reduced the usefulness of these cases as precedents for more contentious situations. *De Búrca*, perhaps the most egalitarian statement on the part of the courts, suggests that the courts' protection of sex equality in the civil/political sphere extends to the invalidation of statutes. Against this conclusion stands *Somjee v. Minister for Justice.* One could distinguish *Somjee* on the basis that the question of admission to citizenship is logically anterior to any claim that civil equality has been breached. Against this, however, Article 9.1.3° suggests that sex equality applies as strongly to questions of admission to citizenship as it does to the treatment of citizens. *Somjee* is a difficult case to defend.

In contrast to civil equality, the courts have not taken an interventionist approach in the social sphere. As noted above, this approach is now justified by reference to the concept of deference, although it may owe its origins to the drafters' belief that equality before the law did not envisage social equality. Although one might disagree with the courts' approach in this area, in particular by arguing for a higher standard of review as set out in chapter six, one must accept that it rests on a reasonably coherent view of the courts' role in the scheme of government. The collection and allocation of resources are seen as being within the province of the legislature and the executive; there is scope for court intervention, but only in the face of gross inequality.

A contentious issue is the rights of fathers. Those such as Mr O'G., who can be accommodated within the template of the Irish marital family, have fared better than those such as Mr Nicolau. That said, the courts have upheld parts of the tax and social welfare code which discriminate against the marital family in favour of those, such as single parents,

thought to have more pressing needs. This approach can, however, again be explained by the general deference shown by the courts to social legislation.

Chapter Eight

Instances of Constitutional Equality

Equality in the Political Process

In *O'Donovan v. Attorney General*,[1] the plaintiff challenged section 3(1) and section 4, and the schedule referred to therein, of the Electoral (Amendment) Act, 1959 as being inconsistent with Article 16 and Article 40.1. The plaintiff argued that these provisions established a ratio of TDs to members of population which was not as far as practicable the same throughout the country, thus breaching Article 16.2.3° of the Constitution. Budd J. interpreted this provision not as requiring mathematical equality but rather as requiring that a parity of ratio of members to population throughout the country be attained as far as practicable. Budd J. bolstered his interpretation of Article 16.2.3° by reference to other provisions of the Constitution, including Article 5 and Article 40.1. He concluded that Ireland was a democratic state in which all citizens had equal political rights:

> That equality is not maintained if the vote of a person in one part of the country has a greater effect in securing parliamentary representation that the vote of a person in another part of the country.... [I]f it be established, as I believe it is, that the spirit and intendment of [Article 5 and Article 40.1] is that the notion of equality in political matters is to be maintained, it would be illogical to find a different and inconsistent principle adumbrated elsewhere in the Constitution.[2]

This strengthened his interpretation of the parity of ratio required by Article 16.2.3°. Any interpretation of Article 16.2.3° that "would have the effect of destroying the dominant principle of equality should be rejected".[3] Although considerations of an administrative and statistical nature were relevant, difficulties as to the working of the parliamentary system were not. To take account of the latter would effectively destroy the dominant principle itself.[4]

---

[1] [1961] IR 114; (1962) 96 ILTR 121.
[2] *Ibid.*, at 137; 133.
[3] *Ibid.*, at 138; 133-4.
[4] On a detailed consideration of the statistics, Budd J. concluded that the allocation of representation, which discriminated in favour of rural, western constituencies at the expense of urban constituencies (particularly in

O'Donovan is thus strong support for the principle of political equality, establishing that all citizens should, insofar as is practicable, have equal input into the political system. The courts, however, have not developed this principle of equality to assist individual citizens who claim to have been excluded from the political process. This first became apparent in *Draper v. Attorney General*.[5] The plaintiff was a registered elector who was unable to vote by reason of a physical disability. She argued that the failure to provide her with the facility of postal voting amounted to an unconstitutional discrimination against her vis-à-vis members of the Defence Forces and An Garda Síochána who were provided with such a facility. In the High Court, McMahon J. considered the issue on the basis that there was an unenumerated right to vote protected by Article 40.3. He held that it was a matter for the legislature to balance the risks and advantages of a system of postal voting; their decision to exclude people with disabilities from such a system was not manifestly unreasonable and would not be struck down. The Supreme Court focused on the arguments based on Article 40.1. O'Higgins C.J., for the Court, first rejected the argument of an unconstitutional discrimination as between the plaintiff and those provided with the facility of postal voting. He reasoned that there was a far greater risk of abuse and error in providing a facility of postal voting to all who declared their inability to attend a polling station than there was in providing that facility to Gardaí and members of the Defence Forces. He also expressed the view that although Article 40.1 allowed the Oireachtas to enact special measures for people in the plaintiff's situation, responding to their difference in physical capacity, it did not require such measures.

In *Breathnach v. Ireland*,[6] Quirke J. suggested that the reasoning underlying *Draper* had been undermined by the subsequent grant of postal facilities to voters with disabilities. Accordingly, he held that the failure to provide such facilities to prisoners constituted a breach of Article 40.1. The Supreme Court rejected this reasoning.[7] Keane C.J. approved *Draper* focusing on the more general equality points made. He accepted the proposition that "the fact that some voters were unable to comply with the provisions of the then electoral law

---

Dublin), did not conform to the principle of equality enunciated in Article 16.2.3°. A near approximation to the required ratio could have been attained without any real administrative difficulty.

[5] [1984] IR 277; [1984] ILRM 643. See chapter four for discussion of some of the general doctrinal issues in this case.

[6] [2000] 3 IR 467.

[7] [2001] 3 IR 230.

did not of itself oblige the State to tailor that law to suit their special needs".[8] Moreover, there was a difference in capacity between those detained because they had broken the law and other citizens which justified the difference in treatment.[9] Denham J. agreed with this conclusion on the basis that the restriction of the plaintiff's right to vote was neither arbitrary not unreasonable.

A somewhat different argument concerning equal access to the political system was made in *Riordan v. An Taoiseach*.[10] Here the plaintiff argued that the nomination without advertisement of the position, by the Government, of Hugh O'Flaherty for the post of vice-president of the European Investment Bank constituted a breach of Article 40.1. Morris P. rejected the claim in the High Court:

> I cannot accept that the duties imposed by Article 40, which provides for equality of treatment, extend to imposing upon the Government an obligation to inform the public every time it proposes to perform the executive function of making an appointment to any position....[11]

The Supreme Court dismissed the appeal. Keane C.J., with whom the other judges agreed, concluded that not even the most expansive construction of Article 40.1 could require the imposition of such restraints on the executive in making recommendations of this nature.[12]

In *Loftus v. Attorney General*,[13] the plaintiffs challenged section 13 of the Electoral Act, 1963 which exempted political parties already represented in the Dáil from the requirement to apply to the registrar of political parties to be registered. Such parties were automatically registered, whereas the plaintiffs' party, the Christian Democratic Party of Ireland, had had to

---

[8] *Ibid.*, at 238.

[9] This argument seems slightly misplaced. The difference in capacity relates to the offence committed not the more fortuitous event of happening to be detained on the day of a particular election. Indeed Keane C.J. later suggested that remand prisoners could also be prevented from voting, notwithstanding that they were not convicted of committing any crime. This suggests a low standard of review in that a close fit between the difference in situation and the differentiating legislation was not required.

[10] [2000] 4 IR 537.

[11] *Ibid.*, at 542.

[12] *Ibid.*, at 548-9.

[13] [1979] IR 221.

apply for registration and meet certain statutory conditions. O'Higgins C.J., delivering the judgment of the Court, rejected the plaintiffs' argument:

> In enacting the legislation it was proper for the Oireachtas to have regard to the existing distinction between political parties which were then represented in the Dáil and those which were not. The very fact of being represented in the Dáil satisfied, in respect of each such party, the statutory requirements that the party be genuinely political and that it be organised to contest elections. To require existing parties, not then represented, or newly-formed parties to apply and to satisfy these requirements in the manner laid down in the section is a treatment of such parties in a manner which, although necessarily different, is not invidious and unfair.[14]

In the more recent case of *O'Reilly v. Minister for Environment*,[15] a plaintiff challenged a contentious feature of Irish electoral law, namely the alphabetical listing of candidates on ballot papers. Although Murphy J. accepted that there was a bias in favour of candidates listed towards the start of the ballot paper, he rejected the constitutional claim on the basis that the problem lay not with the electoral scheme – although a more closely tuned one could be devised – but with inattentive voters.

In *McGimpsey v. Ireland*,[16] the validity of the Anglo-Irish Agreement was challenged by reference to a number of constitutional provisions. Finlay C.J., with the agreement of the other members of the Court, rejected the equality argument on the somewhat unconvincing ground that the Agreement was not a "law" within the meaning of that term in Article 40.1. This seems inconsistent with other cases, such as *McMahon v. Leahy*,[17] in which Article 40.1 was held to apply to official actions other than enactments of the Oireachtas.

In *State (Lynch) v. Cooney*,[18] the prosecutor challenged an order made under section 31(1) of the Broadcasting Act, 1960 prohibiting the broadcasting authority from broadcasting any matter made by or on behalf of, or inviting support for, the Sinn Féin organisation. In the

---

[14] *Ibid.*, at 242-3.
[15] [1986] IR 143; [1987] ILRM 290.
[16] [1990] 1 IR 110; [1990] ILRM 440.
[17] [1984] IR 525; [1985] ILRM 422.

course of his judgment, Henchy J. considered the implications of Article 40.1 for party political broadcasts. He suggested that allowing one political party to make such a broadcast while denying that opportunity to any of the other political parties contesting that election would amount, at least *prima facie*, to a breach of Article 40.1. This judgment presaged the new direction in constitutional equality law seen in the mid-1990s, referred to in chapter two. As discussed in that chapter, Article 40.1 has been utilised by the courts to establish a general norm of fairness applicable to State activity.

Equality in Substantive Criminal Law

People subjected to criminal prosecution have often had recourse to their constitutional rights, including the equality guarantee. Article 40.1 has most often been invoked with regard to criminal procedures and the decisions of prosecutorial authorities, but it has also had some impact on the substantive criminal law. In *State (Woods) v. Attorney General*,[19] the prosecutor alleged that the imposition of a sentence of penal servitude was unconstitutional, by reference to a number of provisions including Article 40.1. In the High Court, Henchy J. summarily rejected the proposition that any provision of the Constitution prohibited such a sentence. The Supreme Court did not consider this point on appeal, but appears to have implicitly rejected the point in the earlier case of *In re Tynan*.[20]

In *Dooley v. Attorney General*,[21] a more substantive point was raised. The plaintiff was prosecuted under section 3 of the Prohibition of Forcible Entry and Occupation Act, 1971. Section 2 renders forcible entry of land an offence, unless the person is an owner of the land or does not interfere with the use and enjoyment of the land or enters the land in pursuance of a *bona fide* claim of right. Section 3 provides that a person who remains in forcible occupation of land shall be guilty of an offence, unless the person is the owner of the land or remains thereon in pursuance of a bona fide claim of right. Section 1 defines owner to include, *inter alia*, any person having "an estate or interest in land". The plaintiff alleged that sections 2 and 3, read in the light of the definition of "owner", distinguished between

---

[18] [1982] IR 337.
[19] [1969] IR 385.
[20] [1969] IR 273.
[21] [1977] IR 205.

landowners and non-landowners. She argued that this discrimination breached Article 40.1. Griffin J., delivering the judgment of the Supreme Court, rejected the plaintiff's interpretation of the Act, holding that the definition of owner referred to the owner of the land forcibly entered or occupied and, accordingly, there was no discrimination between landowners and non-landowners as a class:

> The owner who is exempted from prosecution under ss. 2 and 3 of the Act is the person whose right to the use and enjoyment of the land or vehicle (in respect of which the forcible entry or detention took place) has been interfered with; all others, whether they have an estate or interest in the land or not, are liable to prosecution if they offend the sections.[22]

This reasoning allowed the Court to uphold the constitutionality of the legislation as a discrimination against people who chose forcibly to enter onto or to occupy property, rather than against non-landowners as a class. It seems implicit in the judgment that, had the legislation in fact discriminated against non-landowners as a class, it would have been constitutionally problematic.

In *King v. Attorney General*,[23] the plaintiff challenged the constitutionality of section 4 of the Vagrancy Act, 1824 as applied to Ireland by the Prevention of Crimes Act, 1871. Section 4 of the 1824 Act criminalised, *inter alia*, the possession of housebreaking implements with the intention of committing a felony and the frequenting by "every suspected person or reputed thief" of certain specified places. Section 15 of the 1871 Act provided that it was not necessary to show that the accused person was guilty of any particular act tending to show her purpose or intent in order to prove that she intended to commit a felony. The accused person could be convicted if, from the circumstances and her known character, it appeared to the court that her intention had been to commit a felony. The plaintiff was convicted of three offences, of the type described here, contrary to section 4. The plaintiff argued that section 4 was inconsistent with various provisions of the Constitution, including Article 40.1, and had not been continued in force by virtue of Article 50.1.

---

[22] *Ibid.*, at 210.
[23] [1981] IR 233.

In the High Court, McWilliam J. partly relied on Article 40.1 in finding a portion of section 4 inconsistent with the Constitution. He held that Article 40.1 protected those citizens who had been convicted, at least when acting in any capacity that was not directly related to their conviction. Article 40.1 was thus breached because a suspected person or previously convicted person could be prevented from doing what was perfectly lawful for any other citizen to do. Accordingly, the "housebreaking implements" portion of section 4 was not declared unconstitutional but the "suspected person or reputed thief" section was so declared. The Supreme Court agreed with this conclusion on appeal, stating its repulsion at the "class-conscious and un-Christian philosophy"[24] which underlay the legislation. O'Higgins C.J. further suggested that the inconsistency in the legislation was so clear that it required no further elaboration. Henchy J. agreed that, "in its arbitrariness and unjustifiable discrimination", the impugned portion of section 4 failed to hold all citizens equal before the law. In contrast to the situation in *Dooley*, the law in *King* was seen as distinguishing between citizens based on their character or who they were, rather than what they chose to do.[25]

Special Treatment by the Criminal Law

King suggests that all citizens should be equally subject to the criminal law. Different laws for different groups in society is seen as fundamentally at variance with the ideal of equality before the law.[26] This idea can be seen in a number of other cases. In *People (Attorney General) v. O'Driscoll*,[27] the Court of Criminal Appeal considered an argument that the applicants' convictions were unsatisfactory on the basis that the trial judge had taken undue cognisance of the fact that the applicants were Travellers. Although he considered that the argument could not be sustained on the facts, Walsh J. made the following observations:

---

[24] *Ibid.*, at 249.

[25] In *State (McIlhagga) v. Governor of Portlaoise* Unreported, Supreme Court, 29 July 1971, Ó Dálaigh C.J., for the Supreme Court, upheld the constitutionality of a proviso to a prison sentence which provided that the accused would be released from prison if he paid a certain sum of money to the victim of the crime. Ó Dálaigh C.J. reasoned that this proviso encouraged restitution of moneys to the fraud victim and accordingly was just and not a discrimination between rich and poor.

[26] See the discussion of formal equality in chapters one and four.

[27] (1972) 1 *Frewen* 351.

> A complaint made about the conduct of the trial was that the Judge in some way permitted the fact that the applicants were itinerants to creep into the evidence or to colour the case in a way which has caused them to be the objects of discrimination at the trial. Needless to say, if any such position were disclosed in the transcript or otherwise established to the satisfaction of this Court, the conviction would be quashed without hesitation on the grounds that the trial violated the provisions of [Article 40.1] of the Constitution.[28]

In *State (H.) v. Daly*,[29] the prosecutor challenged, *inter alia*, the provisions of the Mental Health Act, 1945 which required that an appointed inspector examining a person in an ordinary mental hospital must report on the legality of the person's detention, whereas such an inspector examining a person in the Central Mental Hospital need not do so. Given the right of the prosecutor to seek an enquiry from the High Court into the legality of his detention, as well as other procedural safeguards, Finlay P. concluded that this discrimination was only a distinction in detail. The point was not considered on appeal.

A concern for legal consistency underlies the decision of Carney J. in *DPP v. Haugh*.[30] In this case, the applicant challenged the decision of the respondent to circulate to potential jurors a questionnaire concerning their knowledge of and attitude to Mr Charles Haughey, who had been charged with obstructing a Tribunal of Inquiry. Carney J., a member of the divisional High Court convened for the case, having held that there was no jurisdiction for such a procedure under the Juries Act, 1976, rejected the suggestion that Mr Haughey's case merited special consideration:

---

[28] *Ibid.*, at 353. In *Donnelly v. Timber Factors Ltd* [1991] 1 IR 553, at 556 McCarthy J., speaking with the concurrence of the other members of the Court on this point, made some suggestions as to the role of a trial judge (in civil proceedings):

> The role of the judge of trial in maintaining an even balance will require that on occasion he must intervene in the questioning of witnesses with questions of his own – the purpose being to clarify the unclear, to complete the incomplete, to elaborate the inadequate and to truncate the long-winded. It is not to embellish, to emphasise or, save rarely, to criticise.

Further, in *Mackie v. Wilde* [1998] 2 IR 570; [1995] 1 ILRM 468, Morris J. rejected as inconsistent with Article 40.1 any rule of law that a client's evidence as to the terms of a retainer should be preferred to a solicitor's evidence where the solicitor had failed to obtain a written retainer.

[29] [1977] IR 90.

[30] Unreported, High Court, 12 May 2000, Carney J.

> There has been made the suggestion that Mr Haughey's case is so unique that a special set of rules can be devised for him which will have no application to any other case in the future. This proposition I totally reject. In the first instance it is offensive to the constitutional imperative that all citizens should be equal before the law that a unique set of procedures should be devised for one person alone to have no application to anyone else ever.[31]

Finally, a similar concern is seen, albeit in a different context, in the judgment of Denham J. in *D.G. v. Eastern Health Board*.[32] The applicant, a minor who had been convicted of no offence within the jurisdiction, had issued judicial review proceedings seeking declaratory and injunctive relief in relation to his care and accommodation. Kelly J. made an order directing the detention of the applicant in St Patrick's institution, for a short period, as the only feasible way of securing his constitutional rights. The applicant appealed against this order, asserting that the trial judge had acted in excess of jurisdiction. Although some members of the Court expressed unease about the High Court practice of committing youngsters to secure accommodation in vindication of their rights, they upheld the order of the High Court. Denham J. dissented, partly on the basis of Article 40.1:

> No adult could be ordered to a penal institution in circumstances such as those existing here. It would be preventative detention, which is unconstitutional. Thus the child is not equal to the adult. However, the Constitution clearly envisages equality being affected by differences in capacity. Thus, the mere fact that such an order could not be made of an adult does not *per se* render it unconstitutional.[33]

Nevertheless, as the difference in treatment could only be justified by reference to the welfare of the child, it was only justified where the essence of the institution was educational and caring, not where it was penal. The equality guarantee had thus been breached by Kelly J. Denham J. concluded her reasoning based on Article 40.1 with the following observation:

---

[31] *Ibid.*, at 13. The other members of the Court did not consider the issue in these terms.
[32] [1998] 1 ILRM 241.
[33] *Ibid.*, at 261.

> [A]pproaching the matter as to equality between children, it must be queried whether a child from a different background, who brought a civil action, would find himself ordered to be detained in a penal institution.[34]

Although there is much force to this observation, it relies on distaste for significant socioeconomic inequality. It seems unlikely that Denham J. was suggesting that the courts had a general role in dismantling such inequality.

Equality in Criminal Procedures

The rules of criminal procedure have proved a tempting, albeit ultimately unproductive, source of litigation under the equality guarantee. *State (Hunt) v. O'Donovan*[35] concerned a rather complicated point of criminal procedure. The prosecutor had signed a plea of guilty to a charge that he had committed an indictable offence and was sent forward for trial to the Circuit Court. He did not withdraw his plea and was sentenced to a term of imprisonment. He failed in his attempt to appeal the sentence because section 13 of the Criminal Procedure Act, 1967 rendered it impossible for him to show that he had been "tried on indictment", a precondition for an appeal to the Court of Criminal Appeal, established by section 63 of the Courts of Justice Act, 1924. The section which had been replaced by section 13 had allowed for an appeal in these circumstances. The prosecutor alleged that this situation constituted an unconstitutional discrimination as between himself and a person who withdrew her plea in the Circuit Court and then pleaded guilty to the indictment, since such a person did have a right of appeal to the Court of Criminal Appeal. Finlay J. rejected the argument that this potential for differential treatment amounted to an invidious discrimination, emphasising both that the accused person chose into which category he fell and that any sentence would be imposed by a constitutional court following prescribed procedures. This latter point is not particularly strong as it suggests that an ability to appeal is never important. Nevertheless, the former point – that it is the accused who elects the inequality – does count against the

---

[34] *Idem.* In *D.G. v. Ireland* [2002] ECHR 39474/98, the European Court of Human Rights concluded that the detention of juveniles, who had not committed an offence, in penal institutions breached the Convention.
[35] [1975] IR 39; (1973) 107 ILTR 53.

argument of the prosecutor. The Supreme Court dismissed the appeal in two sentences without offering any reasons.[36]

The issue of appeals again arose in *People (DPP) v. O'Shea*.[37] In this controversial case, the Director for Public Prosecutions successfully established a right to appeal against an acquittal based on a literal reading of Article 34.4.3°.[38] In a dissenting judgment, Henchy J. posited the discrimination between two people tried on the same offence, one in the Circuit Court the other in the High Court.[39] He considered that the discrimination between these two persons, whereby one could have an acquittal appealed and the other could not, was in breach of Article 40.1, therefore suggesting a different reading of Article 34.4.3° in light of the general scheme of the Constitution.[40] This reasoning was not adopted by other members of the Court.

In *Tormey v. Attorney General*,[41] the plaintiff challenged section 31(1) of the Courts Act, 1981 on the basis that it allowed an accused returned for trial to the Circuit Court sitting outside Dublin to transfer to the Circuit Court sitting in Dublin, but not the reverse. He alleged that this breached the equality guarantee contained in Article 40.1. Costello J. rejected this argument on the basis that the distinction drawn was not based on the individual characteristics or qualities of accused persons in the different venues. Instead, it was a response by the Oireachtas to the perceived need:

> to allow either the prosecution or the accused to obtain a transfer of a trial to Dublin where there is available a much larger number of persons qualified to act as jurors than would be available in venues outside Dublin, and where, accordingly, the likelihood of any possible prejudice which might affect the trial could be obviated.[42]

---

[36] The right of appeal claimed by the prosecutor was restored by section 1 of the Criminal Procedure (Amendment) Act, 1973.
[37] [1982] IR 384.
[38] "The Supreme Court shall, with such exceptions and subject to such regulations as may be prescribed by law, have appellate jurisdiction from all decisions of the High Court....".
[39] Section 18 of the Criminal Procedure Act, 1967 allows additional counts, that would normally be triable in the Circuit Court, to be added to a High Court indictment.
[40] [1982] IR 384, at 440. Henchy J. made similar comments in *People (DPP) v. Quilligan (No. 2)* [1989] IR 56, at 66; [1989] ILRM 245, at 252.
[41] [1984] ILRM 657.
[42] *Ibid.*, at 662.

In *Molyneux v. Ireland*,[43] Costello P. rejected an argument against the constitutionality of differential powers of arrest depending on whether the police officer operated in Dublin or not. His conclusions were based on similar reasoning to that employed in *Tormey*. Somewhat similarly, in *Heaney v. Ireland*,[44] Costello J. rejected the contention that section 52 of the Offences Against the State Act, 1939, which effectively required persons arrested under Part IV of the Act to give an account of their movements to the Gardaí when asked, breached Article 40.1. He reasoned that there were perfectly rational and valid reasons why the Oireachtas would treat serious crimes referred to in the 1939 Act differently to other types of crime.[45]

In *Donnelly v. Ireland*,[46] the plaintiff challenged section 13 of the Criminal Evidence Act, 1992 which allows the evidence of certain persons to be taken by way of live video link at the trial of a sexual offence. A number of arguments were unsuccessfully advanced against the constitutionality of this section including, in the High Court, an argument based on Article 40.1. Although Costello P. did not directly deal with the equality argument, he did advert to the special trauma suffered by complainants in such cases which would seem to justify the difference in treatment.

In *DPP (Stratford) v. O'Neill*,[47] the defendant challenged the constitutionality of section 5(1) of the Summary Jurisdiction over Children (Ireland) Act, 1884 by reference to a number of constitutional provisions including Article 40.1. This section allows a young person, charged with an indictable offence other than homicide before a court of summary jurisdiction, to be dealt with summarily if the court thinks it is expedient to do so having regard to the character and antecedents of the person charged, the nature of the offence and all the circumstances of the case, and if the young person so consents. Smyth J. considered that the exercise was in the nature of a preliminary examination and did not infringe the principle of equality before the law but rather realised the constitutional concern to have due regard to differences of

---

[43] [1997] 2 ILRM 241. See the discussion in chapter six.
[44] [1994] 3 IR 593; [1994] 2 ILRM 420.
[45] The Supreme Court dismissed the appeal without considering the arguments based on Article 40.1: [1996] 1 IR 580; [1997] 1 ILRM 117. On appeal to the European Court of Human Rights, it was held that the provisions violated Article 6: *Heaney v. Ireland* (2001) 33 EHRR 264.
[46] [1998] 1 IR 321.

capacity. He interpreted the reference to "character and antecedents" as referring to the accused's maturity, "legal character and antecedents". He considered that the differential treatment of old people and young people was justified by reference to differences in capacity.

In *Cullen v. Attorney General* [1979] IR 394, Hamilton J. held that section 57 of the Road Traffic Act, 1961, which effectively allows a district judge to make a compensation order, in addition to imposing penal sanction, against a person convicted under section 56 of the Act, infringed Article 38 of the Constitution. However, with regard to Article 40.1, Hamilton J. relied on the double construction rule to hold that the statute required the same procedural safeguards prior to a compensation order that exist in a civil proceedings and hence that there was no inequality.

In *Grealis v. DPP*,[48] the applicant challenged the constitutionality of section 1 of the Interpretation (Amendment) Act, 1997 which attempted retroactively to remedy a procedural problem which had emerged following the abolition of the common law offence of assault. Section 1(4) provided that if any constitutional rights were breached by this Act, the other provisions would be subject to such limitations as were necessary to avoid such a breach. O'Donovan J. held this provision unconstitutional on a number of grounds, including the ground that it created "a presumption of inequality between citizens, in that, it allows for different limitations to be laid down for securing that the provisions of the said Act do not conflict with the constitutional rights of any given individual".[49]

In *Corbett v. Director of Public Prosecutions*,[50] McGuinness J. employed the concept of equality before the law to reach the opposite conclusion on the same point. The applicant argued that as the Special Criminal Court had accepted, in *Kavanagh v. Director of Public Prosecutions*, that a prosecution should not proceed, it would be unequal to allow his prosecution to proceed. McGuinness J. rejected this argument, reasoning that it would have the effect of creating a class of people who were alleged to have committed the offence but

---

[47] [1998] 2 IR 383; [1998] 1 ILRM 221.
[48] [2000] 1 ILRM 358.
[49] *Ibid.*, at 367. O'Donovan J. failed to consider whether such differences in treatment could be justified. His conclusion was better supported by the other grounds he cited.

who could not be the subject of criminal proceedings on account of that offence. This class was created solely by reference to the date on which the offence was alleged to have been committed. This, she concluded, would amount to inequality before the law.

The appeals from *Corbett* and *Grealis* were heard together.[51] The Supreme Court upheld O'Donovan J.'s judgment and overturned McGuinness J.'s judgment. Article 40.1 was not considered.

In *Dillane v. Attorney General*,[52] the Supreme Court upheld the constitutionality of Rule 67 of the District Court Rules, 1948, which gave a general power to a district justice to award costs and witnesses' expenses against any party to proceedings, but which precluded such an order being made against, *inter alias*, a Garda acting in the discharge of her duties as a police officer. The Court, in a judgment delivered by Henchy J., rejected the contention that there was an unconstitutional discrimination between a Garda and a member of the public who takes a prosecution. The Court supported this conclusion by reference to the difference in social function between a Garda and a member of the public.

In *Cox. v. Ireland*, the plaintiff challenged the constitutionality of section 34 of the Offences Against the State Act, 1939 which provided that any person convicted by the Special Criminal Court of a scheduled offence under the Act would forfeit any public office or employment she held and would be disqualified from holding any further public office or employment for seven years.[53] In the High Court, Barr J. rather cursorily concluded that section 34 infringed Article 40.1 of the Constitution as well as Article 40.3. In upholding his judgment on appeal, the Supreme Court adverted to the equality arguments of the plaintiff but ultimately decided the case without reference to Article 40.1

---

[50] Unreported, High Court, 7 December 1999, McGuinness J.
[51] [2001] 3 IR 144.
[52] [1980] ILRM 167.
[53] [1992] 2 IR 203.

Inconsistent Decisions of State Officials

In *McMahon v. Leahy*,[54] the plaintiff challenged an extradition order made against him. He and four others were accused of escaping from lawful custody in Northern Ireland a number of years previously. The other four had been arrested shortly after their escape but their release was ordered pursuant to section 50 of the Extradition Act, 1965 on the grounds that the offence was a political offence or an offence connected to a political offence. The plaintiff here faced with an extradition order sought an order for release in the same terms as his co-escapees. In the High Court, Keane J. dismissed the plaintiff's claim on the basis that he had not established that the offence was political or connected to a political offence. On appeal to the Supreme Court, the plaintiff obtained the leave of the Court to adduce evidence of the nature and the results of the proceedings that had been instituted a number of years previously by his four co-escapers. In the view of O'Higgins C.J., this raised a different issue for decision:

> This issue, in my opinion, is whether, having regard to these circumstances and subsequent events, it is open or proper for the authorities who are represented by the defendant in these proceedings to oppose the plaintiff's application for a release, and to maintain that the offence to which the warrant relates is not political or connected with a political offence.[55]

With regard to two of the co-escapees, their claim under section 50 had not been contested by the State, although the State was represented by counsel. With regard to the other two, it appeared that the claim might have been contested by the State but no appeal was taken against the order made by the Court, under section 50, for the release of the two men.

---

[54] [1984] IR 525; [1985] ILRM 422. A similar point arose in *Dublin Corporation v. Hamilton* [1999] 2 IR 486, at 493; [1998] 2 ILRM 542, at 548. Here Geoghegan J. rejected the defendant's contention that a housing authority, prior to an eviction, must, in addition to formal proofs, show compliance with general statutory duties and constitutional provisions including Article 40.1. Nevertheless, the option of judicial review on such grounds was open to an evicted tenant. Similarly, in *Liddy v. Minister for Public Enterprise* Unreported, High Court, 2 February 2003, Finnegan P., the Court noted that Article 40.1 applied both to the process of enacting and applying the law. The applicant argued that the planning code was being applied inconsistently in that permission was being granted for some developments within the red safety areas at Shannon airport but not for others. Finnegan P. reasoned that as the planning code, itself required by the common good, was of universal application, there was no unjust discrimination. It was not established that the planning code was being applied to the applicant in a discriminatory fashion and it remained open to the applicant to challenge particular planning decisions by way of judicial review.

[55] [1984] IR 525, at 536; [1985] ILRM 422, at 431.

O'Higgins C.J. then noted that the State was now, eight years late, trying to enforce a warrant on grounds which it either had previously rejected as unsound or had expressly declined to argue with regard to other men whose extradition was sought arising out of exactly the same incident. This constituted discriminatory treatment which, at least, required justification. O'Higgins C.J. rejected the State's contention that each application for the political exemption had to be considered separately:

> If the State were successful in this submission, it would mean that contradictory declarations in relation to the same incident would have issued from our Courts. If such occurred, respect for the administration of justice in our Courts would surely suffer, and the Courts' process would certainly have been abused.... In such circumstances, could it be said that all these five citizens had been held equal before the law? This obligation to provide equal treatment for citizens of the State is ordained by Article 40 of the Constitution. It is the clear duty of the Courts to see that this obligation is discharged.[56]

Henchy J. also considered the issue on the basis of Article 40.1. He reasoned that making the extradition order would result in unequal treatment by the Court of citizens who were equally situated in the context of the law involved. This unequal treatment, where there was no ground of difference which could distinguish the plaintiff in this case from his co-escapers, could not be in conformity with the implicit guarantee in Article 40.1 to treat like persons alike. The way in which the State had acquiesced in the plaintiff's continued existence in the State rendered the discrimination, in his view, unconscionable and oppressive. Griffin, Hederman and McCarthy JJ. agreed with these judgments in finding for the plaintiff, although McCarthy J. also relied on procedural irregularities in the extradition warrant.

McMahon v. Leahy established the important principle that not only laws but also the administrative decisions of state officials are subject to the equality guarantee. The contours of this principle have, however, proven difficult to establish. The difficulty that arises is

---

[56] *Ibid.*, at 537-8; 433. O'Higgins C.J. also referred to the fact that the plaintiff had been effectively encouraged to live a normal life in the jurisdiction and, perhaps, to become complacent about the need to prove that his offence was political.

illustrated by the earlier case of *In re Singer*.[57] Two defendants had been returned for trial on the same charges, on the same dates by identical orders made by the same District Justice. In one case, the trial proceeded and the Attorney General contended that the order returning for trial was valid. In the other case, the Attorney General contended that the order returning for trial was not valid, thus penalising the defendant by imposing upon him the cost and burden of a new preliminary investigation. Murnaghan J. gave little consideration to the equality argument, noting that it had not been pressed by counsel and that one of the defendants was not an Irish citizen. He concluded that the equality proposition was not sustained. As the matter was not explored fully, it is difficult to say whether *Singer* should have been decided the same way as *McMahon v. Leahy*. Nevertheless, there is a tension in judicial impulse. On the one hand, the courts want to ensure that accused people are treated consistently. On the other hand, prosecutorial discretion, which inevitably leads to at least some inconsistency, is an important feature of an adversarial criminal system.

In *O'Sullivan v. Wallace*,[58] the High Court favoured the arguments of prosecutorial discretion. The applicant, who was charged with assault, claimed he was acting in self defence. He sought to stay proceedings against him until the Director of Public Prosecutions also initiated proceedings against the other party to the incident. Morris P. reasoned that he was being asked to exercise a supervisory power over the exercise of the Director's powers and referred to a number of Supreme Court cases which established that such a power should only be exercised where the Director acts *mala fides* or pursuant to an improper motive.[59] Although Morris P. did not explicitly consider *McMahon v. Leahy* in his judgment, the applicant did rely on Article 40.1 in his claim so the judgment must be seen as some circumscription of the scope of *McMahon v. Leahy*. Perhaps the cases can be distinguished on the basis that in *McMahon* the State sought to make inconsistent legal arguments whereas in *O'Sullivan* the State, through the Director, sought to respond differently to two people involved in one factual situation.[60] Further, in *McMahon* the two were acknowledged

---

[57] (1964) 98 ILTR 112.

[58] Unreported, High Court, 19 April 1999, Morris P.

[59] *State (McCormack) v. Curran* [1987] ILRM 225; *H. v. Director of Public Prosecutions* [1994] 2 IR 589.

[60] Another example of this is *McHugh v. Garda Commissioner* [1985] ILRM 606 where the plaintiff claimed that Regulation 8 of the Garda Síochána (Discipline) Regulations, 1971 breached Article 40.1 in allowing an investigation against the plaintiff alone. Costello J. rejected this argument on the basis that the discretion of the Appointing Officer to investigate the conduct of one member rather than the others involved in the incident did not contravene the equality guarantee. In *Garvey v. Ireland* [1981] IR 75 McWilliam J. also considered an

to have committed the same offence; in *O'Sullivan*, the Director presumably decided that Mr. O'Sullivan was the more culpable party.

The conflict between the need to ensure consistency and the obligation of deference to the Director of Public Prosecutions came into sharper relief in *Byrne v. Government of Ireland*.[61] The applicants had each been charged with offences and were returned for trial to the Special Criminal Court on the basis of a certificate by the Director of Public Prosecutions that the ordinary courts were inadequate to secure the effective administration of justice and preservation of public peace and order in relation to the trial of the applicants on those charges. The majority of their co-accused, however, were returned for trial to the ordinary courts as no such certificate was made in respect of their charges. The applicants alleged that this inconsistent treatment breached the guarantee of equality by analogy with *McMahon v. Leahy*. The Supreme Court, *per* Hamilton C.J., first rejected an argument that it could review the decision of the Director of Public Prosecutions. In line with *Kavanagh v. Ireland*,[62] such decision could only be reviewed where it was shown that it was made *mala fides* or pursuant to an improper motive. He then noted that the accused persons were similarly situated insofar as each had been charged with the same offences arising out of the same set of circumstances. However, there was a crucial difference:

> What distinguishes the Appellants from their co-accused is that, in respect of them only, the Director of Public Prosecutions has certified that the ordinary court (*sic*) are inadequate to secure the effective administration of justice and the preservation of public peace and order.... In the absence of a *prima facie* case of *mala fides* in the issue by the Director of Public Prosecutions of the certificate, he cannot be called upon to explain his decision or give the reasons for it nor the sources of the information upon which it was based.[63]

Under the logic of Article 40.1, specifically as applied in *McMahon v. Leahy*, however, the fact that the Director had chosen to treat the accused persons differently could hardly have

---

equality point in the context of a dismissal from the Garda Síochána. It is not clear from the report what exactly the point was; in any event, it was brusquely rejected.

[61] Unreported, Supreme Court, 11 March 1999.

[62] [1996] 1 IR 321; [1996] 1 ILRM 133.

counted as justification for that difference in treatment. For this reason, Hamilton C.J.'s reliance on purely formal equality does not so much reconcile *Kavanagh* with *McMahon* as assert that *Kavanagh* represents the superior norm. Inconsistency in treatment can only be found unconstitutional where it is motivated by male fides, in which case it would in any event breach the general rules of administrative law. *Byrne* thus suggests that the requirement of consistency on the part of government officials no longer applies in the context in which it was first stated, i.e. decisions of prosecutorial authorities. One could, however, reconcile *McMahon* with *Kavanagh* in by reading *McMahon* in a more limited way to impose an obligation of consistency only on the courts, not on arms of the executive. Nevertheless, *McMahon* has generally been assumed to have a wider scope than that. See, for instance, the recent comments of Keane C.J. in *Sinnott v. Minister for Education*,[64] below.

In *State (Keegan) v. Stardust Compensation Tribunal*,[65] an attempt was made to expand the reasoning in *McMahon v. Leahy*. The prosecutors sought to challenge awards made by the Tribunal. The Tribunal had made an award of £50,000 to the first prosecutor's wife for nervous shock occasioned by the death of her daughter in the fire, but had made no such award to the first prosecutor. In the Supreme Court, Henchy J. considered an argument based on *McMahon v. Leahy*.[66] He accepted that Article 40.1 required that "people who appear before the Courts in essentially the same circumstances should be dealt with in essentially the same manner".[67] However, the issue in the present case was whether the evidence in the two claims was essentially the same. Given that the members of the Tribunal had heard evidence and examined witnesses, which the Supreme Court had not done, he was unwilling to overturn their award. *Keegan* thus establishes, if it needed establishing, that although courts and tribunals must treat people consistently, this duty cannot be reviewed because an appellate or supervisory court does not have the benefit of hearing the evidence and thus cannot assess whether consistency has been achieved.

---

[63] Unreported, Supreme Court, 11 March 1999, at 22-3.
[64] [2001] 2 IR 545.
[65] [1986] IR 642; [1987] ILRM 202.
[66] Although the other members of the Court did not consider this point, nothing in their judgments detracts from Henchy J.'s analysis.
[67] [1986] IR 642, at 658; [1987] ILRM 202, at 215.

A further attempt to expand *McMahon v. Leahy* was made in the High Court in *Finucane v. McMahon*.[68] This case arose again in the context of section 50 of the Extradition Act, 1990. Over the course of the 1980s, the Supreme Court had considered the interpretation of "political offence" on five different occasions, offering different conclusions depending on how the Court was constituted.[69] In *Finucane*, the applicant argued that it breached Article 40.1 to treat him differently to people who had had the benefit of the more expansive interpretation of "political offence". Noting that another person had already been dealt with under the more restrictive interpretation, Hamilton P. rejected this argument:

> The argument that an order of this court which resulted in the applicant's extradition would amount to an unconstitutional discrimination prohibited by [Article 40.1] of the constitution ignores, it seems to me, the system of judicial adjudication which our courts apply and which is envisaged by the Constitution. Under that system, every branch of the law, and not just the law of extradition, may evolve as a result of one or a series of authoritative judicial decisions. As a result following an authoritative statement of the law it may well be that citizens who had previously enjoyed some statutory exemption, relief or benefit might no longer be entitled to it. For a court to make such a ruling or for other courts to follow it does not, in my judgment, involve any infringement of [Article 40.1]....[70]

This judgment confirmed that *McMahon v. Leahy* did not preclude judicial evolution of the law, even if that meant inconsistency of treatment.[71] However, the more recent case of *Hanley v. Minister for Defence*[72] implicitly provides some support for the *McMahon* requirement of consistency, at least as it pertains to factual situations. In this case, the Supreme Court considered the fairness and impact of the "Green Book", introduced by the Civil Liability (Assessment of Hearing Injury) Act, 1998 as a means of evaluating hearing impairment. Denham J. in concluding that guidelines were appropriate in this area made the following observations about justice, consistency and Article 40.1:

---

[68] [1990] 1 IR 165.
[69] See Hogan and Whyte, *Kelly: The Irish Constitution* (3rd ed., Butterworths, 1994), at 879-83.
[70] [1990] 1 IR 165, at 178.
[71] On appeal, the Supreme Court reverted to an earlier definition of "political offence", to the benefit of Mr. Finucane.
[72] [1999] 4 IR 392; [2000] 2 ILRM 276.

> It is of fundamental importance that the administration of justice be fair. This includes the concept that there should be consistency in similar cases in decision-making, including the determination of awards of damages. The constitutional guarantee of equality (Article 40.1) requires that persons be held equal before the law. There is an obligation of equal treatment. Thus, similar cases should be determined in a constant and foreseeable pattern. The concepts of justice and fairness demand that the system not be a lottery. Also, if a formula is in place there is less reason for delay and injured parties should be able to move to a conclusion in a speedy process.[73]

The *obiter dictum* of Keane C.J. in *Sinnott v. Minister for Education*[74] provides support for the continued vitality of *McMahon v. Leahy*. The Chief Justice suggested that future plaintiffs who would receive less compensation than Mr Sinnott, on account of the State's concession in this case, might be able to resist "such a clear inequality of treatment by the court" by reference to *McMahon*.

Laws of Civil Procedure

Article 40.1 has also been argued in a number of cases impugning the validity of civil procedural rules. In *O'Brien v. Manufacturing Engineering*,[75] the plaintiff challenged the constitutionality of parts of section 60 of the Workmen's Compensation Act, 1934. The plaintiff had accepted compensation payments under the Act for an accident he had suffered, but then sought to institute proceedings against his employer 26 months after the date of the accident. Section 60(1) of the Act provided that nothing in the Act affected the civil liability of the employer but section 60(2) provided that an employer could not be liable twice. Section 60(6) provided that a workman who accepted payments under the Act could maintain an action at common law, provided it was instituted within 12 months of the date of the accident or, if there were substantial grounds for not having brought the action within that period, within 24 months of the date of the accident. As the shortening of the limitation period from the standard three years to two years was not unreasonable and as workmen had

---

[73] *Ibid.*, at 399; 281.
[74] [2001] 2 IR 545, at 636.
[75] [1973] IR 334; (1974) 108 ILTR 105.

advantages under other parts of the Act, the Court considered that there was no breach of the equality guarantee.

In *O'Brien v. Keogh*,[76] the plaintiff challenged section 49(2)(a)(ii) of the Statute of Limitations, 1957 which provided that a general exception for minors, allowing them to sue within three years of reaching their majority, did not operate where the plaintiff minor was in the custody of a parent when the cause of action accrued. The plaintiff was injured in a car accident involving his father's car and initiated proceedings four and a half years later. The Court, *per* Ó Dálaigh C.J., accepted that the differentiation effected by the section was based not on physical location but on custody: the essential difference was between being in the custody of a person who is in *loco parentis* and not being in the custody of such a person. The purpose of the provision was to attempt to establish equality between these two groups and, apparently for this reason although it is not stated, there was no breach of Article 40.1. Nevertheless, the Court proceeded to hold that the plaintiff's unenumerated right to litigate under Article 40.3 was infringed.

In *Mapp v. Gilhooley*,[77] the plaintiff, a minor, had been injured in a schoolyard accident. On appeal, it was argued that the plaintiff should not have been allowed to give evidence without having taken an oath. The plaintiff argued that the rule requiring such evidence to be on oath was discriminatory against him as a youthful plaintiff might not understand the nature of an oath but would otherwise be capable of explaining what had occurred. Finlay C.J. reasoned that the purpose of the statute was to ensure the truth of evidence by reference to a moral and religious sanction against deliberate untruth. He concluded that, because of this, such a rule could not be inconsistent with either the equality guarantee or the right of access to the courts. It is not clear why this conclusion follows.

Property

In a number of cases, plaintiffs alleging a breach of their property rights have also alleged breaches of Article 40.1. In *Blake v. Attorney General*,[78] the plaintiffs challenged the statutory

[76] [1972] IR 144.
[77] [1991] 2 IR 253.
[78] [1982] IR 117.

scheme of rent restriction. The plaintiffs relied on Article 40.1 and the protection of private property contained in Articles 40.3 and 43. In the High Court, McWilliam J. merged analysis of the two claims, focusing on the arbitrary and unequal limitation of property rights effected by the Rent Restrictions Act, 1960. He considered that equality before the law required that property rights should not be delimited in an arbitrary way. Further, he considered that *de Búrca*, although not directly on point, indicated "some of the limitations on making a property qualification a ground for discrimination".[79] Article 40.1 was not considered on appeal.

It is interesting that the human personality doctrine does not appear to have been raised by the defence in *Blake*. It was this argument that ultimately defeated the plaintiffs' equality claims in *Brennan v. Attorney General*[80] and *Madigan v. Attorney General*,[81] already considered in chapter six. In *Muckley v. Attorney General*,[82] the plaintiffs challenged section 21 of the Finance Act, 1980, adopted after *Murphy v. Attorney General*,[83] which purported to enable the Revenue Commissioners to collect from defaulting taxpayers the amounts that would have been due in the fiscal years up to 1979-80, had the provisions struck down in *Murphy* remained in force. Both the High Court and Supreme Court held that section 21 was unconstitutional, having regard to Article 41 and Article 40.3 of the Constitution. There was no consideration of Article 40.1.

In *Cox v. Ireland*,[84] the plaintiff challenged the constitutionality of section 34 of the Offences Against the State, Act 1939 which imposed certain restrictions consequential upon conviction of an offence scheduled under the Act.[85] The plaintiff had been convicted of a scheduled offence and lost his job as a teacher in a community school. The plaintiff argued that section 34 infringed his right to a trial in due course of law, his property rights and the equality guarantee. Barr J. in the High Court concluded that both Article 40.1 and Article 40.3 were

---

[79] *Ibid.*, at 125. It is difficult to see the relevance of this. The Rent Restrictions Act, 1960 did not create a property qualification as a basis for discrimination but rather discriminated in its restriction of citizens' property rights.

[80] [1983] ILRM 449 (HC); [1984] ILRM 355 (SC).

[81] [1986] ILRM 136.

[82] [1986] ILRM 364.

[83] [1982] IR 241. See discussion in chapters four and five.

[84] [1992] 2 IR 503

[85] A person who held an office or employment remunerated by the State would forfeit such office or employment upon conviction and would be disqualified from receiving any pension, superannuation, allowance or gratuity in respect of any service rendered or thing done by her prior to such conviction.

breached but did not explain precisely why. On appeal, Finlay C.J. noted three equality arguments made by the plaintiff: that section 34 discriminated between those convicted of the same offence in a Special Criminal Court and in any ordinary court; that it discriminated between persons convicted of different offences before a Special Criminal Court, i.e. scheduled and unscheduled offences; and that it discriminated between persons convicted of a scheduled offence before a Special Criminal Court whose office or employment was funded by the State and persons convicted of an identical offence whose office or employment was otherwise funded. Nevertheless, in deciding the case, the Court did not refer to any equality argument, instead relying solely on the infringements of property rights effected by section 34. For this reason, *Cox* is not authority for any proposition about Article 40.1.

In *McMenamin v. Ireland*,[86] as noted in chapter five, the plaintiff challenged the discrimination in pension rights as between District Court judges and Circuit Court judges. Although ultimately successful in the Supreme Court, his claim based on Article 40.1 failed, partly because of the human personality doctrine and partly because of a perceived difference in situation between the two types of judge. In *An Blascaod Mór Teoranta v. Commissioners of Public Works*,[87] the plaintiffs challenged a discriminatory delimitation of their property rights in the form of a compulsory purchase order scheme for the Great Blasket Island. This case has already been considered in chapter six. It is notable because, although success in the High Court was based on both the equality guarantee and the private property guarantee, the Supreme Court chose to rest its decision exclusively on Article 40.1. This is a rare example of Article 40.1 being preferred as a basis of decision. In *re Article 26 and the Planning and Development Bill 1999*,[88] the Supreme Court considered the constitutionality of Part V of the said Bill. Essentially, this Part allowed planning authorities to set aside portions of new developments for social and affordable housing. The Court rejected the argument that Part V invidiously discriminated between landowners who proposed to develop their land for housing and those who did not. It also rejected the contention that there was an unfair discrimination between the affected landowners and those benefiting from the scheme:

---

[86] [1996] 3 IR 100; [1994] 2 ILRM 368 (HC); [1997] 2 ILRM 177 (SC).
[87] [2000] 1 IR 6; [2000] 1 ILRM 401.
[88] [2000] 2 IR 321; [2001] 1 ILRM 81.

> The fact that a particular planning scheme may result in the conferring of benefits on some categories of persons seen by the Oireachtas as being in particular need of assistance and that this is done at the expense of landowners who are benefiting financially from related planning provisions can be said to be a form of unequal treatment. However, Article 40 does not preclude the Oireachtas from enacting legislation based on any form of discrimination: as has often been pointed out, far from promoting equality, such an approach would simply result in greater inequality in our society.[89]

Having regard to the particularly strong presumption of constitutionality that applied to contentious socioeconomic legislation, the Court concluded that the Bill met the "relevant to a legitimate purpose" test laid down by Barrington J. in *Brennan*.

Delegated Legislation

The courts have developed a framework for determining which matters may be the subject of delegated legislation, how delegates of the power to legislate should undertake their task and how the courts should review legislation in this area. Article 40.1 has had some slight impact in the formulation of this framework. In *East Donegal Co-op v. Attorney General*,[90] the plaintiffs challenged the constitutionality of sections 3 and 4 of the Livestock Markets Act, 1967. This Act regulated the business of selling cattle, sheep or pigs by auction for the first time. Section 3 of the Act established a licensing scheme operated by the Minister for Agriculture and Fisheries. Section 4 allowed the Minister to grant exemptions from the provisions of the Act in respect of conduct of any particular class or kind. O'Keeffe P. considered the constitutionality of this type of legislation, having regard to Article 40.1. He reasoned that Article 40.1 provided a wide scope for the differentiation between individual citizens but did not allow for the arbitrary preference of one citizen to another. O'Keeffe P. held that those parts of section 3 which granted an unfettered power to the Minister to draw distinctions, implicitly without any obligation to have regard to the second sentence of Article 40.1, violated the equality guarantee. He declared that the licensing provisions of the Act

---

[89] *Ibid.*, at 357, 117.
[90] [1970] IR 317; (1970) 104 ILTR 81.

were unconstitutional. On appeal, Walsh J., for the Court, relied on the presumption of constitutionality and double construction rule to overturn O'Keeffe P.'s holding that section 3 was unconstitutional. However, he held that section 4 was unconstitutional insofar as it allowed the Minister to exempt individual businesses as opposed to classes of business:

> The constitutional right of the Oireachtas in its legislation to take account of difference of social function and difference of capacity, physical and moral, does not extend to delegating that power to members of the Executive, to the exclusion of the Oireachtas, in order to decide as between individuals (all of whom are, by the terms of an Act bound by it) which of them shall be exempted from the application of the Act – unless such an exemption were necessary to avoid an infringement of the constitutional rights of such individuals which infringement, because of circumstances peculiar to them, would necessarily result from the application of the statutory provision without such exemption. No such justification appears in the provision under consideration.[91]

It is not quite clear why such a power with respect to classes of businesses did not pose constitutional problems.

In *Cityview Press Limited v. AnCO*,[92] the plaintiffs challenged section 21 of the Industrial Training Act, 1967 which allowed the defendant to impose and determine the amount of a levy on employers, in an industry designated under section 23, to fund training in that industry. The plaintiffs contended that this permitted the defendant to impose different levies on different kinds of industry, thus infringing a requirement of Article 40.1 that there had to be uniformity of basis in respect of levies imposed. McMahon J. doubted whether Article 40.1 had any relevance to this case and even if it had, the human personality doctrine foreclosed the issue. Article 40.1 was not considered on appeal. In *Cooke v. Walsh*,[93] the plaintiff challenged the constitutionality of Article 6(3) of the Health Services (Limited Eligibility) Regulations, 1971 and its parent provision, section 72 of the Health Act, 1970, as breaches of Article 40.1. Hamilton J. concluded that section 72 only allowed distinctions to be drawn

---

[91] *Ibid.*, at 350; 96.
[92] [1980] IR 381.
[93] [1983] ILRM 429.

between the classes of persons eligible for the free health care and so did not cause the problem identified by Walsh J. in *East Donegal*.

Miscellaneous Cases

In *Heaney v. Minister for Finance*,[94] the plaintiff challenged the operation of the Prize Bond lottery established by the Finance (Miscellaneous Provisions) Act, 1956. The plaintiff had purchased a prize bond for £5 in 1961 for participation in periodic draws for prizes. He argued that, given inflation, it was unfair that bonds purchased in 1985 for £5 should have the same chance of winning a prize as his bond purchased in 1961. Murphy J. noted that the courts did not have the power to substitute their view of justice and fairness for that of the Oireachtas. in any event, he held that the plaintiff had not suffered any injustice as his bond had been entered in numerous draws since 1961, a boon not enjoyed by the canny investor in 1985. For these reasons, there was no need to consider the general interpretation of Article 40.1.

In re a Ward of Court[95] raised the exceptionally contentious issue of whether it was permissible to withdraw nutrition from a patient in a near persistent vegetative state. Some of the judges considered Article 40.1 in reaching their conclusions. Hamilton C.J. and Denham J. both saw Article 40.1 as relevant to the effect of the Ward's loss of her mental capacity on the exercise of her constitutional rights. Hamilton C.J. felt that the Ward, if mentally competent, would have a right to refuse treatment. Having regard to Article 40.1, he held that it was preferable for the Ward to have her autonomy-related rights exercised on her behalf:

> The loss by an individual of his or her mental capacity does not result in any diminution of his or her personal rights recognised by the Constitution, including the right to life, the right to bodily integrity, the right to privacy, including self-determination, and the right to refuse medical care or treatment. The ward is entitled to have all these rights respected, defended, vindicated and protected from unjust attack and they are in no way lessened or diminished by reason of her incapacity.[96]

---

[94] [1986] ILRM 164.
[95] [1996] 2 IR 73; [1995] 2 ILRM 401.
[96] *Ibid.*, at 126; 428.

Denham J. recognised that the difference of capacity between the Ward and a sentient person might justify a difference in treatment, but concluded that the difference in situation did not extend beyond the recognition that a person may not be able to exercise a right. As equality was a positive proposition, it was appropriate to try to provide to the Ward the same rights as those of a sentient person:

> The State has due regard to the difference of capacity and may envisage a different process to protect the rights of the incapacitated. It is the duty of the Court to uphold equality before the law. It is thus appropriate to consider if a method exists to give to the insentient person, the ward, equal rights with those who are sentient.[97]

Whatever one's views about the ultimate decision that withdrawal of treatment was not unconstitutional, the use made of Article 40.1 was perplexing. Seldom can a difference in capacity have been so pronounced. Admittedly, the case raised no question of deference to legislative judgment so the Court was more free to make its own assessment of the appropriate response to the difference of capacity. Nevertheless, the autonomy-related rights under consideration made no sense in the case of an almost insentient person. Although one should of course treat people in the unfortunate position of the Ward as equal human persons, worthy of respect, it does not follow that that they have an equal right to self-determination. Autonomy exercised on your behalf by another is not autonomy; it is paternalism. Such paternalism may or may not be justified, but it should not be equated with autonomy; the use of Article 40.1 to do so was regrettable.

In *SPUC v. Grogan (No.3)*,[98] the defendants argued before the Irish High Court that they were being treated unequally as compared to providers of abortion information who had an association with abortion clinics abroad. The European Court of Justice had ruled that only the latter providers of information could gain the benefit of Community law. Morris J. rejected the defendants' argument on the basis that, as a matter of Irish law, the distribution of such

---

[97] *Ibid.*, at 159; 457
[98] [1993] 1 CMLR 197.

information was illegal regardless of whether there was an association. This scarcely addressed the point.

Part III

Chapter Nine

Process Conceptions of Constitutional Equality

Introduction

The Irish courts have adopted a process conception of constitutional equality and may be moving from a weak process conception to a strong process conception. The implications of this doctrinal development can only be fully understood if it is placed in its theoretical context. There are many different types of process conception. Although process conceptions may generically be distinguished from substantive conceptions of equality, there are variations between process conceptions and even between strong process conceptions. In terms of political debate, some lean leftwards and some lean rightwards. It is therefore important to ascertain precisely to which strong process conception the Irish courts may have committed themselves. I shall then outline an alternative process conception of equality that may be consonant with much of Irish constitutional doctrine. In chapter ten, I shall contrast the process conceptions, generically, with a substantive conception.

The Irish Courts' Development of Constitutional Equality Doctrine

Based on a number of *dicta* from two recent Supreme Court cases I have argued that Irish constitutional equality doctrine may be moving to a position of differentiated scrutiny, i.e. a position whereby classifications on certain grounds require greater justification than classifications on other grounds. In *re Article 26 of the Constitution and the Employment Equality Bill, 1996*,[1] the Supreme Court made two relevant statements:

> The forms of discrimination which are, presumptively at least, proscribed by Article 40.1 are not particularised: manifestly, they would extend to classifications based on sex, race, language, religious or political opinions.[2]

The Court later observed:

---

[1] [1997] 2 IR 321. Hereinafter referred to as "the *Employment Equality Bill Case*".

[2] *Ibid.*, at 347. This suggested that the onus lay on the State to justify the use of certain grounds of classification.

> Once, however, it is accepted that discrimination on the grounds of age falls into a different constitutional category from distinction on grounds such as sex or race, the decision of the Oireachtas not to apply the provisions of the Bill to a relatively narrowly defined class of employees in the public service whose duties are of a particular character becomes more understandable.[3]

In *An Blascaod Mór Teoranta v. The Commissioners of Public Works*,[4] Barrington J., speaking for the Supreme Court, reasoned as follows:

> In the present case the classification [between persons whose ancestors lived on the island on the evacuation date and those whose ancestors did not] appears to be at once too narrow and too wide. It is hard to see what legitimate legislative purpose it fulfils. It is based on a principle – that of pedigree – which appears to have no place (outside the law of succession) in a democratic society committed to the principle of equality. This fact alone makes the classification suspect. The Court agrees with the learned trial judge that a Constitution should be pedigree blind just as it should be colour blind or gender blind except when those issues are relevant to a legitimate legislative purpose. This Court can see no such legitimate legislative purpose in the present case and has no doubt but that the plaintiffs are being treated unfairly as compared with persons who owned or occupied and resided on lands on the island prior to November 1953 and their descendants.[5]

Taken together, these observations suggest that different grounds of classification require different levels of justification. Grounds of classification considered to be particularly objectionable (such as race, gender, ethnic origin and pedigree) will require greater justification than other classifications. Where such classifications are made, the onus will lie on the State to show that the classification is justified, and not on the plaintiff to show that there is no justification. It is also possible that a higher standard of justification will be

---

[3] *Ibid.*, at 349. This suggested that grounds of classification fall into different categories and that justification is more difficult in some categories than in others.

[4] [2000] 1 IR 6; [2000] 1 ILRM 401. Hereinafter referred to as "the *Great Blasket case*".

required.[6] Such a conception of equality is referred to as a "strong process conception" because it gives the constitutional guarantee more traction against unjust social practices.

This move towards a strong process conception can be understood in terms of a development of the human personality doctrine. Article 40.1 contains a commitment to both human equality and Aristotelian equality. The concept of human equality maintains that all humans are fundamentally equal; the concept of Aristotelian equality maintains that all humans are fundamentally different, the task of equality being to take proportionate account of such differences as do exist.[7] For as long as human equality was understood in a politically minimalist manner,[8] it could coexist with the politically minimalist Aristotelian conception. When human equality is considered as a strong political ideal,[9] however, it begins to create friction with the Aristotelian conception. For the presupposition of difference conflicts with the presupposition of equality. Strong process conceptions are best understood as an attempt to take account of the command of human equality within the conceptual framework established by Aristotelian equality.

Right-leaning Strong Process Conceptions

Human equality can be integrated into a process conception in different ways. Given the *dicta* in the *Employment Equality Bill Case* and the *Great Blasket Case*, two such conceptions require attention. In terms of current political debate, one such conception leans to the right, the other to the left. They differ in their application to reverse discrimination. In chapter four, I posited a possible distinction between adverse and reverse discrimination. For some process conceptions of equality, including the left process conception, adverse discrimination is the paradigmatic discrimination against which an equality guarantee should protect. Reverse discriminations are either of less concern to equality or no concern at all. For other process conceptions, including the right process conception, there is no distinction

---

[5] *Ibid.*, at 19; 409. This again suggested that some grounds of classification were presumptively invalid, requiring justification by the State.

[6] This depends on one's reading of the *dicta* in the *Employment Equality Bill Case*. See chapter six.

[7] In constitutional law, this becomes process equality because it requires the courts to analyse the process by which legislation is enacted, the process in which differences are taken into account.

[8] For instance, equality before God in the next life.

[9] For instance, when one reasons from a belief that humans are all equal to the political proposition that the law should treat all persons as if they were all equal.

between adverse and reverse discriminations: they are equally objectionable and equally the subject of an equality guarantee. Even if people accept the distinction between adverse and reverse discrimination, it does not follow that they will agree on what constitutes reverse discrimination. One's understanding of reverse discrimination is dictated by one's general conception of equality.

In this section, I shall consider the differences between two right-leaning process conceptions of equality: symmetry and colour-blindness. Neither recognises the concept of reverse discrimination. In the next section, I shall consider whether the Supreme Court in the *Great Blasket case* is better understood as committing itself to symmetry or colour-blindness. In the following section, I shall consider the alternative, left process conception of equality.

Colour-blindness is the strongest sub-set of symmetry. It requires not simply that the courts be equally sceptical of adverse and reverse racial classifications but that they be so sceptical of each that they adopt the *a priori* position that racial classifications are never permissible.[10] Kull argues for a doctrine of colour-blindness, in the American context, on the basis that the American people have very good reason to be sceptical of their political capabilities concerning race.[11] Constitutional approaches which do not require colour-blindness give judges a discretion in deciding which racial preferences are acceptable. Given American history, he argues, one should be sceptical of any political organ – including the courts – having such a power. One should therefore adopt the *a priori* position of colour-blindness, thus removing the possibility of judges making mistakes:

> A constitutional rule actually capable of constraining results, not merely subjecting them to judicial oversight, must either require the government to classify its citizens by race or else forbid the practice: there is no middle ground. The alternative is to treat a racial classification like any other (age, sex, occupation, income), with the

---

[10] I adopt the terminology of "adverse" and "reverse" discrimination for descriptive purposes only. It is difficult to develop a terminology which is neutral on this issue, i.e. which presupposes neither that one is as bad as the other nor that one is worse than the other. "Adverse" and "reverse" probably suggest that one type of discrimination is worse than another; nevertheless, as words they are less loaded than "malign" and "benign", "negative" and "positive", etc.

[11] Kull, *The Color-blind Constitution* (Harvard University Press, 1992), at 5.

> result that such use of it will be made as the political process approves [once] we regard the Supreme Court's legislative oversight as part of the political process....[12]

The idea of colour-blindness was used by Charles Sumner in 1847, arguing the legal case against racial school segregation in Boston.[13] It received federal, constitutional approval from Harlan J. in his dissenting judgment in *Plessy v. Ferguson*,[14] but has never since received explicit approval from the US Supreme Court. A majority of that Court has adopted symmetry but not colour-blindness as its guiding doctrine on issues of racial justice:

> [A]ll governmental action based on race – a group classification long recognised as "in most circumstances irrelevant and therefore prohibited" – should be subjected to detailed judicial inquiry to ensure that the personal right to equal protection of the laws has not been infringed.... Accordingly, we hold today that all racial classifications, imposed by whatever federal, state or local governmental actor, must be analysed by a reviewing court under strict scrutiny. In other words, such classifications are constitutional only if they are narrowly tailored measures that further compelling governmental interests.... The principle of consistency simply means that whenever the government treats a person unequally because of his or her race, that person has suffered an injury that falls squarely within the language and spirit of the Constitution's guarantee of equal protection.[15]

This approach imposed the most onerous standard of review (strict scrutiny) on all racial classifications, regardless of whether they could be classified as adverse or reverse. This introduced the requirement of symmetry into the process conception: racial classifications are

---

[12] *Ibid.*, at 223.

[13] *Ibid.*, at 40-52.

[14] He reasoned:

> [I]n view of the Constitution, in the eye of the law, there is in this country no superior, dominant, ruling class of citizens. There is no caste here. Our Constitution is color-blind, and neither knows nor tolerates classes among citizens. In respect of civil rights, all citizens are equal before the law. The humblest is the peer of the most powerful. The law regards man as man, and takes no account of his surroundings or his color when his civil rights as guaranteed by the supreme law of the land are involved.

Plessy v. Ferguson 163 US 537, at 559 (1896).

[15] *Adarand Constructors Inc v. Pena* 515 US 200, at 229-30 (1996). Kennedy J. agreed with this reasoning. Rehnquist C.J. and Scalia and Thomas JJ. agreed with O'Connor J.'s conclusion but not all of her reasoning.

all equally difficult to justify. It eschews colour-blindness in leaving open the possibility that such classifications could be justified: colour may be used as a ground of classification; the courts must establish whether governmental use of colour as a criterion satisfies the onerous standard of review.

The Strong Process Conception Adopted by the Irish Courts

The *dicta* in the *Employment Equality Bill case*, although suggesting the adoption of a strong process conception of equality, contain few clues as to which type of strong process conception. The *dicta* of Barrington J. in the *Great Blasket case* are more revealing. Barrington J. held that the Constitution should be "pedigree blind just as it should be colour blind or gender blind except when those issues are relevant to a legitimate legislative purpose". The problem with this *dictum* is that it was inconsistent. On the one hand, Barrington J. endorsed the notion of colour blindness which, properly understood, precludes judicial oversight of, for instance, racial classifications. On the other hand, he explicitly allowed for judicial oversight of such classifications by reiterating the "legitimate legislative purpose" test. Given that he explicitly limited colour blindness by reference to the legitimate legislative purpose test, one may take it that the latter is the more important aspect of the constitutional position. For this reason, the Supreme Court seems to have committed itself to a position of symmetry but not colour-blindness. Adverse and reverse racial classifications require the same level of justification – a greater level of justification than other classifications – but, in theory at least, they can both be justified; it may be that reverse racial classifications will prove, in practice and on a case-by-case basis, easier to justify than adverse such classifications.

It is necessary to consider the theoretical support for such an approach. Brest argues that the process conception of equality, which he terms the "antidiscrimination principle", guards against certain defects in the process by which race-dependent decisions are made.[16] Race-dependent decisions are irrational in that they reflect an assumption that members of one race are less worthy than other people. But sometimes race-dependent decisions might not

---

Stevens, Souter, Breyer and Ginsberg JJ. disagreed with the idea of symmetry and, *a fortiori*, with the idea of colour-blindness.

[16] Brest, "Foreword: In Defense of the Antidiscrimination Principle" 90 *Harvard Law Review* 1, at 6 (1976).

be irrational. The antidiscrimination principle thus provides a rule that, although recognising the general irrationality of race-dependent decisions, allows the courts stringently to test such decisions although allowing for the possibility that there might be a justification.[17]

The Irish constitutional position, in its adoption of symmetry, takes a more doctrinaire approach to this reasoning than does Brest. It maintains that the proper subject of equality inquiry is the individual. Inequality occurs when irrelevant considerations pollute the legislative process. An individual is treated unfairly and unequally when she is classified by reference to an irrelevant consideration. In general, a simple rationality test would suffice to ascertain whether a person has been classified irrationally, and therefore unfairly and unequally. Nevertheless, because race-dependent (or gender-dependent or pedigree-dependent) decisions that purport to be rational and based on legitimate considerations are likely to rest on irrational considerations about differential racial worth, a more exacting inquiry is required. The *dicta* in the *Employment Equality Bill Case* and the *Great Blasket Case* allow for that more exacting inquiry. The reference to colour-blindness suggests that race, pedigree and gender are, *prima facie*, always irrational considerations. A reverse discrimination which favours a black person over a white person with regard to admission to a predominantly white college, for example, contravenes equality in exactly the same way as a segregationist measure which favours a white person over a black person with regard to admission to the same college. Although it is theoretically possible that either of these measures could be shown to be justified, such a development would merely justify the infringement of equality. It would not remove that infringement.

An Alternative Strong Process Conception for the Irish Courts

As already noted, the language of colour-blindness was borrowed from the United States Supreme Court. There is a problem with such comparative exercises in doctrinal translation, namely that the recipient court does not fully understand the legal, let alone the political and moral, implications of the language which it borrows. The idea of colour-blindness, and indeed of symmetry, is hotly contested in the United States, but the Irish Supreme Court adopted the phrase without any reference to the attendant controversy. Given that the phrase

[17] This is clearly at odds with Kull's analysis.

was adopted to favour the plaintiff in the *Great Blasket case*, it seems likely that no more expansive reading was offered by the other side. For these reasons, the Court's apparent adoption of the doctrine of symmetry might be reconsidered if the implications of that doctrine were clarified. It is therefore worth considering an alternative strong process conception, broadly compatible with the *dicta* of the court in the two cases, which coheres better with earlier case law, in particular the basis of discrimination version of the human personality doctrine. This is the left-leaning process conception already adverted to above.

Dworkin endorses the value of human equality arguing that the sovereign virtue of the political community is to treat all persons with equal concern and respect: "political decisions and arrangements must display equal concern for the fate of all".[18] I am not so much concerned here with whether this statement is warranted but rather with how, given the reference to "human persons" in Article 40.1, to elaborate a conception of constitutional equality based on human equality.[19] I shall draw on the arguments of Dworkin, and others, and attempt to show how a conception of human equality can be a compelling interpretation of Irish constitutional law.

First, it is necessary to note an objection posed by Perry. He disagrees with Dworkin's value of equal concern and respect on the basis that it would, for example, require one to treat Gandhi and Hitler with equal respect. This denies the principal function of moral evaluation. One must accept that not all persons are moral equals.[20] This criticism is misplaced. The demand to treat all humans with equal concern and respect does not require a denial of individual moral responsibility. Instead, it requires that one *a priori* accord equal respect to all. Perry himself notes the alternative:

> [T]he extent of the respect and concern that we accord another person is sometimes also a function of the extent to which we approve or disapprove of that person's status, not as an individual, but as a depersonalised abstraction – "black", for example, or "woman".... [A]lthough not every person is the moral equal of every

[18] Dworkin, *Law's Empire* (Harvard, 1986), at 381.
[19] O'Connell has undertaken a similar exercise at greater length. See O'Connell, "The Irish Courts and Equality Before the Law" (LL.M. Thesis, UCD, 1993).

> other person, there are some traits and factors – of which race is the paradigmatic example – by virtue of which no person ought to be deemed morally inferior to any other person.[21]

To my mind, this appears consistent with Dworkin's account of human equality; any tension is one more of language than of substance. The challenge is to translate the rather abstract requirement of equal respect into a more concrete, political programme, realisable in constitutional law.

In the context of racial discrimination, Dworkin elaborates three possible conceptions of the general virtue of equal respect.[22] First, he considers a theory of suspect classifications, similar to that which I have outlined above. Under this conception, the right against racial discrimination is just a facet of a more general right of people to be treated equally. Race and similar grounds of distinction are special only because history suggests that some groups are more likely than others to be denied the consideration due to them. Nevertheless, such distinctions may be justified by reference to the general interest. This general interest could include the general interest in not outraging a societal prejudice. Secondly, he considers a banned categories approach. This recognises a distinct right against discrimination on the basis that certain properties or categories should never be used to distinguish groups of citizens for different treatment, even when this might achieve the general interest. Thirdly, he considers a banned sources approach: generally, it is a good argument in favour of a particular social goal that more people want it, or that they want it more intensely. Social policy is generally legitimate where it follows the collective preferences of the community. The theory of banned sources, however, requires that preferences which "are rooted in some form of prejudice against one group"[23] cannot count in favour of a policy that disadvantages that group.

Dworkin argues that the banned sources theory is the best conception of the command to treat with equal respect. Nevertheless, he draws a distinction between the practical and

---

[20] Perry, "Modern Equal Protection: A Conceptualisation and Appraisal" 79 *Columbia Law Review* 1023, at 1030 (1979).
[21] *Ibid.*, at 1031.
[22] Dworkin, *Law's Empire* (Harvard, 1986), at 382-7.

academic elaboration of a theory. He argues that the banned sources theory would be very difficult for judges because it is difficult to decide whether people's preferences are motivated by prejudice or by other, legitimate, factors. Therefore, it needs a practical elaboration. If one nevertheless accepts this theory, one should "construct a practical elaboration based on judgments about the kinds of preferences that often or typically have been generated through prejudice, and about the kinds of political decisions that in normal circumstances could not be justified were such preferences not counted as part of the justification".[24] This renders the practical elaboration similar to the first theory in that it identifies a list of suspect classifications. Nevertheless, the case necessary to rebut the presumption that a classification infringes equality is very different, for in assessing the general interest one cannot take into account preferences tainted by prejudice. Further and more relevant to the discussion above, it would react very differently to legislation "whose purpose and effect is to benefit people who have historically been the victims of prejudice, not to harm them".[25] Such legislation is not motivated by prejudice against the superordinate group; it does not arise from a banned source. This is clearly different to the banned categories approach – colour blindness, in other language. It is also different to the symmetry approach considered above. Under that approach, reverse discrimination was an inequality which could theoretically be justified. Under the banned sources approach, reverse discrimination is not an inequality because it is not rooted in prejudice. Accordingly, it does not require justification.

There are good reasons to adopt this as an interpretation of Irish constitutional equality. The idea of classifications sourced in prejudice lies at the heart of the "basis of discrimination" version of the human personality doctrine, canvassed in chapter six. The obligation to treat people equally, as human persons, is fundamentally subverted where the State determines that some people are, by virtue of their human attributes, inferior to other people. It is worth recalling the expansive comments of Walsh J. in *Quinn's Supermarket v. Attorney General*:

> [Article 40.1] is not a guarantee of absolute equality for all citizens in all circumstances but it is a guarantee of equality as human persons and (as the Irish text of the Constitution makes quite clear) is a guarantee related to their dignity as

---

[23] *Ibid.*, at 384.
[24] *Ibid.*, at 386.
[25] *Idem.*

> human beings and a guarantee against any *inequalities grounded upon an assumption*, or indeed a belief, that some individual or individuals or classes of individuals, by reason of their human attributes or their ethnic or racial, social or religious background, are to be treated as the inferior or superior of other individuals in the community.[26]

The banned sources theory is consistent with most of the doctrinal developments in the *Employment Equality Bill Case* and the *Great Blasket Case*. It diverges, however, in that it does not adopt the language of colour-blindness and symmetry. It does not equate, even *prima facie*, discrimination against members of an oppressed group with discrimination in favour of such persons. What is important is not the ground of classification itself, but the source of the classification. If the Supreme Court insists on the language of colour-blindness, then the banned sources theory cannot count as a good interpretation of Irish constitutional doctrine. If the Supreme Court, however, were prepared to deem the references to colour-blindness an ill-considered aside, the banned sources theory could be a compelling interpretation of Irish constitutional doctrine.

In my view, the banned sources theory is the most egalitarian yet plausible interpretation of Irish constitutional law. It is well-grounded in both the constitutional text and the case law. It provides a significantly stronger test for legislative classifications without adopting the position of the US Supreme Court on reverse discrimination. Nevertheless, it is still a process conception of equality. It focuses on the individual who has been unfairly classified by reference to objectionable criteria. What constitutes an objectionable ground of classification is now determined by generalisations about the motivations of actors, but it is still a question of classification. Further, little account is taken of the life situation of the victim. Rather, in assessing whether an individual has a good claim that the equality guarantee has been breached, the focus is primarily on the motivation of the person alleged to have breached the guarantee: has that person acted out of prejudice? The perpetrator perspective lives on. The courts must assess which classifications generally arise from the banned source of prejudice. This entails an assessment of social reality which may presumably be done on a contingent rather than universalist/essentialist basis. That is the courts may presumably conduct an

---

[26] [1972] IR 1, at 13-4. Emphasis added.

historical inquiry into the existence and character of prejudice in a particular society rather than a metaphysical inquiry into the immutable nature of prejudice. It remains, however, process-based in its orientation.

Strong Process Conceptions of Equality and Indirect Discrimination

At a risk of generalisation, there are two ways in which strong process conceptions are different from weak process conceptions. The first is the adoption of doctrinal devices that allow for differentiated levels of justification. The second is the adoption of doctrinal devices that recognise that discrimination may occur notwithstanding the fact that no discrimination appears on the face of the legislative measure. The term "indirect discrimination" connotes situations where the terms of a statute are facially neutral and yet effect a discrimination. For instance, a law banning the wearing of turbans might be considered indirectly discriminatory on the basis of religion. Essentially, the claim is that an unobjectionable ground of classification in legislation acts as a proxy for another, objectionable ground. *Dicta* in the *Illegal Immigrants Bill case* and *Redmond v. Minister for Environment*, considered in chapter four, suggest that the Irish courts recognise classification-*categorical* indirect discrimination but not classification-*salient* indirect discrimination. Nevertheless, if the courts do strengthen the process conception by adopting differentiated levels of justification as suggested in the *Employment Equality Bill case* and the *Great Blasket case*, they might also strengthen the process conception by recognising the concept of indirect discrimination with regard to classification-salient measures. The concept of indirect discrimination can be doctrinally realised in one of two ways: discriminatory purpose and disparate impact. US constitutional equality doctrine has adopted the discriminatory purpose test; European Community law has tended to adopt the disparate impact test.[27] Both tests differ from the approach of the Irish courts in that they both would recognise the discrimination on the basis of sexuality at issue in *Norris*. Nevertheless, they operate in very different ways and need to be considered separately.

---

[27] In the non-constitutional context, the US Supreme Court has favoured the disparate impact test. See *Griggs v. Duke Power* 401 US 424 (1971).

In *Washington v. Davis*,[28] the United States Supreme Court held that facially neutral classifications which effectively differentiated according to race were unconstitutional if they were motivated by a racially discriminatory purpose. The later case of . *Feeney v. Personnel Administrator of Massachusetts*[29] provided guidance as to the meaning of the discriminatory purpose requirement in the context of an alleged sex discrimination. Feeney challenged a Massachusetts statute which provided a preference for war veterans in civil service employment, effectively excluding women from the upper levels of civil service employment in the Commonwealth of Massachusetts. The Court ruled that the foreseeable impact of the statute was not sufficient to prove discriminatory purpose:

> "Discriminatory purpose" ... implies more than intent as volition or intent as awareness of consequences. It implies that the decision-maker, in this case a state legislature, selected or re-affirmed a particular course of action at least in part "because of", not merely "in spite of", its adverse effects upon an identifiable group.[30]

This means that a facially neutral measure will only fall foul of the equal protection clause if it is proven that those who enacted the measure were motivated by a desire to harm or disadvantage the disproportionately affected group. Knowledge of disproportionate impact is not enough: *animus* against the group must be demonstrated. Interpreted literally, this test would uphold the constitutionality of facially neutral discriminations based on outmoded stereotypical notions of the group in question, provided only that such discriminations were not motivated by animus.

EU anti-discrimination law provides a good statement of the concept of disproportionate impact. This concept allows one to view a measure that bears more heavily on one group than on another as discriminatory notwithstanding the fact that it is framed in facially neutral terms. For instance, European Community law provides:

> [I]ndirect discrimination shall exist where an apparently neutral provision, criterion or practice disadvantages a substantially higher proportion of the members of one sex

---

[28] 426 US 229 (1976).
[29] 442 US 256 (1979).
[30] *Ibid.*, at 279.

> unless that provision, criterion or practice is appropriate and necessary and can be justified by objective factors unrelated to sex.[31]

This test focuses on the effect of the measure on the subordinate group rather than on the intention of the perpetrator of the discrimination. For this reason it does not cohere as well with the general process conception of equality as does the discriminatory purpose test. Nevertheless, both doctrinal devices can be understood as compromises between fidelity to the process conception of equality and an impulse to address the substantive reality of inequality; both are premised on the realisation that what appears on the face of the legislative process does not necessarily reflect the reality of the situation. But the reality of the situation is transformed, through the lens of legal process, from a problem of unequal results into a problem of hidden classification.

---

[31] Article 3, Council Directive 97/80/EC of 15 December 1997 on the burden of proof in cases of discrimination based on sex Official Journal L14/6 of 20 January 1998, cited in Feldman, *Discrimination Law* (Oxford, 2002), at 107.

Chapter Ten

Substantive Conceptions of Equality

Introduction

The courts may be moving towards a strong process conception of equality, but it is far from clear which strong process conception they will adopt. A better understanding of the limits and character of these process conceptions can be gleaned from a comparison with substantive conceptions of equality. Further, given that strong process conceptions are best understood – analytically – as Aristotelian equality corrupted by a belief in basic human equality and a commitment to counteract substantive inequality, an examination of a purely substantive conception allows one better to understand the substantive elements that permeate current constitutional doctrine, as well as its plausible strong process alternatives.

I shall now set out the ways in which substantive conceptions differ generically from process conceptions. I shall then outline some of the issues which the substantive conception raises for constitutional equality doctrine. I shall not suggest definitive resolutions of these issues; it suffices to note how the terrain of constitutional adjudication changes when one conceives of equality in a substantive way. This emphasises the differences between the process and substantive conception and highlights the value judgments made by the courts in adopting a process conception. In chapter eleven I shall consider how the process and substantive conceptions would differ in response to a live issue: namely, the criminalisation of trespass. In chapter twelve, I shall consider the relative merits of the process and substantive conceptions.

The Substantive Impulse in Equality Law

The strong process conception of equality, which the Irish courts may be adopting, represents a number of compromises between Aristotelian equality and human equality. Aristotelian equality maintains that people differ in many respects; equality consists of treating people differently proportionately to their relevant differences. Realised in constitutional law, this produces process equality: the courts oversee the legislative process

to ensure that relevant differences are proportionately taken into account. Human equality maintains that humans are basically equal. When human equality is developed from a metaphysical proposition to a political proposition, it forces one to confront the injustice of differential life situations and entrenched disadvantage. It is no longer sufficient to meet difference in situation with different treatment. Instead, one must question the justice of the difference in situation.

The Irish courts' process conception adopts the basic framework of Aristotelian equality but may now, with the developments in the *Employment Equality Bill Case* and the *Great Blasket Case*, be attempting to imbue that framework with substantive ideas drawn from the ideal of human equality. The strengthening of the process conception is based on perceptions of subordination. The courts perceive that the life situations of the members of some groups in society are resolutely worse than those of other groups. The courts become particularly sceptical of the grounds of classification which distinguish these groups. They adopt doctrinal devices which treat some grounds of classification more sceptically than others. Further, the courts recognise that legislation which appears not to differentiate between the dominant and subordinate group can actually further diminish or restrict the life opportunities of those in the subordinate group. Conceptions of indirect discrimination are developed, characterising this phenomenon as a problem of hidden classification.

The process conception is thus best understood as an attempt to describe and deal with substantive inequality through the lens of fair process. The problem is that this lens distorts one's understanding of what inequality is and of what human equality requires. This conceptual distortion leads to a standing divergence between inequality and law's account of inequality. For this reason law, under the process conception, is peculiarly incapable of addressing the inequality which it has committed itself to address. The problem of the differential life situations of the members of different groups is conceived as a problem of the classification of individuals: provided such classification is rational, constitutional equality is not concerned. The rationality of the actor rather than the result on the victim is the core concern. The problem of the deeply entrenched subordination of some groups is conceived as a problem of the irrelevance (or presumptive irrationality) of certain grounds of classification. Purity of process rather than justice of outcome is the concern of the law.

The perpetuation of the subordination of some groups through general rules, practices and standards which apply to all is conceived as a problem of hidden classification. Individuals' actions rather than society's structures become the focus of equality scrutiny. What pervades the process conception is the idea that inequality is the result of irrational differentiation by a hostile actor. In Irish constitutional law, this idea is well-captured by the phrase "invidious discrimination". Constitutional law, which focuses on the rights of people, develops a quasi-criminal character in focusing on the person alleged to have breached those rights. The constitutional standard of equality is breached only if one can identify the responsible actor who has acted irrationally. The role of society generally in producing and enforcing subordination and inequality is thus not cognisable to the law.

Substantive inequality is not satisfactorily addressed by process equality. The process conception fails to perceive some matters as being of concern to equality; moreover, the process conception can wrongly perceive as inequality measures that are vital for the achievement of equality. Perceiving substance through the lens of fair process, the process conception has little of use to say about inequality.

Substantive conceptions of equality can be understood as an effort to discard that lens and to align law as closely as possible with the reality of inequality. Their hope is that a better understanding of inequality will allow for a more effective egalitarian programme. Most basically, substantive conceptions recognise that inequality consists primarily of the effects on subordinated groups of unjust social structures. This is not an unproblematic assertion and it opens up a whole new range of legal issues. I shall consider these later in this chapter. At this stage, however, it is useful to repeat, by reference to a series of antinomies, how the substantive conception differs from the process conception.

The Basic Differences Between Process and Substantive Conceptions

The process conception focuses on individuals and questions whether they have been unfairly treated by the law. Its premise is that the function of law is to classify and differentiate, to separate individuals into different classes and to accord them

correspondingly different treatment. Provided that, in the legislative process of differentiation, only relevant considerations are taken into account and provided that such considerations are rationally assessed, the differentiation has not been unfair and there is no inequality. Conversely, inequality exists where there has been an unfair differentiation, where a person has been classified by reference to considerations that are, properly understood, irrelevant. Whereas a process conception of equality focuses on the process by which legal measures are adopted, a substantive conception of equality focuses on the result and effect of a measure.[1] Facially differentiating measures that do not produce unequal results do not concern substantive equality doctrine but facially neutral measures that produce unequal results do. This basic concern establishes the proper object of equality scrutiny. Whereas a process conception questions whether individuals have been unfairly differentiated or classified, a substantive conception questions whether a particular group has been subordinated or unjustly treated.

The process conception is individualist in two ways. First, it focuses on the differentiation and classification of individuals as the potential inequality against which it guards. Although in common parlance one may, for example, talk of a measure which discriminates against Jews, under the process conception one must identify an individual person who has been unfairly differentiated on the basis of religion. Secondly, the process conception focuses on individual responsibility for inequality. In order for an inequality to be subject to constitutional invalidation, it must be fairly attributable to a responsible state actor. By requiring a degree of culpability or responsibility on the part of the actor, this analogises constitutional wrongs to torts and criminal offences. Rather subtly, this requires one to conceive of inequality from the perspective of the perpetrator rather than the perspective of the victim.[2] The focus is not on the life conditions of the victim class but rather on what particular perpetrators are doing to some victims. Under this account, discrimination is not perceived as a social phenomenon; rather, it is perceived as the misguided activities of particular individuals. In contrast, the

---

[1] Nevertheless, a substantive conception does not preclude the constitutional adoption of some individual fairness protection. It just denies that this is a prime concern of equality.

[2] See Freeman, "Legitimizing Racial Discrimination Through Antidiscrimination Law: A Critical Review of Supreme Court Doctrine" 62 *Minnesota Law Review* 1049, at 1053-7 (1978). Abrams suggests that the perpetrator perspective is based on "liberal assumptions about responsibility, agency, and causation [which] have made it easier for us to think about social phenomena as arising from the acts of individuals". She also attributes it to the solipsism of privileged thinkers who identify more with the agents of inequality than the

substantive conception focuses on groups both as the subjects and agents of inequality. First, the substantive conception focuses on whether a group has been unjustly subordinated. Secondly and more subtly, it focuses on group and societal responsibility for inequality. It eschews the perpetrator perspective of the process conception. Inequality need not be traced to a responsible "bad person" in order to be the subject of legal redress. It then becomes possible to perceive the benefits which members of the dominant group collectively gain from the continuance of deep-seated patterns of social discrimination which cannot themselves be traced to a responsible actor. The differential position of the two groups is the prime concern, not the individual actions which currently occur within the context of that differential position.

The process conception of equality aspires to be both universalist and essentialist. As noted in the previous chapter, strong process conceptions *a priori* deem some differentiations to be objectionable. This relies on a belief that they are rarely, if ever, relevant to legitimate governmental activity. Its understanding and account of irrelevant considerations is informed by a universalist belief that certain characteristics of individuals should never be taken into account in drawing legislative classifications. At a time when the universality of human rights is often taken as a fundamental tenet, this aspect lends the process conception great moral currency. One seems to underscore one's moral commitment by asserting that the same is required in all places at all times.[3] In contrast, a substantive conception of equality sees itself as a response to forms of inequality and subordination that have historically been a problem in a particular society. Thus, under the substantive conception, discrimination against Travellers would be a particular problem for Ireland, and properly the subject of constitutional scrutiny, but not, perhaps, for Tuvalu. In contrast, under the process conception, differentiation on the basis of membership of the Travelling community is only problematic if there is something intrinsically and universally unfair in differentiation on that ground.

The process conception of equality aims to be both neutral and objective. It is characterised by a strong belief that constitutional law should be neutral between competing visions of

---

subjects of inequality. Abrams, "Equality and Impasse: Mobilizing Group-Based Perspectives in an Era of Group Blindness" in Douglas and Devins (eds), *Redefining Equality* (Oxford, 1998), at 14.

[3] This appearance may be misleading. It does not necessarily follow from a universalist commitment to equality that equality requires the same thing in all places and at all times.

society, ordinarily allowing such disputes to be resolved through the democratic process. Only where the democratic, legislative process is corrupted by irrationality does constitutional law declare an inequality. Objective rules can be stated with sharpness and clarity, are not heavily dependent on factual inquiries or judgments of degree and are not time-bound.[4] The universalist turn of the process conception supports objectivity. Only the consideration of traits universally thought to be irrelevant can justify judicial intervention in the legislative process. Such traits must be objectively identifiable as universally irrelevant, a requirement perhaps implicit in universality itself. In contrast, a substantive conception of equality does not accept that the courts should be neutral as between competing groups in society. It considers that the constitutional guarantee of equality commits the courts to take sides in the struggle between those who dominate and those who are dominated. Inequality is an asymmetrical problem and can only be remedied by asymmetrical action on the part of the law. Although such an approach does not turn its back on objectivity, it is sceptical of the existence of objectively ascertainable factors.

Sex Inequality: the Substantive and Process Conceptions Contrasted

Sex inequality is the one area of substantive inequality to have been constitutionally addressed in a real and ongoing way by the Irish courts. It is also an area which has attracted a lot of theoretical criticism. For this reason, it provides a useful context in which to consider the differences between a process conception and a substantive conception. I shall first outline the Irish courts' treatment of sex inequality, summarising the conclusions of chapter seven. I shall then outline a number of arguments advanced in the United States from the perspective of the substantive conception. The Irish courts have demonstrated enthusiasm for ridding the law of old common law rules that are based on a view of women as inferior. Other issues, however, have proved more contentious.

The judgment of Walsh J. in *de Búrca v. Attorney General*[5] is the strongest statement of sex equality on the part of the courts. It is based on a strongly Aristotelian view that the law may have due regard to legitimate differences but cannot presuppose a unitary social function on

---

[4] See Fiss, "Groups and the Equal Protection Clause" 5 *Philosophy and Public Affairs* 107, at 121 (1975)
[5] [1976] IR 38; (1977) 111 ILTR 37.

the part of women as a justification of all differentiating legislation. Where women are different, they may be treated differently. Otherwise, they should receive the same treatment as men:

> [T]he provision in the Act of 1927, is undisguisedly discriminatory on the ground of sex only. It would not be competent for the Oireachtas to legislate on the basis that women, by reason only of their sex, are physically or morally incapable of serving and acting as jurors. The statutory provision does not seek to make any distinction between the different functions that women may fulfil and it does not seek to justify the discrimination on the basis of any social function. It simply lumps together half of the members of the adult population, most of whom have only one thing in common, namely, their sex. In my view, it is not open to the State to discriminate in its enactments between the persons who are subject to its laws solely upon the ground of the sex of those persons. If a reference is to be made to the sex of a person, then the purpose of the law that makes such a discrimination should be to deal with some physical or moral capacity or social function that is related exclusively or very largely to that sex only.[6]

A similar approach, with different results, was taken in *Lowth v. Minister for Social Welfare*.[7] Again, the issue was whether men were in the same situation as women. If they were, then a difference in treatment was not warranted. If there was a difference in situation, then a difference in treatment was justified. Hamilton C.J. gave the judgment of the Supreme Court:

> It is not the function of this Court to adjudicate upon the merits or otherwise of the impugned legislation. It is only necessary to conclude, as this Court has done, that there were ample grounds for the Oireachtas to conclude that deserted wives were in general likely to have greater needs than deserted husbands so as to justify legislation providing for social welfare whether in the form of benefits or grants or a combination of both to meet such needs.[8]

---

[6] *Ibid.*, at 71; 53-4
[7] [1998] 4 IR 321; [1994] 1 ILRM 378 (HC); [1999] 1 ILRM 5 (SC).
[8] *Ibid.*, at 342; 14.

These two cases neatly illustrate the application of a process conception in the context of sex inequality. The issue is whether an individual has been irrationally differentiated on the basis of her or his sex. Setting aside issues as to the level of judicial deference, the question is basically whether the aggrieved party can show that the perceived sex difference implicitly asserted by the legislation is not grounded in reality. If she or he can show that she or he is in the same situation, then she or he must be treated in the same way. A strong process conception with a more stringent standard of review requires the courts to evaluate the state's claim of real social difference more closely, but the basic methodology remains the same.

MacKinnon has been very critical of a similar approach in the US context. The Aristotelian approach and the need to demonstrate sameness in order to receive equal treatment is, for her, the core of the problem:

> Unquestioned is how difference is socially created or defined, who sets the point of reference for sameness, or the comparative empirical approach itself. Why should anyone have to be like white men to get what they have, given that white men do not have to be like anyone except each other to have it? Since men have defined women as different to the extent that they are female, can women be entitled to equal treatment only to the extent that they are not women? Why is equality as consistent with systematic advantage as with systematic disadvantage, so long as both correlate with differences?[9]

If constitutional equality doctrine requires that one must be the same in order to gain equality, matters that affect only women, such as pregnancy and reproductive control, cannot doctrinally be viewed as matters of sex equality. Difference justifies differentiation; struggles over equality are, as a matter of constitutional equality doctrine, struggles over whom one considers to be different, and whom the same.[10] Although constitutional equality can address sex-based generalisations, it has little application to the differences that women do share. This is a particularly acute problem given the way in which unequal treatment can produce

---

[9] MacKinnon, "Reflection on Sex Equality under Law" 100 *Yale Law Journal* 1281, at 1287 (1991).

[10] Thus in *de Búrca*, Walsh J. and O'Higgins C.J. did not have different ideas as to what equality was; rather, they had different ideas as to the extent to which women were differently situated to men.

and reproduce differences. In MacKinnon's view, the worse the inequality is, the more like a difference it looks.[11] The process conception, based on Aristotle's injunction to treat differently those in different situations, is thus fundamentally inadequate to the task of dealing with sex inequality. A radically different approach is required:

> Inequality, as analyzed here, is not a bad attitude that floats in the sky but an embodied particular that walks on the ground. It is first concrete, historical, present, and material, only derivatively generic, and never abstract. Social inequality does not first exist in the abstract, in search of a basis or polarization or natural joint to carve or asymmetry to which to attach. It exists in the social reality of its particulars, such as the social dominance of men through which women are subjected. Sex equality as a norm comes into being through the resistance of women as a people to their subjection. The equality principle, in this approach, is properly comprised of the practical necessities for ending inequality in each of its real forms.[12]

Under this approach, equality does not cease to be comparative; it is still concerned with the relative situation of women, their subordination vis-à-vis men. But it abandons abstract Aristotelian comparisons in favour of "substantive comparisons that recognize hierarchy and history".[13] Thus the claim that women's difference in situation warrants difference in treatment is treated sceptically. The law must question why women are differently situated and develop asymmetrical measures to deal with that problem.

MacKinnon makes a further, interesting criticism of the process conception. In the US, the African American struggle for social equality forged the deep structure of legal equality, even if it was phrased abstractly. A side-effect of this is that sex inequality has to be accounted for in a model designed, however poorly, to deal with racial inequality. A similar, if less defined, point can be made in the Irish context. The courts wrongly assumed that the doctrinal

---

[11] *Ibid.*, at 1296. *Foy v. an tArd-Chláraitheoir* Unreported, High Court, 9 July 2002, McKechnie J. provides a stark illustration of this. In McKechnie J.'s view, different treatment was justified because Ms Foy, a male-to-female transsexual was differently situated to a woman. From the perspective of Ms Foy, however, that society labels her as different to a woman is at the core of the inequality she experiences. A conception of equality which accords different treatment to those it perceives to be different cannot begin to unravel this problem.

[12] *Ibid.*, at 1324.

[13] *Ibid.*, at 1326.

devices of Aristotelian equality, developed to analyse normal social legislation, were adequate to the issue of sex inequality. The above discussion of difference makes this point.

Under the process conception, inequality is treated as a unitary concept: irrationality in legislative classification. But the structures of inequality, although all concerned with subordination, vary. Race discrimination was typically founded on identity-based hatred, but its structures varied. In the slavery era, it manifested itself through role differentiation: whites were full legal agents; blacks were property. With the abolition of slavery, it manifested itself through separation: blacks were to be segregated from mainstream society. Although it is no longer socially acceptable to express conscious hatred of blacks, this structure arguably continues, although now without formal legal approval. Sex inequality is different again. It is nonsensical to suggest that discrimination against women is a manifestation of identity-based hatred. Misogyny is rare; chauvinism, a belief in women's benign inferiority, is prevalent. The structure of women's subordination has tended to be a highly elaborate schema of role differentiation. Article 41.2 of the Irish Constitution emphasises this, with its strong suggestion that a woman's place is in the home. One can provide further illustrations of this point. Discrimination against Travellers is arguably founded on identity-based hatred but its structure is the legal pressure not to travel, if not to assimilate.[14] Discrimination against homosexuals is founded on a long articulated view that homosexual practices are gravely immoral. The structure of this discrimination is first to demand that homosexuals do not declare themselves as such and secondly to refuse public approval of homosexuality.

Although all these groups are subordinated within society, the basis and structure of the subordination vary. The problem with the process conception is that it is incapable of accounting for this variation. It treats inequality as a unitary concept: irrationality in legislative classification. Only measures which can be understood in that way are cognisable as inequality to the process conception. Different social phenomena are addressed as if they were the same and therefore are not addressed properly. The character of inequality is distorted and the law thus fails to address it. The disjunction between the reality of social

---

[14] Although there is no formal, legal pressure on Travellers to settle, Part IIA of the Criminal Justice (Public Order) Act, 1994, as inserted by section 24 of the Housing (Miscellaneous Provisions) Act, 2002, effectively makes travelling a crime by precluding stopping other than with the consent of the owner of the land or at an

inequality and the form of legal equality is exacerbated. This problem is particularly clear-cut with regard to sex equality where the idea of legitimate differentiation is inappropriate to dealing with problems of inequality as suffered by women. Although not so clear-cut in other situations, the problem is of general application.

A Substantive Understanding of Equality: Subordination of Status Groups

A substantive conception of equality requires a substantive understanding of society andof discrimination. There are many such substantive understandings; an exhaustive survey of them lies far beyond the scope of this thesis. For this reason, I propose to focus on one substantive conception. I shall, however, make brief allusions to other substantive conceptions if only to emphasise how the one that I have chosen to describe is one of many.

Balkin, writing with regard to the US Constitution, has argued for a substantive conception of equality based on the idea of status groups and status hierarchy.[15] The idea of status groups originated with Weber, who contrasted them from social classes. Put briefly, whereas social class is an objective economic fact determined by one's position in the market, status group membership is based around common styles of life and a common sense of honour, prestige and moral rectitude. Whereas one's status honour may be linked with one's class situation, it stands in opposition to "the pretensions of sheer property".[16] This distinguishes Weber's thought from that of Marx who explained inequality almost exclusively in terms of a class struggle between two economic classes: the bourgeoisie and the proletariat.[17]

Balkin explains social inequality in terms of a number of key concepts. Social status is the degree of honour and prestige that individuals or groups enjoy. Members of status groups have a common interest in defending and increasing the prestige of their group, their common ideals or their common styles of life. Status hierarchies emerge, in many societies,

---

authorised halting site or on certain unproscribed roadsides. For lengthy discussion of this statute, see chapter eleven.

[15] Balkin, "The Constitution of Status" 106 *Yale Law Journal* 2313 (1997). He argues that one should not jettison the rationality inquiry part of constitutional equality doctrine but rather that one should consider the inquiry into status hierarchy as "a distinct problem, to which other questions of constitutional equality may bear only a family resemblance". *Ibid.*, at 2359.

[16] Weber, *Economy and Society* (Bedminster Press, 1968), at 932.

between groups with distinctive identities or styles of life. This is not simply a case of mutual disdain between two status groups. Status hierarchy is sustained by a system of social meanings in which one group receives relatively positive associations and the other group receives correspondingly negative associations. For this reason, the identity of each group is not free-standing: an increase in the prestige of one group involves a diminution in prestige for the other group. In the short run at least, status competition is a zero-sum game.

In ascertaining objectionable grounds of classification, strong process conceptions have tended to articulate general formulae, capable of application to any situation. The "immutable characteristics" and "discrete and insular minority" formulae are two prominent examples. Balkin's account requires a more subtle understanding which focuses on other aspects of social reality. Status groups may be identified by reference to immutable characteristics, but this is not necessarily the case. On the one hand, there is no limit on the types of trait which can mark out status groups: such traits can be mutable or immutable, physical or ideological; they can relate to behaviour or appearance. On the other hand, not every distinguishing trait corresponds to a status group in a status hierarchy: the organisation of a status hierarchy is a result of a particular history of social stratification and subordination. The point is not what the trait is but rather what it can be made to mean in opposition to other traits. Biological traits can be useful because they render a system of subordination more stable by making it difficult to escape, although even traits such as race can be avoided by miscegenation. This clarifies the discussion of these formulae in chapter six. As noted there, the "immutable characteristics" formula cannot explain why one objects to discrimination on the basis of religion; the "discrete and insular minority" formula cannot explain why one objects to discrimination against women. What matters, according to Balkin, is the structure of stratification and subordination that has built up around the characteristic. Discrimination against discrete and insular minorities marked out by an immutable characteristic may be a particularly stable form of subordination, as escape from the group is, at least within a particular generation, impossible and there is a large number of people outside the group interested in maintaining the subordination of the group. Nevertheless, this does not mean that one should treat such discrimination as the paradigm of all unjust discrimination. What

---

[17] See Grusky (ed), Social Stratification: Class, Race and Gender in Sociological Perspective (2nd ed., Westview Press, 2001), at 15.

matters is the fact of subordination, not the trait around which the structure of subordination is organised.

Status groups compete not only for material resources but also for prestige and honour. These symbolic struggles are types of status competition.[18] The forms of status competition vary because one's status can be diminished or augmented in many different ways. Groups who fear a loss of status experience status anxiety and reassert their status through new forms of status competition. Balkin suggests that status competition is at its most intense in austere times. Prosperity can provide material compensation for relative loss of status, but in an economic downturn, status groups often return to the zero-sum game of status politics.

Status groups have a collective sense of their own moral worth. A superordinate group will often believe that a subordinate group is justly subordinated because of the immorality of its practices. That is, the structure of subordination involves moral condemnation of the subordinate group, a moral proposition sincerely believed by the members of the superordinate group. Nevertheless, the mere fact that people sincerely believe in the moral condemnation does not mean that the condemnation is just. A status regime is accompanied by rationales and justificatory rhetoric.[19] Constitutional equality must decide between the moral claims of the subordinate and superordinate groups and whether the justificatory rhetoric amounts to a true justification.

Balkin notes the paradox of status hierarchy. He suggests that as the set of social meanings which preserves the status hierarchy begins to weaken, and as the hierarchy itself weakens, status competition actually increases. When status hierarchies are relatively rigid, higher status groups may treat lower status groups with condescension or even affection. But as the hierarchy weakens, and the higher group feels threatened, the importance of status comes to

---

[18] The struggle is not purely symbolic because symbols are an indication of social status, and social status is itself a valuable good.

[19] For example, the US status regime of legislative racial segregation was justified, at least in the eyes of its upholders, by reference to a tripartite conception of equality, a conception which viewed the social sphere as the product of private intercourse, an area beyond legal regulation. Although this appears ludicrous now, to the perpetrators of discrimination at the time, it made sense. See Siegel, "The Critical Use of History: Why Equal Protection no Longer Protects: The Evolving Forms of Status-Enforcing State Action" 49 *Stanford Law Review* 1111, at 1119-28 (1997).

the forefront. Thus, social conflict is at its most intense not when the hierarchy is most entrenched but when it begins to weaken.

Subordination is present in all societies and in all democracies. The question is what the role of the law should be when presented with such stratification. One view is that the law, in particular the Constitution, should confine itself to regulating the struggles of social groups by laying down fair rules of competition. The alternative, preferred by Balkin, is that the law should take sides in these struggles. He argues that the US Constitution commits the US to a substantive, democratic ideal, a democratic ideal that commits that nation to break down older forms of social hierarchy and democratise the social structure.

This argument about equality directly parallels the argument, noted in chapter two, between substantive and process conceptions of democracy. The most restrictive view is that all cultural struggles should be left to the ordinary political process. Ely's view, built on footnote four from *Carolene Products*, can be viewed as a constitutional demand that status hierarchies must be dismantled but only to the extent that they deny citizens equal rights to vote and participate in the political process. Beyond that, the Constitution has no role. Balkin argues for a more substantive role: "The Constitution has an egalitarian demand for equality of social status, a demand that exists even though it cannot be achieved through legal means alone."[20]

Unjust Subordination

Not all subordination is unjust and, in this regard, the law must address two discrete issues. First, the law must decide which subordinating measures are of concern to it. For example, paedophiles are a subordinated group within society. Their way of life is criminalised and they are subjected to nearly uniform vilification and abuse. Yet it seems wrong to pose this as an equality concern. The subordination of paedophiles appears just. Secondly, even with regard to groups who are the subject of unjust subordination, it may be the case that a particular measure, which has a subordinating effect, is justified. The Constitution commits the legal system both to values other than equality and to achieving the common good. Any

[20] Balkin, *loc. cit.*, at 2343.

plausible doctrine of constitutional equality must take account of this. For example, people with disabilities are a subordinated group within society. A law which allows the security forces not to employ persons with certain physical disabilities might, although subordinating of those persons, be justified by reference to the need to maintain a good national defence.[21]

These two observations could be conceptually conflated. That is, one could argue that there is no *a priori* question of which groups are unjustly subordinated and that it is simply a question of whether there is a justification for a particular subordinating measure. On this account, the subordination of paedophiles is an equality concern but particular measures could be justified by reference to the moral imperative to protect children. Although such an approach might avoid a number of conceptual difficulties, which I shall outline later, it has a number of problems. First, it does not tally with one's understanding of subordination. One does generically think that measures subordinating of some groups are of more concern than measures subordinating of other groups. In order to align law's understanding of inequality as closely as possible with what understands to be the most significant features of inequality, this intuition about inequality should be reflected in legal doctrine. Secondly, one's view of what is a justly subordinating measure is likely to be largely determined by one's view of whether the group is generally the subject of unjust subordination. It is therefore sensible to address this issue separately. For instance, one would automatically be much more concerned about a measure excluding women from jury service than a measure excluding judges from jury service. One's views as to whether such measures are justified would have as much to do with the position of women in society vis-à-vis the position of judges as it has to do with the particular rationales for exclusion. For these reasons, it makes sense to keep conceptually separate the issue of whether a subordination of a particular group is justified.

I shall therefore consider the two issues separately. First, how does the law decide which groups have been unjustly subordinated within society, i.e. the subordination of which groups constitutes a concern for equality? Secondly, how does the law decide whether a particular measure, subordinating of an unjustly subordinated group, is justified? In assessing the first issue, I shall analyse Balkin's resolution of the problem. In assessing the second issue, I

---

[21] I am not saying that such a measure would necessarily be justified; presumably much depends on the level of immunity granted to the employer. The point is simply that one is prepared to accept some subordination of unjustly subordinated groups.

shall attempt to formulate a standard of review that avoids the conceptual pitfalls that plague the standards of review adopted under the process conception.[22]

Which Groups are Unjustly Subordinated?

Balkin recognises that the problem of status hierarchy is not a purely descriptive problem. Although one can distinguish groups from status groups in an ongoing status hierarchy,[23] there are groups who "suffer overlapping and reinforcing forms of subordination and social disadvantage due to their place in that social hierarchy",[24] but whose subordination is just. Balkin argues that homosexuals are a status group in society and considers whether they are unjustly subordinated:

> [H]omosexuals are a social group whose status is central to their general social identity. Moreover ... homosexuals exist in a fairly overt hierarchy of status, in which they and their lifestyle are routinely condemned as immoral, abnormal, deviant, and against the laws of God and Nature.... Homosexuals can avoid legal and social disabilities only by remaining in the closet; the stresses and strains in their lives resulting from this masquerade are simply the flip side of the disabilities they suffer from making their sexual orientation public. But that is hardly the end of the matter. It is not enough that homosexuals exist in a status hierarchy sustained both by law and by social custom. They must also exist in an *unjust* status hierarchy. Why is the hierarchy of heterosexuality over homosexuality unjust? Even if this hierarchy is gradually breaking down in social custom and convention, why should the Constitution use its authority to accelerate the trend?[25]

Balkin argues that, to determine whether the status hierarchy is just, one must examine the "justice of the system of social meanings that create and perpetuate that status hierarchy". He argues that homosexuals have low status because they transgress the set of meanings that constitutes gender hierarchy. The dominant group can deal with the problem of homosexuality either by pretending that it does not exist or, where this is not possible, by

---

[22] See chapter five.

[23] For instance, law students are a group but not a status group. That said, within the sub-society of my first year law class, I suspect that there may be different status groups.

[24] Balkin, *loc. cit.*, at 2359. What these groups are is a contingent social fact.

declaring it abnormal, immoral and deviant. But this is merely a plausible outline of the structure of subordination. It does not establish why that subordination is unjust.

The issue of unjust subordination is thrown into sharp relief if one contrasts the treatment of homosexuals with the treatment of paedophiles. Both are subordinated groups. There is a nearly universal moral belief that sexual relationships between adults and children are wrong; there is an increasingly less commonly held belief that sexual relationships between men or between women are wrong. One cannot dismiss these moral claims simply because they are moral; the obligation to dismantle unjust status hierarchies is itself a moral obligation. Instead, one must attempt to evaluate the claims. Balkin argues:

> [B]ecause people use moral arguments to justify existing status hierarchies, we must try to be morally critical about claims of morality. The question is whether moral condemnations are linked to the preservation of an unjust form of status hierarchy. If they are, the Constitution cannot defer to majoritarian moral judgments simply because they are moral judgments. Conversely, absent a persuasive argument that moral disapproval of pedophilia is deeply connected to the preservation of an oppressive social structure, we should leave the legality of pedophilia to judgments of democratic politics.[26]

In other words, to decide which groups are *unjustly* subordinated, one must be able to distinguish between the valid and invalid moral claims which are used to justify that subordination. Balkin suggests that one has reason to be suspicious of the moral condemnation of homosexuality because it is organised around a pervasive hierarchy of social meanings. On the other hand, one has no need to be similarly suspicious of the moral condemnation of paedophilia in the absence of a "more than hypothetical moral disagreement about the properties of sex with children".[27] One needs an account of social structure that justifies one's suspicions.

---

[25] *Ibid.*, at 2360-1.
[26] Balkin, *loc. cit.*, at 2364-5.
[27] Balkin, *loc. cit.*, at 2365.

This approach is inconsistent. On the one hand, the structure of the subordination of homosexuals serves to make one critical of the moral position against homosexuality. On the other hand, the moral position against paedophilia serves to immunise the subordination of paedophiles from equality scrutiny. It is unclear whether the moral position should justify the subordination or whether the subordination should render one morally critical of the moral position. Ultimately, it is a question of moral judgment. The need to make moral judgments is not itself problematic. What is problematic is the facility of the courts to substitute its own moral judgments for those already made within the ordinary political process.

Ultimately, if a judicially enforceable equality guarantee is to mean anything, one must allow the courts to make these moral judgments. The courts hold the community to its general moral standards, as expressed in the Constitution, and must determine whether the majority's interpretation of those standards (for instance, that homosexuality is immoral and that therefore homosexuals are justly subordinated) is a good interpretation. Although this may not be an entirely satisfactory solution, it is preferable to the equivalent doctrinal devices adopted under the process conception. In order to decide which grounds of classification are generically objectionable, strong process conceptions articulate general formulae such as "immutable characteristics". These were shown not to explain many of the grounds of classification which one considers generically objectionable. The reason for this failure is that such judgments depend on a moral view about the justice of subordinating particular groups. The process conception fails to capture one's intuitions about equality first because it has no coherent social explanation of inequality and secondly because it fails fully to accept the moral judgments which it makes. Although it may appear troubling to have judges second-guessing the moral judgments of the majority, at least this happens openly under the anti-subordination doctrine. People can criticise it; judgments can be re-evaluated. In contrast, under the process conception, the moral judgment is hidden. Critical evaluation within the conceptual framework is impossible.

This discussion does, however, open up a more profound critique of equality doctrine to which I wish to allude briefly. Siegel has argued that the forms of social stratification evolve over time; efforts to reform a status regime bring about changes in its rule structure and

justificatory rhetoric.[28] Although one can very easily see the inequality of previous status regimes, such as slavery, one finds it very difficult to see the inequality of current status regimes.[29] This is partially explained by the fact that the justice of the current regime is actively contested. Its supporters argue that the current regime achieves equality, perhaps by reference to process conceptions, and use moral arguments to justify the subordination of different groups. The justifications of this regime are currently contested and may, in time, be considered just as illusory as the justifications of slavery. Today's accepted claim for equality may be tomorrow's justificatory rhetoric of unjust subordination. Nevertheless, one is unable to stand outside of one's own time and assess how one's sense of justice will appear to one's descendants. For this reason, the best one can manage is to be sceptical, continually re-evaluating the justice of the status quo.[30]

A Standard of Review under the Anti-subordination Doctrine

Although a substantive conception of equality is more far-reaching than process conceptions, it does not maintain that equality is the only value in society. There may be other values or aspects of the common good which could justify a derogation from equality. Under the process conception, the courts have evolved various standards of review which test the legitimacy of classification. I have already argued that these standards of review present an inaccurate image of the real bases of justification and may operate as a smokescreen for contentious value judgments on the part of the courts.[31] In addition to their slippery character, a real problem with these standards of review is that they take no account of the actual equality harm in assessing whether it is justified. Consider *Foy v. An t-Ard-Chláraitheoir*.[32] The discrimination suffered by Ms. Foy in her daily life, eloquently set out by McKechnie J. earlier on in the judgment, disappears from view when he comes to assess whether the discrimination was justified. At that stage, the beneficial effect of the legislation for the

---

[28] Siegel, "The Critical Use of History: Why Equal Protection no Longer Protects: The Evolving Forms of Status-Enforcing State Action" 49 *Stanford Law Review* 1111, at 1113 (1997). See also Siegel, "Civil Rights Reform in Historical Perspective: Regulating Marital Violence" in Douglas and Devins (eds), *Redefining Equality* (Oxford, 1998).

[29] Indeed, Siegel suggests that the force of one's condemnation of earlier status regimes partially serves to immunise current status regimes from criticism.

[30] The implications for equality doctrine of Siegel's critique go far beyond what I have set out here. Unfortunately, given the limited space of this thesis, I am unable to explore them further at this stage. For an arguably similar critique, see Freeman, "Legitimizing Racial Discrimination Through Antidiscrimination Law: A Critical Review of Supreme Court Doctrine" 62 *Minnesota Law Review* 1049 (1978).

[31] See chapter five.

[32] Unreported, High Court, 9 July 2002, McKechnie J. See chapter seven.

common good and for Ms. Foy's family are assessed; the detrimental effect of the legislation for Ms. Foy herself is ignored. Standards of review under the process conception purport to test the proportionality of differentiation to difference, and the proportionality of legislative means to legislative ends, but they explicitly do not test the proportionality of achieving the common good to infringing equality. This is ignored.

Equality harm triggers the need to justify but does not directly affect the level of justification required. Admittedly, differentiated tiers of justification allow for the equality harm to be taken into account to a certain extent, in that some grounds of classification are treated as generically requiring greater justification than other grounds. Nevertheless, this cannot take into account the magnitude of the equality harm. The standards of review of the process conception do not account for this, treating a measure as justified solely if it is sufficiently closely related to a sufficiently important objective. The strictness of the test varies not with the degree of harm but with the ground of classification.

A substantive conception, sensitive to the social reality of subordination, is also sensitive to the fact that some instances of subordination may be less troubling than others. For instance, a law exempting women from jury service might be less troubling than a law excluding women from public employment. Both are symbolically important in their subordination, but the material effect of the latter is far greater. It follows that the latter should be more difficult to justify than the former. A standard of review under the substantive conception must take account of this.

In framing this new standard of review, it is possible to borrow some of the main elements from the process conception's standard of review, although formulating them in a more open way. The courts should ask whether a particular measure advances an important governmental objective to such an extent that its infringement of equality is justified. A number of features should be noted. First, the test is phrased in terms of actual rather than hypothetical justification. If one is to give reality to the equality guarantee, one can only accept infringements of equality that one thinks are actually justified, not infringements of equality that one thinks other people might think are justified. Secondly, the test is not phrased in terms of means-end rationality, thus closing off the possibilities of circular analysis

as favoured by the process conception's tests. Instead, the courts simply ask what state of affairs is advanced by the measure. Thirdly, the test allows for a direct comparison of the equality harm with the advancement of the desired state of affairs.[33] The courts ask whether the state of affairs is advanced to such an extent that justifies the infringement of equality also effected.[34] Obviously, there is no easy calculus for performing this function. Indeed, at a deeper level, one might argue that equality and other values or social objectives are incommensurable and that one should therefore eschew any attempt to balance the two. But this, I think, misses the point. The Constitution commits the legal system to equality but also to certain other values and the common good. If one accepts two reasonable premises – that these commitments may conflict and that it is the courts' role to resolve such conflicts in order to give one definitive answer – then it follows that one has decided to treat equality and other values or the common good as if they were commensurable. The benefit of the standard of review that I propose is that it puts such comparisons, inevitably influenced by contestable value judgments, into the open. One may not always agree with the choice made by the courts and there may be no simple basis for justifying the choice, but at least the presentation of the reasoning matches the reality of the reasoning. This allows for informed moral criticism of the choices made by judges. Given that the choices are made openly, it is relatively easy for the system to take account of the moral criticism.[35]

The Substantive Conception as an Interpretation of Irish Constitutional Law

The vast majority of the case law interpreting Article 40.1 is wholly inconsistent with a substantive interpretation of Article 40.1.[36] Nevertheless, the wording of Article 40.1 itself is

---

[33] In contrast, standards of review under the process conception tautologically assess the measure's advancement of the desired state of affairs against the measure's purpose.

[34] This comparison is possible because equality is treated as a substantive entitlement. Under the process conception, the protection of another constitutional value can always justify a legislative classification. Under the substantive conception, the protection of another constitutional value has to be compared with the infringment of equality. Some real balance must be struck; equality is thus no longer a subordinate constitutional norm.

[35] The process conception also makes these judgments but they are not openly stated. The value judgment which it makes is that, even allowing for differentiated tiers of scrutiny, discriminations on the same ground are equally objectionable. Whether or not such discriminations are justified depends entirely on their rationality, judged to whatever standard; their detrimental effect on equality is irrelevant.

[36] Indeed, only one bit of oblique support can be found for the substantive conception. In *re Article 26 and the Employment Equality Bill 1998* [1997] 2 IR 321, at 366, the Supreme Court considered that the pursuit of equality was an aspect of the common good which could justify some delimitation of property rights. If this aspect of the common good is nonetheless based on Article 40.1, it suggests that the Constitution recognises an equality independent of the rationality of legislative measures, a substantive equality that can actually justify

not incompatible with the adoption of a substantive conception of equality, such as that sketched in this chapter. The guarantee of human equality, I have argued, grounds the practical proposition of political morality that the law should treat all people as equals. This practical commitment requires a sophisticated understanding of the ways in which people are not treated as equals. That is, in order to attain human equality, one must understand the most significant aspects of the social reality of inequality.

Inequality is not an individualist phenomenon. It consists not of irrational classification but rather of the unjust subordination of historically subordinated groups. The members of such groups are denied their human equality. If the law is truly to treat all people as equals, it must dismantle the structures of inequality which give effect to such subordination.

This is not a particularly radical argument in support of the substantive conception. It posits no breach with the individualism of western liberal democracy. It does not treat equality as a group right. Such a proposition is probably precluded by Article 40.1. Rather, group analysis is adopted because inequality exists as a group phenomenon. In order for individuals to be treated as equal, the law must address the ways in which the unjust subordination of a group affects the members of that group.

One could argue, however, that the second sentence of Article 40.1 endorses the notion of legitimate differentiation and therefore suggests that the commitment to equality before the law should be interpreted as a *prima facie* prohibition of differentiation. Although there is some merit to this observation, it does not necessarily follow that Article 40.1 is concerned solely with differentiation. The identification of legitimate grounds of differentiation does not, of itself, establish that differentiation is the only concern of Article 40.1. Indeed, one could argue that the second sentence's legitimation of differentiation suggests that differentiation is not the primary concern of the first sentence. Although this argument is not wholly convincing, it is not wholly implausible. The case for leaving this argument open is strengthened if one recalls that equality, as a political ideal, often embarrasses its own statement.[37] That is, given that equality calls for continuous, critical evaluation of established

---

legislative measures. Nevertheless, the Court did not explicitly say this and, in any event, it is scant support for the substantive conception in the face of all the support for the process conception.

[37] See chapter one.

practices, one must leave open the possibility that the document which commits the country to equality is not itself an accurate statement of equality.

I have argued that, although the substantive conception is a plausible interpretation of Article 40.1, it is foreclosed by the intervening case law. That is, it is too inconsistent with precedent to count as a plausible interpretation of the equality guarantee. Nevertheless, the courts sometimes do implausible things. A complete rupture with previous case law is a standing possibility; although it would be a poor interpretative choice for the courts to adopt a substantive conception of equality, this does not mean that they will never do so.

This possibility of rupture with the past is particularly acute for an equality guarantee, given that a commitment to equality requires continuous, critical evaluation of established practices including, by implication, established legal precedent. In the United States, for instance, the declaration in *Brown v. Board of Education* that "separate but equal" in the context of public education was "inherently unequal"[38] marked a complete rupture with the previous tripartite conception of equality. It is also possible, albeit most unlikely, that the courts could reject process conceptions of equality in favour of a substantive conception.

Conclusion

I have argued that the process conception of equality is best understood as Aristotelian equality modified to take account of a belief in basic human equality and a substantive understanding of inequality. I have outlined the basic features of this process conception and how it differs from substantive conceptions, before considering one substantive conception of equality in more detail. To advance the understanding of these points, I shall in the next chapter consider how the process conceptions and this substantive conception would deal with one very current instance of inequality: the criminalisation of trespass.

[38] 347 US 483, at 495 (1954).

Chapter Eleven

The Criminalisation of Trespass

Introduction

Travellers are probably the most marginalised and disadvantaged group in Irish society. The debate over Travellers and their place in Irish society has run for many decades. In terms of constitutional litigation, Travellers have argued for the socioeconomic right to a properly serviced halting site, advanced in *O'Reilly v. Limerick Corporation*.[1] The Supreme Court decisions in *Sinnott v. Minister for Education*[2] and *T.D. v. Minister for Education*,[3] however, appear to have rendered this strategy ineffective.[4] But a new front has opened in this constitutional battle. In April 2002, with a general election looming, the Oireachtas took the radical step of criminalising trespass in a far broader range of circumstances than had ever before been considered. Section 24 of the Housing (Miscellaneous Provisions) Act, 2002 inserted a new Part IIA into the Criminal Justice (Public Order) Act, 1994.[5] This measure was stated to be adopted in response to the problem caused by large scale, unauthorised Traveller halting sites.

Part IIA has been applied on a number of occasions and is currently the subject of a constitutional challenge.[6] There is a number of possible grounds on which a constitutional challenge could be based.[7] Of relevance to this thesis are the egalitarian concerns that one might have with Part IIA, for this legislation provides an excellent case study of the differences between different conceptions of equality. A close examination of the legislation, and of how it would be treated differently by different conceptions of equality, demonstrates that this discussion of equality is not of solely academic interest. The courts' choice of a

---

[1] [1989] ILRM 181. For a comprehensive survey of litigation on behalf of Travellers, see Whyte, *Social Inclusion and the Legal System: Public Interest Law in Ireland* (IPA, 2002), at 215-45.

[2] [2001] 2 IR 545.

[3] [2001] 4 IR 259.

[4] In these cases, the Supreme Court ruled that, if the State breaches a constitutionally protected socioeconomic right, the courts should usually only grant a declaratory order recognising the breach. A mandatory order should only be granted in the most exceptional of cases.

[5] Hereinafter referred to as "Part IIA".

[6] See Ryan, "Travellers move from car park to roadside" *The Irish Times*, 14 August 2002.

[7] See Binchy, "The Criminal Trespass Legislation: What Does it Do and is it Constitutional?" paper presented to conference, Law School, Trinity College, Dublin, 23 July 2002.

conception of equality has a drastic effect on the life situations of the most vulnerable people in our society. Whether or not one agrees with the choices made by the courts, one must recognise their character and consequences.

I shall begin by summarising the provisions of Part IIA, before outlining how the measure relates to Travellers. I shall argue that, under the courts' current conception of equality, Part IIA does not infringe Article 40.1. I shall then consider what alterations to the current conception of equality are necessary for Part IIA to be perceived as an infringement of Article 40.1. In doing this, I shall consider both the substantive conception, outlined in the previous chapter, and a number of process conceptions.

The Criminalisation of Trespass

Part IIA inserts eight new sections into the Criminal Justice (Public Order) Act, 1994: sections 19A-19H. Section 19C provides that it will be a criminal offence for a person, without the duly given consent of the owner, to enter and occupy any land or to bring onto or place on any land any object[8] where certain consequences are likely to ensue.[9] Five such consequences are listed, but it is not stated whether the list is conjunctive or disjunctive.[10] Section 19E(c) provides that a Garda may arrest without warrant any person whom he or she finds committing an offence under section 19C. Section 19G provides that a person found guilty of an offence under section 19C shall be liable, on summary conviction, to a fine not exceeding EUR3,000 and/or to a term of imprisonment not exceeding one month. The offence cannot be prosecuted on indictment.

---

[8] Section 19A(1) defines "object" to include any temporary dwelling and any animal. "Temporary dwelling" is defined by reference to section 69 of Roads Act, 1993: any tent, caravan, mobile home, vehicle or other structure or thing (whether on wheels or not) which is capable of being moved from one place to another (whether by towing, transport on a vehicle or trailer, or otherwise), and (a) is used for human habitation, either permanently or from time to time, or (b) was designed, constructed or adapted for such use. An exception is made with regard to temporary dwellings used by public authorities during works on, in or under certain prescribed roads, but not in other contexts, such as those envisaged by Part IIA.

[9] These consequences generally involve damage to the land or its amenities or making it difficult to use the land and its amenities.

[10] It is not clear how the courts will interpret this provision. On the one hand, as it would be difficult to satisfy all five conditions, one could argue that it would make better sense to read the conditions disjunctively. On the other hand, one could argue that, as ambiguities in criminal legislation should be resolved in favour of the accused, a conjunctive reading is appropriate

Of more concern, however, than the penalties for the offence are the various powers that accrue to Gardaí who believe that an offence has been committed. Section 19C(3) provides that, where a Garda has reason to believe that a person is committing or has committed an offence under 19C(2), that Garda (a) may demand the name and address of that person, (b) may direct the person to leave the land concerned and remove an object of which they are the owner or controller and (c) shall inform the person of the nature of the offence suspected and the statutory consequences of failing to comply with a demand or direction under the subsection. There is a number of serious consequences. First, section 19D provides that failure to comply with a direction or to supply a name and address (or supplying a false or misleading name or address) shall be an offence punishable in the same way as described above. Secondly, the Garda may arrest without warrant a person who fails to comply with a direction to leave the land or who fails or refuses to give his or her name or address or who gives a name or address which the Garda has reasonable grounds for believing is false or misleading. Section 19F provides for further consequences which may follow on from a failure to comply with a direction to leave the land. The Garda may remove and may store, or may cause to be removed and cause to be stored, any object which he or she has reason to believe was brought onto or placed on the land in contravention of section 19C.[11] The remainder of section 19F deals with the procedures for the return of the object to its owner. For present purposes, it suffices to note that section 19F(4) gives to the Garda Commissioner a discretion to require the owner to pay the amount of any expenditure reasonably incurred in removing and storing the object.

Travellers and the Criminalisation of Trespass

Part IIA was introduced as an amendment to the Housing (Miscellaneous Provisions) (No. 2) Bill, 2001 at report stage. In introducing the amendment, Mr Dan Wallace, TD, Minister of State at the Department of the Environment and Local Government, commented that Part IIA was "for the purpose of dealing with the very important issue of unauthorised temporary dwellings" and "unauthorised encampments".[12] Most of the limited debating time was taken up with the effect, justified or otherwise, that this measure would have on members of the

[11] As noted above, "object" includes a temporary dwelling.
[12] 551 *Dáil Debates* 582.

Travelling community. The first prosecutions under Part IIA have all been taken against Travellers, very quickly after the sections were commenced.[13] Furthermore, prosecutions have been taken only against small groups of Travellers, usually particular families. The legislation has not, to the best of my knowledge, been enforced against large-scale Traveller encampments.

The legislation does not mention Travellers specifically. Nevertheless, those who enacted the measure unambiguously viewed it as a response to a problem generally associated with Travellers, namely large-scale unauthorised encampments. Although the legislation could affect people other than Travellers, its effect is most harshly and, thus far, exclusively felt by those who lead a nomadic way of life. For although the legislation does not criminalise travelling per se, it effectively criminalises stopping anywhere other than on certain roadsides, authorised halting sites and on private land with the consent of the owner.[14] As the nomadic way of life requires that one be able to stop travelling periodically, Part IIA bears particularly on those who follow that way of life. As other people, most obviously members of the settled community, do not have their way of life targeted in this way, Part IIA raises concerns of equality.

Part IIA Analysed under Current Constitutional Doctrine

Introduction

The first question for consideration is whether Part IIA is at odds with the conception of equality adopted by the Irish courts in their interpretation of Article 40.1. In answering this question, I shall consider three doctrinal issues of particular relevance: (a) whether Part IIA is discriminatory at all; (b) whether discrimination on the basis of membership of the Travelling community should be subjected to a more onerous standard of review than is generally the case; and (c) whether Part IIA meets such a standard of review. In considering these issues, it is important to bear in mind that law, constitutional law in particular, is not static. I shall therefore attempt to capture both the current position and the plausible potential for change

[13] See, for instance, Ryan, "Travellers move from car park to roadside" *The Irish Times*, 14 August 2002. A challenge to the legislation has been initiated by a group of Travellers.

in the current position. This examination precipitates a second, possibly more significant, set of questions. Even if a strong process conception of equality can recognise Part IIA as an equality issue, can it correctly perceive the character of that issue? Or is the reality of Part IIA distorted when viewed through the lens of fair process?

Is Part IIA an Equality Issue?

In *Dooley v. Attorney General*,[15] a case of direct relevance to the constitutionality of Part IIA., the plaintiff challenged the constitutionality of a number of sections of the Prohibition of Forcible Entry and Occupation Act, 1971 on the basis that they effected an illegitimate differentiation of landowners from non-landowners. The Supreme Court, *per* Griffin J., rejected the plaintiff's contention that the Act drew a blanket distinction between landowners and non-landowners by allowing the former to enter forcibly onto any property. Instead the Court interpreted the legislation to provide that landowners could enter only their *own* property and only where they were entitled to do so. The Act conferred no new general entitlement. It seems implicit in the judgment that, had the legislation drawn the blanket distinction alleged by the plaintiff, there would have been constitutional problems. The legislation, as interpreted by the courts, did not discriminate between persons based on the human attribute of land-ownership;[16] rather, it treated people differently based on the activities in which they chose to partake, i.e. whether they chose to enter forcibly other people's land.

On two levels, *Dooley* tends to support a conclusion that Part IIA does not breach Article 40.1. First, it strongly suggests that it is legitimate for the Legislature to criminalise unlawful entry onto land. Secondly and more importantly, it suggests that it is permissible to discriminate between people based on what they do as opposed to who they are.[17] Applied to Part IIA, it could be argued that the criminalisation of trespass is a discrimination against

---

[14] Section 69 of the Roads Act, 1993 criminalises the erection, placement or retention of temporary dwellings on national roads, motorways, busways or protected roads within the meaning of section 45 of that Act. Stopping on other roads would not be a criminal offence.

[15] [1977] IR 205.

[16] Arguably something of this kind was at issue in *de Búrca v. Attorney General* [1976] IR 38; (1977) 111 ILTR 37.

people who *choose* to trespass; it is not a discrimination against people who *are* Travellers. Any attempt to argue that Part IIA constitutes an illegitimate inequality will have to plot a different course to that argued in *Dooley*. It will have to show two things: first, that Part IIA amounts to a differentiation of people based on who they are, not what they do; and secondly, that this differentiation does not pass the appropriate constitutional test of justification.

Despite the observations based on *Dooley*, there seems an important sense in which equality is at issue. The measure was, on the terms of its proponents, adopted as a response to a particular social problem caused by a particular social group. The measure, by design and intent, will penalise most harshly members of that group. The measure, although neutral on its face, effects a discrimination between Travellers and non-Travellers in that Travellers will be penalised for pursuing their way of life, while non-Travellers will not be. The crucial question is whether the courts' conception of equality can perceive this social reality as morally relevant. If this social reality is perceived as raising equality concerns, the next step for constitutional equality is to question whether the newly identified discrimination is unjust. That a measure is indirectly discriminatory does not presuppose that a measure is unjustly discriminatory.

As noted in chapter four, the courts have not been sympathetic to the concept of indirect discrimination. In *Norris v. Attorney General*,[18] a number of equality arguments was considered by the High Court and the Supreme Court. The argument that received shortest shrift was to the effect that the criminalisation of anal sex constituted a discrimination between homosexuals and heterosexuals. McWilliam J. reasoned as follows:

> A certain act is declared to be unlawful. It may be performed by either homosexual or heterosexual men with either men or women. Although it is perfectly obvious that such acts will usually be performed between homosexual males, which is probably what the legislature had in mind, that does not constitute an invidious or arbitrary

---

[17] Admittedly, this distinction between being and doing is not perfect. In a certain sense, what you do determines who you are; and who you are may determine what you do. Nevertheless, it remains a useful guide for assessing the likely response of the courts to certain constitutional arguments.
[18] [1984] IR 36.

> discrimination against homosexual citizens any more than the statutes making theft an offence constitute an invidious or arbitrary discrimination against congenital kleptomaniacs, supposing there were such a group of people.[19]

On appeal, O'Higgins C.J. rejected the argument more tersely, acknowledging neither the discriminatory intent nor the disproportionate impact of the measure on male homosexuals. These *dicta* suggest antipathy to the idea that facially neutral legislation, salient to a ground of classification, could be tested by the courts as discrimination. Nevertheless, the more recent cases of *In re Article 26 and the Illegal Immigrants' (Trafficking) Bill 1999*[20] and *Redmond v. Minister for Environment*[21] were more equivocal on the issue of indirect discrimination, but not in a way which affects the current issue.[22] Part IIA is analogous to the *Norris* situation. The legislative measure, although neutral on its face, is directed at and most keenly felt by a discrete group of people.[23] To view Part IIA as an equality issue, the courts would need to strengthen their conception of equality. There are two plausible methods of doing so.

On the one hand, the courts could adopt the discriminatory purpose test of the United States Supreme Court, described in chapter nine. It is unarguable but that Part IIA was enacted with Travellers in mind. As noted above, having introduced the amendment to the Dáil, Mr Dan Wallace, TD, then Minister of State at the Department of the Environment, stated that it provided "an effective mechanism to deal with the type of large-scale unauthorised encampments which have emerged over the last two years".[24] Almost all the debate in the

---

[19] *Ibid.*, at 44.
[20] [2000] 2 IR 360.
[21] [2001] 4 IR 61.
[22] Part IIA is not categorically related to discrimination against Travellers because it potentially applies to other people. It is, however, highly salient to discrimination against Travellers. The *Illegal Immigrants Bill case* and *Redmond* did not deal with this point, however.
[23] It criminalises the act of trespass. Although people other than Travellers commit this act, its criminalisation impacts most severely on Travellers. Because of the chronic shortage of authorised halting sites, trespass has become essential to nomadism.
[24] 551 *Dáil Debates* 584. In *Crilly v. Farrington* [2001] 3 IR 267, at 280-4; [2002] 1 ILRM 161, at 178-82, the Supreme Court, *per* Denham J., sounded a note of caution about the use of parliamentary statements to assist in the construction of a statute. In *Controller of Patents v. Ireland* [2001] 4 IR 229 at 246, the Supreme Court, *per* Keane C.J., specfically applied these concerns to the testing of the constitutionality of a statute. In *An Blascaod Mór Teoranta v. Commissioenrs of Public Works* [1994] 2 IR 372, Murphy J. for similar reasons had refused the plaintiffs' application for discovery of documents relating to the manner in which the relevant Minister's decision to sponsor the An Blascaod Mór National Historic Park Act, 1989 was made, and to the preparation and drafting of the Act.Some of Denham J.'s concerns – such as the danger that parliamentary

Dáil and Seanad concerned whether the amendment was a proper and effective way to deal with the issue of unauthorised encampments.

The legislation was clearly enacted with Travellers in mind. Can it be said to have a discriminatory purpose? If purpose equates with intended consequences, then Part IIA was adopted with a discriminatory purpose. It was adopted in order to make it more difficult for Travellers to act in a particular way. Its proponents and opponents agreed on this; they simply disagreed as to whether such a measure was legitimate and warranted. If purpose, however, equates with animus as held in *Feeney v. Personnel Administrator for Massachusetts*,[25] the argument is somewhat more difficult to make. On the basis of the Parliamentary debates at least, it could be argued that the measure was motivated by concern at a pressing social problem and not by anti-Traveller sentiment. If the courts took this view of the legislation, it would not satisfy the discriminatory purpose test as laid down in *Feeney*.[26]

There are incidental dangers of introducing a discriminatory purpose test. For just as it is possible to draft legislation in facially neutral terms, it may also be possible to debate that legislation in facially neutral terms. It is simply a matter of talking in code. A discriminatory purpose rule creates an incentive for the legislature to talk in a neutral way and thus not to betray any discriminatory purpose. This would allow discrimination to be hidden once again behind facially neutral language. Further, it would be institutionally corrosive in that it would mitigate against the open discussion of important issues by the legislature.

On the other hand, the courts could adopt the disparate impact test, key to the concept of indirect discrimination in EU anti-discrimination law.[27] This concept allows one to view a measure that bears more heavily on one group than on another as discriminatory notwithstanding the fact that it is framed in facially neutral terms. If after Part IIA has been

---

statements would be framed with later judicial interpretation in mind –may mitigate against the adoption of the discriminatory purpose test in Irish law. Nevertheless, if the courts were to adopt the discriminatory purpose test, *Crilly* could scarcely be applied in this context.

[25] 445 US 901 (1980).

[26] This indicates the exceptionally restrictive nature of the *Feeney* test. So long as legislators do not maintain a written record of their hostility to a particular group, facially neutral measures do not infringe the constitutional guarantee of equality.

[27] Also described in chapter nine.

operative for some time it could be shown that it is used only or primarily against Travellers, then it could be concluded, under this conception, that Part IIA is discriminatory. In contrast to the discriminatory purpose rule, the adoption of an indirect discrimination rule would not preclude the Oireachtas from directly confronting and debating the discriminatory impact of its legislation.

It is clear, therefore, that as a matter of constitutional doctrine there are significant obstacles to considering Part IIA as an equality issue. The courts would have to reject the approach implicitly adopted in *Norris* and adopt either a discriminatory purpose approach or a disparate impact approach. Although there are good egalitarian reasons for adopting either of these, the disparate impact model being preferable in that it encourages open consideration of relevant issues, it is by no means clear that the courts would expand their understanding of constitutional equality in this way. Even if they did so, the question would still remain as to whether the discrimination effected or intended by Part IIA was justifiable.

Must Part IIA Meet a Higher Standard of Review?

As argued in chapters six and nine, the Irish courts may have adopted a stronger process conception of equality whereby some grounds of classification require greater justification than others. Assuming that this is the case and that we can treat the criminalisation of trespass as a discrimination against Travellers, it is necessary to question whether such discrimination is a classification on an objectionable ground requiring more stringent justification.[28]

From the *Employment Equality Bill Case* and the *Great Blasket Case*, one can tentatively suggest that classifications based on race, sex, language, religious or political opinions, age (possibly), colour and pedigree require positive justification by the State and perhaps must meet a higher standard of justification. None of these grounds of classification seems to cover membership of the Travelling community. Therefore, in order for Part IIA to be evaluated against a heightened standard of justification, one must argue that membership of

[28] In chapter nine, I noted the differences that arise between right strong process conceptions and left strong process conceptions when one considers the issue of reverse discrimination. These differences are not relevant to the discussion in this chapter, so I do not here distinguish between these different types of strong process conception.

the Travelling community is either subsumed within a further objectionable basis of classification or is itself a further objectionable basis of classification. An argument that a particular ground of classification is objectionable generally proceeds by way of analogy with the grounds of classification already enumerated by the courts as objectionable. Although the Irish courts have not considered what qualities connect these objectionable grounds, some formulae may be found in case law from other jurisdictions and in the academic commentary.

As suggested in chapter six, the two most common formulae focus on immutable characteristics and discrete and insular minorities. Although the formulae are flawed,[29] these criteria may be of strategic use in contesting that membership of the Travelling community should be seen as an objectionable ground of classification. For membership of this community is an immutable characteristic. One is born a Traveller and one remains a Traveller. Clearly Travellers are a minority within society and, to a greater or lesser extent, this minority is discrete and insular. For these reasons, it could be argued that membership of the Travelling community is an objectionable basis for classification, analogous to other such bases enumerated by the courts, and should receive heightened judicial scrutiny. It should be noted that in *People (Attorney General) v. O'Driscoll*,[30] the Court of Criminal Appeal considered an argument that the applicants' convictions were unsatisfactory on the basis that the Trial Judge had taken undue cognisance of the fact that the applicants were Travellers. Although the argument could not be sustained on the facts, Walsh J. made the following observations:

> A complaint made about the conduct of the trial was that the Judge in some way permitted the fact that the applicants were itinerants to creep into the evidence or to colour the case in a way which has caused them to be the objects of discrimination at the trial. Needless to say, if any such position were disclosed in the transcript or otherwise established to the satisfaction of this Court, the conviction would be quashed without hesitation on the grounds that the trial violated the provisions of Article 40.1 of the Constitution.[31]

---

[29] For reasons explored in chapter six.
[30] (1972) 1 *Frewen* 351.
[31] *Ibid.*, at 353.

This suggests that the courts will not look favourably on discrimination against Travellers and could support an argument that such discrimination should be required to meet a higher standard of justification. The force of Walsh J.'s declaration may, however, be partly explained by the context of the discrimination, namely the judicial process. Even formal equality, the most minimalist conception of equality, would have been breached if the allegations were substantiated.[32]

One could make the argument in a more abstract way by suggesting that Travellers are a group identified by the objectionable trait of ethnicity. In *Quinn's Supermarket v. Attorney General*, Walsh J. suggested that discrimination on the basis of ethnic background breached the equality guarantee.[33] This suggestion was reiterated by Budd J. in the *Great Blasket Case*.[34] Although ethnic groups are not necessarily minorities, ethnicity is a relatively immutable characteristic. For these reasons of principle and precedent, one can plausibly argue that discrimination on the basis of ethnicity may require the strengthened standard of review suggested by the Supreme Court in the *Employment Equality Bill case* and the *Great Blasket case*. It is generally accepted that Travellers constitute a distinct ethnic group within Irish society. Statutory approval of this proposition is seen in section 2 of the Equal Status Act, 2000:

> "Traveller community" means the community of people who are commonly called Travellers and who are identified (both by themselves and others) as people with a shared history, culture and traditions including, historically, a nomadic way of life on the island of Ireland.

The advantage of framing an argument in terms of ethnicity rather than membership of the Travelling community is that it is more likely to appeal to the universalist inclination of the courts' process conception of equality. Although the effect for Travellers would be the same, given that they constitute an ethnic group, the courts could view themselves as making a universal moral point about ethnicity rather than a more contentious point about Irish society.

---

[32] See Zander, *Inequalities Before the Law* (Open University Press, 1976), at 7.
[33] [1972] IR 1, at 13-4.
[34] Unreported, High Court, 27 February 1998, Budd J., at para. 1777. Budd J. commented that the discrimination in question was a "dubious classification with ethnic and racial overtones".

Does Part IIA Meet the Appropriate Standard of Review?

If Part IIA is based on an objectionable ground of discrimination that requires greater justification, it is necessary to consider whether such justification exists. It is useful to begin by considering the standard justificatory test. This was stated by Barrington J. in *Brennan v. Attorney General*.[35] He stipulated that legislative classifications must be made for a legitimate purpose, they must be relevant to that purpose and each class must be treated fairly. The State could argue that Part IIA, although discriminatory, is justified by the need to deal with illegal traveller encampments in that it is a proportionate response to a legitimate government objective. If the traditionally lax standard of review were applied by the courts, this argument is likely to succeed. Alternatively, the State could argue, relying on *O'Brien v. Stoutt*,[36] that Part IIA is justified as a protection of private property.

These arguments become more difficult, however, if a more rigorous justificatory test is applied. The *dicta* in the *Great Blasket case* and the *Employment Equality Bill case* suggest two possible features of such a test. One can, with a reasonable degree of confidence, suggest that the onus of proof has been reversed. That is, the onus is on the State to show that Part IIA is justified, by reference either to the constitutional guarantee of private property or to the societal interest in dealing with unauthorised encampments. With less confidence, one can suggest that Part IIA must meet a higher standard of justification. That is, it must not merely be relevant to a legitimate legislative purpose, but must be closely tailored to achieving a compelling legislative purpose. There are some *dicta* to this effect in the *Employment Equality Bill Case*.

This provides a good illustration of the interplay between means and end in the means-end rationality test.[37] Imagine two different levels of means-end rationality. The lower level is as stated in *Brennan v. Attorney General*: relevant to a legitimate legislative purpose. The higher level requires that legislation be closely tailored to a compelling legislative purpose. The purpose is identified by looking at the terms of the statute itself, but the lower the level of

---

[35] [1983] ILRM 449, at 480. See chapter five.

[36] [1984] IR 316; [1985] ILRM 86. In *O'Brien*, the Supreme Court held that discriminations could be justified by reference to other constitutional values; in that case, a discrimination against illegitimate children was upheld by reference to the constitutional support given to the marital family.

[37] See chapter five.

rationality that is required, the easier it is to deduce a purpose that meets the "end" part of the test.[38] The following table illustrates the dynamic:

1	2	3	4
Purpose	Significance	Means	Fit
Protect private property (a constitutional value)	Compelling[39]	Part IIA	Relevant/Closely tailored?[40]
Make life difficult for Travellers	Not legitimate	Part IIA	Closely tailored
Deal with large scale encampments	Legitimate[41]	Part IIA	Relevant
Deal with unauthorised encampments	Legitimate[42]	Part IIA	Closely tailored
Deal with problems associated with (large scale) encampments	Compelling	Part IIA	Barely relevant[43]

[38] This does not mean that a sufficiently good purpose can never be found that is closely tailored to legislation but simply that it is easier to deduce a sufficiently good purpose when it does not have to be closely tailored to the legislation.

[39] The *O'Brien v. Stoutt* line of authority is best reconciled with the *Brennan v. Attorney General* line of authority by stating that protecting another constitutional value is stipulated by the Constitution to be a legitimate (and "compelling" if one adopts differentiated tiers of scrutiny) legislative purpose.

[40] Whether Part IIA is closely tailored or only "relevant" to protecting the constitutional value of private property depends on whether public authorities, most relevantly local authorities, have constitutionally protected property rights. In *Iarnród Éireann v. Ireland* [1996] 3 IR 321, Keane J. held that, notwithstanding the naturalistic language of Article 43, bodies corporate, including bodies corporate that were wholly publicly owned, had constitutionally protected property rights. The Supreme Court did not address this issue on appeal. It is unclear whether Keane J.'s reasoning applies to public authorities and, in particular, to local authorities. If it does, then it follows that Part IIA is closely tailored to protecting the constitutional value of private property. If it does not, then it follows that Part IIA is only relevant to protecting the constitutional value of private property in that it also protects property which is not the subject of constitutional protection.

[41] This is only legitimate and not compelling because it is hard to see large scale encampments in themselves as a problem; rather it is the litter and waste problems that are closely associated with such encampments that is the problem. The impact of large scale encampments on the enjoyment of private property is addressed by the first suggested purpose (the protection of private property) which I accept is compelling.

[42] The comments in the previous footnote apply *a fortiori* here.

This table has been presented in an orthodox fashion, asking first what is the purpose and how significant that purpose is and asking secondly what means are used and whether those means are closely tailored to achieving that purpose. Given that the purpose is deduced from the terms of the statute itself, the table should really be read in the following way: 3 – [4 and 2] – 1. Part IIA passes constitutional scrutiny if one can identify a purpose (1) to the legislation (3) which satisfies the requirements of both fit (4) and significance (2). The degree of fit establishes the leeway one has in deducing purposes. If the degree of fit required is low, one can identify compelling purposes. If the degree of fit required is high, one cannot identify compelling purposes.

This analysis points to the following conclusion. If the appropriate justificatory test is as stated in *Brennan v. Attorney General*, it is possible to identify a sufficiently closely related purpose which is sufficiently significant. In fact there are two such purposes: protecting private property and dealing with large scale encampments. If, however, discrimination against Travellers implicates an objectionable ground of classification which requires a higher level of justification (i.e. a higher level of means-end rationality), then it is unclear whether it is possible to identify a sufficiently closely related purpose which is sufficiently significant. If one reads *Iarnród Éireann v. Ireland* broadly, it follows that Part IIA is closely tailored to protecting the constitutional value of private property, since that value includes the property of public authorities. If one reads *Iarnród Éireann v. Ireland* narrowly, it follows that Part IIA is only relevant to protecting the constitutional value of private property. The broad reading starkly illustrates the subordinate status of process equality as a constitutional norm: in a conflict between equality and property, property must win. No balance can be struck.

The *Employment Equality Bill case* is not sufficiently clear to say that it is established doctrine that discriminations on an objectionable ground must meet a higher standard of justification. This depends on future judicial decisions. Nevertheless, if the courts were to adopt that doctrine, it is at least arguable that Part IIA would not meet such a justificatory test.

---

[43] Because Part IIA does not directly address such problems.

Conclusions

There is a number of hurdles to Part IIA being considered a breach of the equality guarantee under current constitutional equality doctrine. If the courts, however, were to develop the current rather weak process conception of equality into a much stronger process conception, building on *dicta* in the *Employment Equality Bill Case* and the *Great Blasket Case*, then there is a strong case for the unconstitutionality of Part IIA. It is useful to summarise the developments that are necessary. First, the courts would need to accept that indirectly discriminatory measures are the concern of the equality guarantee, by reference either to a disparate impact model or to a discriminatory purpose model, albeit one that does not understand discriminatory purpose as animus. Secondly, the courts would need to accept that certain grounds of classification require more justification than others and that discrimination on the basis of ethnicity or membership of the Travelling community is one such ground. Thirdly, the courts would need to accept that the stricter justificatory test involves not only the reversal of the onus of justification but also the raising of the standard of justification so that it requires that the legislative measure be closely tailored to a compelling governmental objective.

It is not of much assistance to speculate on whether the courts would adopt these doctrinal changes. Nevertheless, the analysis has illustrated how Part IIA would be perceived under a strong process conception of equality and better allows one to compare such a conception with a substantive conception.

Contextual Criticisms of a Process Conception of Equality

If all the changes detailed above were made, constitutional equality doctrine would be more expansive, yet would remain deeply unsatisfactory. The cause of the problem lies in the way in which various substantive value judgments about equality would be interpolated into a general structure which purports to be both process-based and neutral. The courts have traditionally endorsed a process conception of equality which tests the rationality of legislative classification. The most salient feature of this conception has been the paucity of cases in which Article 40.1 is successfully pleaded. The doctrinal devices of indirect discrimination and heightened standards of review are functional responses to this perceived

defect of the process conception. They are uneasy compromises between substantive views of what inequality is and inherited views of what is cognisable to constitutional equality.

Indirect discrimination is an attempt to take judicial cognisance of the unequal effects of purportedly neutral legislation. Inspired by the substantive view that inequality is about the subordination of groups not the classification of individuals, indirect discrimination undermines the strict neutrality of the process conception. Nevertheless, it is also inconsistent with the substantive viewpoint because indirect discrimination, as the name itself suggests, is parasitic on the concept of direct discrimination. The effects of legislative measures are taken into account but only to the extent that they suggest that the legislative measure itself really was a classification or differentiation. In this way, disparate impact is rendered subordinate, both politically and conceptually, to differentiation and the full impact of a substantive account of equality is frustrated.[44]

The discriminatory purpose model suffers from the same defects in an accentuated form. It asserts that facially neutral measures are only discriminatory where the agent intends to discriminate against a particular group, in the sense that the agent exhibits malice to that group. This underlines the perpetrator perspective, making the experience of the victims of discrimination irrelevant.

The method in which the process conception assesses the legitimacy of legislative differentiation emphasises the contorted way in which it implicitly perceives subordination as morally relevant but then explains subordination in a manner which assumes that fair process concerns are the significant aspects of social reality. Ostensibly, the courts ask what the purpose of the measure is and question whether that purpose is legitimate and whether the legislation is relevant to achieving it. Given that purposes are ascribed to legislation, however, the first and the last question are really the same. The only issue in the testing of legislative differentiation is whether the courts are prepared to ascribe a legislative purpose which is legitimate. Rendering the standard of review more exacting does reduce the courts'

---

[44] For instance, it is questionable whether a disparate impact model can recognise the subordination effected by widespread, dispersed social practices and values. Disparate impact is only relevant as an indicator that an identifiable practice is discriminatory and that an identifiable agent discriminates. Disparate impact is evidence of a perpetrator; constitutional equality thus would not eschew the perpetrator perspective.

freedom to ascribe a purpose that is sufficiently important. Even so, the divergence between the reality and presentation of the justificatory test, particularly when one considers the impact of hypothetical justification, serves to obscure important judgments about competing values and social necessities. Furthermore, these justificatory tests reinforce the perpetrator perspective of constitutional equality doctrine. The only issue is the rationality of the discriminating agent, judged by whatever standard. The experiences of the victim group become irrelevant. Differentiated justificatory tests do suggest that one is more concerned about the experiences of some groups than others (that is why more justification is required), but this is only considered *a priori*. No attempt is made to compare the inequality harm to the harm suffered by the other societal interests or social values.

In any event, the idea that some classifications should *a priori* be assessed more rigorously than others is inconsistent with the neutrality of the process conception. The only way in which one can decide that some classifications are worse than others is by making substantive judgments about equality. These substantive judgments must be made; the problem with the doctrinal structure of process equality is that it attempts to make the substantive judgments in as non-substantive a way as possible. Extrapolated universals such as race and ethnicity are used, and although general explanations are attempted, none is convincingly formulated.

This in turn suggests a further problem. One's sense of objectionable inequality is informed by a view that certain groups in society have been unjustly treated.[45] To make sense in law, this requires both a descriptive account of groups in society and a normative account of the treatment deserved by those groups. The process conception does neither of these things. Realised in the process conception, recognition of group inequality becomes an assertion that the differentiation of an individual on the basis of certain characteristics is irrational and therefore unfair. The process conception thus mistakes group injustice for individual harm and transforms equality into a negative, individual right. It is this divorce of legal form from

---

[45] This is perhaps an over-simplification but it certainly holds true as far as Travellers are concerned. It is hard to imagine any device more anaemic or divorced from our experience of inequality than the proscribed ground of discrimination in the Equal Status Act, 2000, "membership of the Travelling community". It is a significant aspect of social reality that discrimination is directed against Travellers, a historically oppressed group in society, and is objectionable for that reason. It misconstrues that reality to extrapolate to a universally applicable proscribed ground of differentiation.

the most significant aspects of social reality that leads many, although admittedly not all, to adopt the most contentious tenet of the process conception: namely, that equality is a symmetrical requirement and a measure that discriminates against a black person for instance is, in the abstract, just as objectionable as a measure which discriminates in favour of a black person: both are discriminations on the basis of race.

A strong process conception can deal with the inequality effected by Part IIA and, for this reason, is preferable to the weak process conception which cannot. Nevertheless, the strong process conception's success is achieved at the cost of distorting social reality of subordinaiton to fit the preconceived categories of process equality. An egalitarian result might be achieved in the instant case, but conceptual problems are created for later cases.

Part IIA Analysed under a Substantive Conception of Equality

Are Travellers a Historically Disadvantaged Status Group?

Travellers are a significant social group in Irish society. They meet Fiss's definition of a social group: they are viewed as a group; they view themselves as a group; and their social status is linked to the status of the group.[46] In Weberian terminology, they are status groups:

> They are organized around common styles of life and common senses of honor, prestige or moral rectitude. Their members' common interest is in defending and increasing the prestige of their group, their common ideals, or their common style of life.[47]

Travellers are probably the most significantly subordinated status group within Irish society. In chapter one, I noted some of the salient features of this exclusion. Travellers often live in abject poverty; their infant and adult mortality are more than twice as high as those of the settled community. Only 1.3 percent of Travellers live to be 65, compared to 11.4 percent of people in the general population.[48] This subordination is underlined by the hostile attitude of

---

[46] Fiss, "Groups and the Equal Protection Clause" 5 *Philosophy and Public Affairs* 107, at 148 (1975).
[47] Balkin, "The Constitution of Status" 106 *Yale Law Journal* 2313, at 2322 (1997).
[48] See Central Statistic Office, *Statistical Bulletin* (1998), at 237, available at <http://www.cso.ie/publications/demog/travelcomm.pdf>.

the settled community to the Travelling community. Commenting on figures from 1988-89, MacGréil notes:

> It is difficult to comprehend that our attitudes towards our fellow-Irish citizens could be so negative. It is a classic case of severe anti-minority prejudice.... Only one in seven of *the national sample* would welcome a Traveller into the family through marriage, while 59% (three out of five) would not welcome Travellers as next-door neighbours. One in ten would deny citizenship to Irish Travellers.[49]

The life conditions of Travellers and the hostility directed towards them are rationalised by a view of Travellers as less worthy social deviants. Fanning summarises the 1963 *Report of the Commission on Itinerancy* in the following terms:

> Travellers were constructed as a problem for Irish society. Their cultural distinctiveness became constructed, within a highly racialised discourse of Traveller deviance and inferiority, as justification for spatial exclusion and discrimination. Within the dominant discourses of the time Travellers were not to have equal rights to welfare unless they first ceased to be Travellers.[50]

Officialdom has since adopted a more progressive stance on Travellers. The *Report of the Task Force on the Travelling Community*[51] focused on integration rather than assimilation, although it did not go so far as to treat Travellers as a distinct ethnic group. Section 2 of the Equal Status Act, 2000, cited above, provides statutory recognition of the Travelling Community as an ethnic group. Nevertheless, I suspect that the views expressed in the 1963 Report are a better representation of the current majority view of Travellers.[52] They certainly constitute the justificatory rhetoric of anti-Traveller discrimination.

---

[49] MacGréil, *Prejudice in Ireland Revisited* (Survey and Research Unit, St. Patrick's College, Maynooth, 1986), at 327 (emphasis original). He further notes that there has been a marked decrease in tolerance/acceptance of Travellers since an earlier survey in Dublin in 1972-3.

[50] Fanning, *Racism and Social Change in the Republic of Ireland* (Manchester University Press, 2002), at 153.

[51] (Stationery Office, 1995).

[52] This is a personal observation for which I do not have empirical support.

The latter half of the twentieth century was marked by increasing status competition between Travellers and the settled community. Fanning notes that the economic expansion of the late 1950s and 1960s displaced Travellers from their "precarious niche in rural society".[53] The Travelling community became more politically organised and self-aware; they sought both to improve their material situation and to gain symbolic capital through the legal system, at the legislative and judicial level. These attempts to gain symbolic status capital have been resisted to a greater or lesser extent. As Balkin observes, status competition is at its most intense when the social meanings which support the status hierarchy begin to break down. When Travellers knew their place, society was harmonious and there was little need for legal measures directed at Travellers. Is it purely coincidence that, as Travellers become more assertive, particularly as they seek to advance their rights through the legal system (most notably through challenges to refusal of service under the Equal Status Act, 2000), legal measures directed against Travellers are contemplated?

One must also consider the subordination of Travellers in the context of accommodation. Fanning sets out in detail the history of the Traveller accommodation problem in County Clare, more recently the area in which some of the first prosecutions under Part IIA have been taken.[54] The following observations, drawn from Fanning's study, illustrate the broad outlines of Traveller subordination in the context of housing. The Traveller problem became politically important in Clare from 1964 onwards. During the 1960s, assimilation was the objective: Travellers were encouraged to become members of the settled community. Assimilation was, however, thwarted by political objections to the location of sites for Travellers. During the 1970s in the county town of Ennis, Travellers living in the town were frequently prosecuted for illegal parking and under public health legislation. The hostility often displayed towards Travellers is profoundly disturbing:

> Opposition by residents to Travellers who halted took a number of forms. It usually emerged through residents' groups that lobbied councillors or took legal proceedings. Most such activism was bound up with efforts to exclude Travellers from a locality. Sometimes the actions of such groups took the form of boycotting or

---

[53] *Idem.*
[54] *Ibid.*, at 112-51.

> harassment. For example, in 1982 many of the residents on one road on the outskirts of Ennis agreed to refuse Travellers water in addition to pressing the local authorities to take legal action against them. Some councillors considered that Travellers on unofficial sites should be deprived of all basic amenities, including water.... In 1992 residents who lived near an unofficial halting site outside Shannon hired a mechanical digger to make the site uninhabitable whilst many of its occupants were on a pilgrimage to Croagh Patrick. They physically prevented the Travellers from accessing the site on their return. A Garda report at the time identified a problem of friction between the two communities. The response to this problem, as outlined at a meeting of Clare County Council, had been the prosecution of eighteen Travellers on various unspecified offences. There was no discussion of prosecutions in relation to the anti-Traveller actions of residents.[55]

The Traveller accommodation problem remains acute. In Clare in 2001, only 56% of Traveller families were in accommodation, including halting sites. 63 families were not in accommodation. This is the context in which the Oireachtas chose to criminalise the act of trespass.

Travellers are a subordinated status group within Irish society. Indeed, the subordination of Travellers is a classic case of identity-based hatred. The open hostility to Travellers knows few parallels and even echoes the social discourse of the United States during the segregation era.[56] The structure of subordination is mainly one of exclusion: Travellers should be accommodated elsewhere and should not use the services used by the settled community.

Does Part IIA Subordinate Travellers?

Part IIA subordinates Travellers in two ways. First, at a practical level, it renders the nomadic way of life virtually impossible. As noted above, although Part IIA does not criminalise travelling per se, it effectively criminalises stopping anywhere other than certain roadsides,

---

[55] *Ibid.*, at 133 (citations omitted).

[56] Fanning mentions a court case taken in 1997 by a Traveller against a publican for refusal of service. The District Court revoked the publican's licence which was later restored when the publican apologised. Fanning

authorised halting sites and on private property with the consent of the owner. Given that Travellers do not collectively own large amounts of land[57] and given that there is not an extensive network of temporary halting sites to facilitate nomadism,[58] Part IIA effectively criminalises the nomadic way of life.

Secondly, at a symbolic level Part IIA attaches a very negative social meaning to the nomadic way of life. In the summer of 2002, the Citizen Traveller Campaign ran an advertising campaign, the slogan of which was, "Suddenly, in caring, tolerant Ireland, being a Traveller is a crime". An Irish Times editorial declared this sentiment mistaken,[59] but it is difficult to see why. The slogan may be a catchy dramatisation of the effect of Part IIA, but it is not mistaken. The issue of Traveller trespass was previously regulated by the law of tort,[60] but the State has decided that it is such a matter of public concern and such a threat to the common good that it should be regulated by criminal law. This sends a very powerful message about the State's view on Travelling. It clearly labels the nomadic way of life as being criminal and inferior. There can be no doubt that Part IIA subordinates Travellers.

Are Travellers an Unjustly Subordinated Status Group?

It is difficult to imagine a justification for this level of subordination. The justifications generally offered for individual acts of subordination characterise Travellers as deviants. Allegations are advanced of welfare scrounging, drunkenness and, most relevantly in the context of accommodation, dirtiness. Collectively, these might amount to a moral case for exclusion from the mainstream of social life. But this moral case is not coherent. Welfare scrounging, drunkenness and dirtiness are widespread in Irish society.[61] Usually, they are considered to warrant specific measures focused on welfare fraud, alcohol consumption and waste or litter. That alleged instances of these problems within the Travelling community are seen as

---

notes that the judge strongly criticised the local bar for the failure of any local solicitor to represent the Traveller in the case. The Traveller retained a solicitor from Gort, a town fifty miles away.

[57] Even if they did, there would probably be difficulties in obtaining planning permission for halting sites. On this issue, see *Buckley v. UK* (1997) 23 EHRR 101.

[58] The provision of such a network would make Part IIA much less objectionable under the substantive conception. This illustrates how the substantive conception is sensitive to the context in which the discrimination takes place and the extent to which that discrimination infringes equality. A process conception cannot take account of context in this way.

[59] "Campaign Traveller" *The Irish Times*, 8 August 2002. The Department of Justice subsequently withdrew funding for the Citizen Traveller campaign.

[60] "Being a Traveller is a tort" does not have the same ring to it.

[61] Again, these are personal observations.

justifying responses directed generally at the Travelling community suggests that a double standard operates. Hostility towards Travellers derives from a majoritarian failure to identify with the minority group. There is no coherent moral or pragmatic reason for this subordination. This is not a difficult case: the subordination of Travellers is unjust.

Is There a Justification for Part IIA?

As suggested in the last chapter, the relevant question here is whether Part IIA advances an important governmental objective to an extent that justifies its infringement of equality. The infringement of equality is very significant: a way of life has been effectively criminalised. Dealing with the waste problems associated with large scale halting sites is the only objective served by Part IIA which might justify such an inequality, although even that is doubtful. In any event, Part IIA does not serve that objective to any great extent. It prohibits halting sites generally, and so prohibits large scale halting sites, but it does not address the problems that arise from such sites. It makes it easier for the Gardaí to close down such sites but imposes no obligation on the users of those sites to deal with the waste and litter problems that persist. Part IIA does not advance an important governmental objective to an extent that justifies its very significant infringement of equality.

Conclusions

Travellers are an unjustly subordinated group within Irish society. Part IIA further subordinates this group, both in a tangible and symbolic way, by criminalising the nomadic way of life. The extent of this subordination is so great that it is not justified by the extent to which Part IIA may advance desirable social ends.

Conclusion

I have set out how the Irish courts might deal with Part IIA under their current process conception, a strengthened process conception and a substantive conception of equality. I believe that the substantive conception of equality provides the most convincing way of analysing the problem but I postpone until the final chapter my analysis of the merits of each conception of equality.

Chapter Twelve

The Best Conception of Equality

Introduction

In the course of this thesis, I have considered four different conceptions of equality in some detail. The bulk of the thesis was given over to an examination of Irish constitutional law. I argued that the Irish courts have generally adopted a weak process conception of equality. This conception is marked by an Artistotle-lite approach to legislative classification, double deference to the legislature as regards legitimate differentiation and a restrictive interpretation of the phrase "as human persons". I then suggested that an alternative, stronger process conception of equality was immanent in cases such as the *Employment Equality Bill case* and the *Great Blasket case*. The *dicta* in these cases suggest a strong right-leaning process conception of equality which symmetrically protects individuals from differentiation on certain objectionable grounds. I then articulated an alternative strong process conception of equality – based on the ideal of human equality and, in particular, Dworkin's idea of equal respect – which, although focusing on the legitimacy of classifications, identifies prejudice as the primary infringement of equality and thus does not adopt symmetry as a doctrine. Finally, I articulated a substantive conception of equality, based on the unjust subordination of status groups, which differs fundamentally from the process conceptions.

It is generally accepted by academic commentators that Article 40.1 has been interpreted in a very restrictive fashion. If one wishes to interpret the guarantee in a more egalitarian manner, it follows that there are at least three conceptions of equality that one should consider: right process, left process and substance. As more fully explained in chapter nine, the right process conception of equality is a strong process conception of equality which can be described as right-leaning in its political orientation, primarily as a result of its approval of a doctrine of symmetry. The left process conception of equality is a strong process conception of equality which can be described as left-leaning in its political orientation, primarily as a result of its eschewal of a doctrine of symmetry. I shall first consider whether each is plausible as an interpretation of the Constitution; I shall then consider whether each

is a convincing account of equality. This is essentially a summary of the arguments made in chapters nine, ten and eleven.

That a conception cannot count as a plausible interpretation of the Constitution does not preclude consideration of whether it is a convincing account of equality. On the one hand, if it transpires that a particular conception is a convincing account of equality but is precluded because of the words of the Constitution, this would ground an argument for the amendment of the Constitution. On the other hand, if it transpires that a particular conception is a convincing account of equality and is consistent with the words of the Constitution but is precluded by the courts' interpretation of the words of the Constitution, this would ground a critical position on the choices made by judges in their interpretation of the Constitution. In order better to understand legal doctrine and the choices that have created that doctrine, one must consider alternative conceptions of equality which appear at present to be impossible to achieve within constitutional law. Further, it is always possible that the courts could break with past precedent and adopt a wholly new conception of equality that appeared implausible until it was adopted.

Interpretations of the Constitution

Constitutional Text

None of the four conceptions of equality is fully consistent with the original understanding of Article 40.1. Mr de Valera understood the equality guarantee in terms of a division of human life into different spheres: equality was to be guaranteed in the civil and political spheres but not in the social sphere. Clearly, the substantive conception which actively involves the courts in reducing social inequality is at odds with the original understanding. But so too are the three process conceptions. Any approach which focuses on rationality of differentiation rather than on the sphere in which inequality exists is inconsistent with the original understanding. For example, *Lowth* involved a differentiation between men and women in the social sphere. The Supreme Court assessed, admittedly to a low standard, the rationality of this differentiation; under Mr de Valera's original understanding, there would have been no need for such an inquiry. The effects of the substantive conception stray further from the effects envisaged by the original understanding than do the effects of the various process

conceptions. Nevertheless, this is merely a difference of degree. Neither the conceptions of equality adopted by the Irish courts nor the alternatives articulated in this thesis are consistent with the original understanding of Article 40.1.[1]

It is then necessary to consider whether the best reading of Article 40.1, eschewing the original understanding, precludes certain conceptions of equality. In particular, do some of the limiting phrases in Article 40.1 preclude certain conceptions of equality? The best grammatical reading of equality before the law is as a guarantee of formal equality: the equal application of laws, without fear nor favour. But this is inconsistent with the second sentence of Article 40.1 which implies some substantive oversight of the content of legislation. For the same reason, it is inconsistent with almost all the cases interpreting Article 40.1 and thus with each of the four conceptions of equality that I have outlined above. Therefore, it is not now, even if it ever was, a plausible interpretation of Irish constitutional equality.

Nevertheless, one might argue that although the phrase "before the law" does not carry its most obvious, literal meaning, it does limit Article 40.1 to guaranteeing legal equality. One could then argue that only the process conceptions are valid interpretations because only they limit themselves to addressing the validity of laws; in contrast, the substantive conception of equality suggests a wide-ranging oversight of social action. But this misunderstands the substantive conception. That conception does not mandate a general norm of equal treatment, binding on all citizens. It limits itself to addressing legal inequality, but adopts a much broader understanding of the ways in which law operates; it thus commits constitutional law to a much more active dismantling of inegalitarian laws. It is therefore explicable in terms of a guarantee of legal equality. The process conceptions understand legal equality in terms of the rationality of legal actors; the substantive conception understands legal equality in terms of the inegalitarian effects of the law on subordinated groups. Given that the case law, and most constitutional commentators, reject the most obvious grammatical interpretation of the phrase "before the law", it is difficult to see why that phrase should mandate one understanding of legal equality over another.

---

[1] In any event, for the reasons given in chapter two, an originalist interpretation of the Constitution, particularly of the equality guarantee, is inappropriate.

One might also argue that the phrase "as human persons" limits the equality guarantee to individualistic, process conceptions. If equality is guaranteed to citizens as human persons, it follows that a conception of equality should focus on the inequality of persons, not groups. But again this does not necessarily follow. As argued in chapter ten, that citizens are guaranteed equality as human persons does not preclude a recognition that inequality exists on a group basis. If human persons are to be treated equally, the law must deal with the subordination of the groups to which human persons belong. Thus the phrase "as human persons" is broadly consistent both with the process conceptions and with the substantive conception.

Finally, one could argue that the second sentence of Article 40.1 endorses the notion of legitimate differentiation and therefore suggests that the commitment to equality before the law should be interpreted as a *prima facie* prohibition of differentiation. There is some merit to this observation. Nevertheless, the identification of legitimate grounds of differentiation does not, of itself, establish that differentiation is the only concern of Article 40.1. Indeed, one could argue that the second sentence's legitimation of differentiation suggests that differentiation is not the primary concern of the first sentence. Although this argument is not wholly convincing, it is not wholly implausible. The case for leaving this argument open is strengthened if one recalls that equality, as a political ideal, often embarrasses its own statement.[2] That is, given that equality calls for continuous, critical evaluation of established practices, one must leave open the possibility that the document which commits the country to equality is not itself an accurate statement of equality.

This discussion suggests that there are no clear-cut textual limits in Article 40.1 which are relevant to a choice between the four conceptions of equality outlined. The issue as to which is the best interpretation of Article 40.1 turns on which is the most convincing interpretation of equality, which is the most morally appealing account of what equality requires.[3] I shall

---

[2] See chapter one.

[3] This type of moral argument is closer to the constructive morality advocated by Dworkin (see chapter one) than to more traditional moral argument. I do not set out an abstract, moral conception of equality against which one compare the various legal conceptions. Instead, I question which of the legal conceptions best captures and explains one's moral intuitions about what equality requires in particular contexts. Speaking in a different context, Rawls set out the methodology which I attempt to follow here:

> We must now ask: how might political philosophy find a shared basis for settling such a fundamental question as that of the most appropriate institutional forms for liberty and equality?... We collect such

consider this issue in the next main section. Nevertheless, precedent limits the number of equality conceptions that are currently interpretatively plausible. There are conceptions of equality which may have been plausible in 1937 but which are now foreclosed by subsequent judicial decisions. Given that these conceptions were plausible interpretations of the constitutional text, their foreclosure is purely a result of judicial choice.

Constitutional Precedent

The substantive conception is clearly at odds with most of the cases interpreting Article 40.1. The reasoning in all these cases, in particular the repeated invocation of the Aristotelian conception, forecloses the proposition that one should look to the effect of constitutional measures on subordinated groups rather than the rationality of the classifications drawn by such measures.[4] The courts have made an ideological commitment to process over substance.

Given the restrictions of precedent, therefore, only the three process conceptions now count as plausible interpretations of Article 40.1. Clearly the weak process conception has the most support in the case law, although the *dicta* in the *Great Blasket case* and the *Employment Equality Bill case* suggest that it may be strengthened. As noted in previous chapters, there are two plausible strengthened process conceptions. The interesting question is whether the right process conception has more support in the case law than has the left process conception. I argued in chapter nine that although the right process conception cohered better with the *dicta* in the *Great Blasket case* – most obviously with the invocation of colour-blindness – the left process conception cohered better with earlier case law, in particular with the "basis of discrimination" account of human equality outlined by Walsh J. in *Quinn's*

> settled convictions as the belief in religious toleration and the rejection of slavery and try to organize the basic ideas and principles implicit in these convictions into a coherent conception of justice. We can regard these convictions as provisional fixed points which any conception of justice must account for if it is to be reasonable for us. We look, then, to our public political culture itself, including its main institutions and the historical traditions of their interpretation, as the shared fund of implicitly recognized basic ideas and principles. The hope is that these ideas and principles can be formulated clearly enough to be combined into a conception of political justice congenial to our most firmly held convictions. We express this by saying that a political conception of justice, to be acceptable, must be in accordance with out considered convictions, at all levels of generality, on due reflection (or in what I have called "reflective equilibrium").

Rawls, "Justice as Fairness: Political not Metaphysical" " 14 *Philosophy and Public Affairs* 223, at 228 (1985).

[4] See chapter ten for further discussion of this.

Supermarket. The right and left process conceptions are both plausible interpretations of the case law on Article 40.1.

Conclusions

On the basis solely of the constitutional text, all four conceptions are open. Judicial interpretation of that text has, however, precluded the substantive conception. Adoption of the substantive conception would thus mark a rupture with previous case law. Of the three process conceptions, the weak process conception has the most support but may have been undercut by the *Great Blasket case* and the *Employment Equality Bill case*. Of the stronger process conceptions, both the right process and the left process are doctrinally plausible.

Having considered their plausibility as interpretations of the Constitution, it is now necessary to consider which of the three strong conceptions provides the best understanding of equality, according to the sort of moral argument set out above. This moral inquiry is relevant for three reasons. First, it should allow an identification of the moral choices implicitly made by judges of the past when they interpreted Article 40.1 to preclude the substantive conception. Secondly, it identifies the moral choice that judges of the present will make when forced to consider future equality cases, most starkly cases involving reverse discrimination. Thirdly and at a more general level, the identification of these moral choices should inform one's understanding of both the character of judicial reasoning and the moral predilections of the Irish judiciary.

The Right Process Conception as an Understanding of Equality

The merits of the right process conception as an understanding of equality are two-fold.[5] First, it amounts to a powerful affirmation of individual fairness, an important value in Irish society. Secondly, it appears the most legally manageable of all the conceptions; although the selection of the right process conception of equality is a moral choice on the part of the courts, once selected it provides the most clear-cut doctrinal framework for the courts. I shall consider each of these benefits in turn.

---

[5] In this discussion, I rely generally on the academic literature cited thus far, but in particular on Fallon and Weiler, "Firefighters v. Stotts: Conflicting Models of Racial Justice" (1984) *Supreme Court Review* 1.

The right process conception protects individuals from irrational classification on the part of the State. It differs from the weak process conception in its stipulation that certain categories of classification are always *prima facie* considered irrelevant regardless of whether they could be characterised as reverse discrimination. Race is the paradigmatic objectionable classification; it is not clear whether there are others. Colour-blindness maintains that such classifications can never be justified. The less stringent version of symmetry maintains that, although justification is possible, the same level of justification must be shown for reverse classifications as for adverse classifications.

This is individualistic in two ways. First, the right to be treated equally inheres in individuals qua individuals. In the words of O'Connor J. of the United States Supreme Court, "whenever the government treats a person unequally because of his or her race, that person has suffered an injury that falls squarely within the language and spirit of the Constitution's guarantee of equal protection".[6] Secondly, only the irrational behaviour of specified individuals constitutes inequality. Rationality inquiry requires one to focus on individual bodies, albeit often ones such as the legislature which act collectively, as the agents of inequality. Inequality exists where individuals are irrationally differentiated by identifiable state actors.

Equality, under this conception, is thus best understood as a right of individuals to be free from irrational action on the part of the State. Individual freedom is an important value which resonates deeply. It coheres with a minimalist view of law. The law cannot make its subjects equal. It can merely treat citizens equally; in time, citizens will treat each other as equals, paying no attention to criteria such as race. When that happens, true equality will be achieved. The law cannot accelerate this process and, indeed, would jeopardise the process if it were to take into account criteria such as race in an effort to make people equal. The law can merely purify official decision-making processes and allow society, the sum of individual interaction, to follow.

---

[6] *Adarand Constructors, Inc v. Pena* 515 US 200, at 229-30 (1995).

The value of individual freedom and a limited role for the law both cohere with other values considered to be important such as efficiency, merit and achievement. By purging the decision-making process of irrelevant considerations, the right process conception of equality allows society to function more effectively, rewarding merit and encouraging efficiency through the market.

As well as these value arguments of individual fairness, there is the functional argument that the right process conception of equality is the most legally manageable of the three conceptions here under consideration. The right process conception avoids the difficulties which arise when one makes groups the focus of equality inquiry. Given that this conception treats equality as an individual, personal right,[7] there is little scope for tension with other, more explicitly individualist provisions of the Constitution. This reduces the need for judges to engage in contentious judgments between competing political visions.[8] This approach appears the most purely legal of the three strong conceptions. Racial classifications are all strongly presumptively impermissible. No sociological, psychological or moral inquiry is necessary to determine whether classifications are sourced in prejudice or whether a group has been unjustly subordinated.

For all of these reasons, it is unsurprising that the right process conception has much support in the case law. It provides a morally appealing and practically manageable vision of individual autonomy, respected by the State. Nevertheless, the right conception is strongly opposed by advocates of both the left process conception and the substantive conception. I shall at this stage consider the objections made from the perspective of the left process conception, deferring until later the objections made against all process conceptions from the perspective of the substantive conception.

From the perspective of the left process conception, the central objection to the right process conception is that it exists in a self-defined vacuum. It stipulates symmetry (and perhaps

---

[7] And, more importantly, equality as an individual wrong.

[8] Indeed, if one adopts the colour-blind variant of symmetry, the doctrinal framework becomes even simpler. There is no need for judges to consider possible justifications for racial classifications at all. Such classifications are categorically illegitimate; there is no scope for judicial balancing. Further, rejection of the possibility of justification avoids the conceptual quagmire that generally accompanies standards of review under the process conception.

colour-blindness), but does not explain why the Constitution should adopt such a position. Priding itself on its purely legal structure, it lacks a convincing historical or sociological account of why racial classifications, for instance, should be treated so sceptically.[9] To the extent that there is a historical or sociological explanation for scepticism of racial classifications, this actually undermines the injunction to be equally sceptical of reverse and adverse racial classifications. The left process conception, in contrast, suggests that most of the features of constitutional equality doctrine can be explained only in terms of a commitment to treat people as equals, understood as an objection to prejudice-based classification. That commitment informs the contours of the process conception and precludes the adoption of the doctrine of symmetry.

The Left Process Conception as an Understanding of Equality

The left process conception adopts the individualism of the right process conception but in a more sophisticated way. It focuses on the right of individuals to be accorded equal respect and maintains that equal respect is denied where individuals are classified on the basis of prejudice, where some humans are treated *a priori* as less worthy than others. In practical terms, this necessitates an identification of the sorts of classification that are normally motivated by prejudice. This produces an account of "suspect classifications" similar to the right process conception but different in two important respects. First, it does not require symmetry. As argued in more detail in chapter nine, reverse racial classifications tend not to be motivated by prejudice against the majority group. Secondly, the left process conception is more open in its identification of the basis for heightened scrutiny: prejudice. This can then be used as a guide for the expansion of the protectorate, i.e. the judicial decision to accord heightened scrutiny to other forms of classification.[10]

The left process conception accords better with one's understanding of the ideal of equality. Although one may, for reasons of individual fairness, have concerns about reverse

---

[9] This is demonstrated by the failure of formulae such as "discrete and insular minority" and "immutable characteristics" to explain why certain grounds of classification should be prohibited. See discussion in chapter six.

[10] Given the failure of the right process conception to provide a rationale for treating racial classifications as more of a concern than other classifications, it is difficult to formulate arguments that further classifications should be generically treated as more of a concern.

discrimination, one does not view it as being *as* inegalitarian as programmes which discriminate against a generally subordinated group within society. Reverse discrimination programmes do not cause one as much moral concern and so the courts should not use equality doctrine to hold such programmes to the same standard of review. The commitment to treating people as equals illuminates these moral intuitions. In practical terms, the clear relationship between the left process conception of equality and a plausible ideal of human equality provides a readily defensible rationale which can be used to inform the contours of the doctrine.

From the perspective of the right process conception, one can criticise the left process conception for its eschewal of symmetry. It can be argued that it is unfair for an individual white person, for example, to have to pay the price of remedial reverse discrimination programmes designed to benefit blacks. This white person has not been personally responsible for the discrimination suffered by blacks; indeed, where the reverse discrimination programme attempts to remedy the effect of previous societal discrimination, the particular black beneficiary may not herself have suffered from the previous discrimination. On this highly individualist account, one individual is being punished to provide a boon to another individual where the latter has not suffered any previous harm and where the former is not personally responsible for any harm suffered by others. For this reason, the right process conception strongly objects to reverse discrimination as a breach of individual fairness: there should be no creditor and debtor race. The left process conception does not question the basic tenets of this argument, instead merely questioning whether it has implications for constitutional equality. Although reverse discrimination programmes do raise some concerns for individual fairness, they are not so likely to be motivated by prejudice as are malign race-related social programmes. For that reason, they can be more safely left to the ordinary political process.[11] If majority groups see fit to limit the life chances of their own members in order to benefit members of a minority group, there is no particular reason for the courts to intervene. Ordinary standards of review should apply; there is no requirement for heightened review.

---

[11] The preferences, given that they are not motivated by prejudice, may be calculated in the ordinary political process.

General Criticisms of Process Conceptions of Equality

The central argument against process conceptions is that they misunderstand the deep structure of inequality in society. What is really a contingent, social phenomenon of unjust group subordination is portrayed as a universal, ahistorical problem of governmental irrationality and prejudice. This misconception renders the problem of inequality insoluble. Fallon and Weiler note this concern in the context of employment discrimination. Their analysis applies, *mutatis mutandis*, to constitutional equality:

> The [process conception] imagines, as its paradigmatic wrong, an employer consciously making a racially based employment decision, reflecting either racial animus or racial stereotype.... It can be argued, however, that the problems of employment discrimination are as often institutional as individual.... But also troublesome is the [process conception's] definition of discrimination: the problem may not be racial animus but racial effect; not intent to exclude individuals but practices that keep blacks out as a group; not wilful decisions but continued application of criteria, often unjustified by business needs, that have a racially differential impact. If this diagnosis is correct, race discrimination may not be eliminable without pervasive systemic reform, unattainable within the conceptual apparatus and remedial limitations that the [process conception] prescribes.[12]

Inequality is misconceived in four fundamental ways. First, inequality is treated as an individual wrong rather than a group wrong. Secondly, the condition precedent to the recognition of inequality is considered to be a certain attitude on the part of the perpetrator (irrationality, hostility, prejudice), rather than the effects on the members of subordinated groups. Thirdly, the value judgments which permeate all conceptions of equality are not openly acknowledged. Fourthly, inequality is treated as a unitary phenomenon. Collectively these misconceptions prevent equality doctrine from adequately addressing inequality in society.

---

[12] Fallon and Weiler, "Firefighters v. Stotts: Conflicting Models of Racial Justice" (1984) *Supreme Court Review* 1, at 17-8.

The individualism of all process conceptions follows from the basic premises of the Aristotelian conception of equality. Equality is the irrational differentiation of individuals. No matter how one strengthens this conception, by deeming some classifications as *prima facie* irrational or categorically irrational, this individualism remains. Inequality as a group phenomenon cannot be perceived, let alone addressed, by the law.

All process conceptions focus on the perpetrator of inequality rather than the victims of inequality. For the Aristotelian conception, the touchstone of inequality is irrationality. Strong process conceptions vary this somewhat with talk of hostility and prejudice. Either way, what is important is the state of mind of the perpetrator, not the effects on the victims. This perpetrator perspective is entrenched in both versions of the doctrine of indirect discrimination. As argued in chapter eleven, the discriminatory purpose test requires the identification of a hostile actor. The disparate impact test, although somewhat broader, only takes into account the result of a measure to the extent that such measure can be said to be a hidden classification. There must be an actor to whom the measure can be attributed in order for the measure to be labelled "indirect discrimination". Deep-seated patterns of social discrimination are not cognisable to the law.

The failure to acknowledge value judgments manifests itself in two ways. First, all process conceptions adopt standards of review to allow equality to be balanced with other values and the common good. These standards of review misrepresent the manner in which the legitimacy of legislative classification is assessed. They purport to provide a staged, objective inquiry, but the outcome of cases is actually determined by the choice of the courts as to how much scope they will give themselves to imagine legislative purposes.[13]

Secondly, some strong process conceptions fail to provide a convincing account of why certain classifications should be treated as being of more concern than others. The right process conception wholly fails in this regard.[14] In contrast, the left process conception provides an explanation for differentiated standards of review, but this explanation is not wholly satisfactory and neatly illustrates the other ways in which process conceptions

---

[13] See chapter five.

[14] The criticisms from the left process perspective, outlined above, make this point.

misconceive inequality. It posits that classifications sourced in prejudice are a corruption of the normal political process and cannot safely be left to majority rule; a heightened standard of review is therefore appropriate. But although inequality may be the result of classifications motivated by prejudice, this is not always the case. Sometimes inequality exists where no classification or actor, let alone prejudice, can be clearly identified.

Finally, process conceptions of equality, which adopt the doctrine of irrational classification, albeit strengthened by differentiated standards of review and indirect discrimination, provide a unitary and universal, but rather thin, account of what equality is. Strong process conceptions originated in the United States in response to race discrimination. Despite their origins as a reaction against a specific social phenomenon, they were formulated in universal terms and then applied to other situations. Thus the concept of irrational classification, which may have had some useful application for race inequality, was applied to sex inequality. Differential treatment of women was not considered a problem provided that there was an entrenched difference in situation between men and women which could be pleaded as a justification of the difference in treatment. A conception of equality which legitimises differentiation if based on perceived differences is peculiarly inapposite to dealing with the problem of sex inequality; it serves just as much to reinforce as to remedy inequality. Further, women can only gain equality to the extent that they can show themselves to be like men. This substitutes sameness for equality. Treating equality as irrational differentiation, the process conception is ill-equipped to reconcile difference with equality.

The discriminatory purpose variant of indirect discrimination, adopted in US constitutional law, is a further illustration of how the realities of inequality are obscured by the belief that inequality is a unitary phenomenon. The implicit social story of discrimination suggested by this requirement is one of hostility-based hatred. That is, A hates B because of B's identity. Although the requirement of animus may have had some relevance to racial discrimination in the segregation era when animus against blacks was often displayed, it is peculiarly inapposite to dealing with the most important features of discrimination against blacks, a discrimination rooted partly in unconscious prejudice on the part of whites and partly in the continuing and widespread effects of past patterns of more overt racial discrimination. *A fortiori*, the animus requirement makes little sense of other instances of inequality, such as

discrimination against women. Men do not discriminate against women because they hate women. Rather, discrimination is based on paternalistic and stereotyped views of women's capabilities. An animus requirement obscures certain, morally relevant features of discrimination, thus making it difficult adequately to address that discrimination.

The universal and unitary character of the process conception coheres well with the right strong process conception's adoption of symmetry. If race is an objectionable characteristic, it must be so regardless of whether it is adopted to advantage or disadvantage a previously subordinated group. This ignores the disadvantage suffered by the subordinate group which continues to blight the life situations of members of that group. Reverse discrimination measures necessary to secure equality are wrongly portrayed by the right process conception as a paradigm of inequality.

Under the process conceptions, there is thus a serious disjunction between the reality of inequality and law's account of inequality. The doctrines of the process conceptions claim to achieve equality while serving to entrench inequality. Adopted by the courts, they thus allow the law simultaneously to celebrate its egalitarian character and to secure inequality. This is the most troubling characteristic of the process conception. The doctrinal devices of constitutional equality, and their justificatory rhetoric, portray inequality as the achievement of equality, thereby legitimising the social structure and rendering social change, whether through the courts or the electorally accountable organs of government, more difficult.

The Substantive Conception as an Understanding of Equality

Although there are different substantive conceptions of equality, I use the term generically to connote an attempt by the law to deal directly with the substance of inequality rather than viewing inequality through the lens of fair process, ultimately distorting the problem and making it more difficult to solve. I have argued that the strengthened process conceptions are failed attempts to modify process equality so as to address the substantive reality of inequality. The substantive conception, which attempts to address that reality directly, is most clearly explained by reference to how it deviates from the process conception. As these

points have been argued in the previous two chapters, it suffices here to state a number of conclusions without argument.

The substantive conception focuses on the differential life situations of the members of different groups within society rather than on the state of mind of governmental actors. It treats equality as a positive right: members of unjustly subordinated status groups are entitled, subject to the interposition of other important values, to have their life situations equalised with those of the members of superordinate groups. Whereas the process conception prohibits irrational differentiation, the substantive conception prohibits unjust subordination of status groups. This is not an easy inquiry; nevertheless, the moral arguments over unjust subordination arguably inform many of the doctrinal devices of the process conception.[15] Whereas the process conception shields these value judgments behind legal form, the substantive conception foregrounds them. Further, whereas the standards of review of the process conception conceal value judgments behind largely circular legal reasoning, the standards of the review of the substantive conception again foreground the value judgments. This foregrounding of contentious value judgments assists the critical assessment of equality doctrine.

Process conceptions, utilising the disparate impact version of indirect discrimination, can take some account of the differential effect of a measure on the life situations of different people. But indirect discrimination is conceptually and politically subordinate to the concept of direct discrimination. Thus the perpetrator perspective remains and disparate impact is legally considered only where it is attributable to an identifiable governmental actor. In contrast, the substantive conception is directly concerned with the life situations of different groups and so takes cognisance of differential impacts attributable simply to dispersed patterns of social behaviour.

Fundamentally, the process conception relies on a unitary, universalist conception of inequality: irrational differentiation reflecting prejudice or hostility. In contrast, the substantive conception has a much more diffuse understanding of what constitutes inequality. I have argued for anti-subordination doctrine as a coherent substantive conception. This conception

---

[15] For example, the concept of "discrete and insular minorities" and disparate impact.

views various inequalities as being related through the loose family resemblance of subordination. Constitutional equality should be concerned with subordination, but should recognise that the structures and rationales of subordination vary from time to time, from place to place, and from group-to-group. Thus the subordination of illegitimate children may have been more of a concern 50 years ago than today. The subordination of Travellers may be more of a concern in Ireland than in other parts of the world. Most crucially, even within a particular society at a particular time, structures and rationales of subordination differ from group to group. In the segregation era in the United States, for example, the subordination of blacks was structured around the separation of living space and was explained on the basis of racial antipathy. In contrast, women lived in the same space as men and were not hated on account of their gender. Yet women were still subordinated. The subordination of women was structured around role differentiation and was explained on the basis of a paternalistic belief in the inferiority of women. The anti-subordination stance maintains that legal doctrines and devices developed to deal with one structure of subordination should not be universalised and automatically applied to other structures of subordination. Moreover, one should be wary of legal doctrine developed to deal with a current manifestation of subordination of a particular group lest the subordination work its way around the legal doctrine and manifest itself in a new form, not cognisable to the law under the old doctrine. Equality requires continuous, critical self-examination on the part of society. Only a conception which self-consciously focuses on the most basic aspect of inequality can be sufficiently responsive to the changing structures and rationales of inequality.

Finally, it is worth observing that the choice between process conception and substantive conception is not necessarily an either/or exercise. With the exception of reverse discrimination cases, it is quite possible for an anti-subordination doctrine to co-exist with and augment an anti-differentiation doctrine. Even in the case of reverse discrimination, one could retain the anti-differentiation doctrine as a limitation on measures mandated by the anti-subordination doctrine. Clearly, one could not adopt symmetry, let alone colour-blindness, but one could insist that reverse discriminatory measures not interfere to too great an extent with individual fairness. A standard of review modelled on the one I have

suggested for the substantive conception could facilitate the resolution of this clash of values.[16]

General Criticisms of the Substantive Conception of Equality

One could argue against the substantive conception on the basis that it is a flawed understanding of equality. For instance, one could argue that equality *does* consist of the irrational differentiation of individuals. The arguments in favour of the process conceptions, set out above, make this point. There is no need to repeat them here. Other arguments focus on the extensive character of the substantive conception: it envisages an active and expansive role for the courts. In chapter two, I rejected the argument that the Irish Constitution imposed an *a priori* limit on the judicial power which prohibited the articulation and enforcement of a substantive conception of equality. Nevertheless, it is necessary to consider an independent, moral argument – not grounded in the Constitution – to the effect that the substantive conception is too expansive.

One could argue that the substantive conception requires judges to adopt an unusual role. They must become historians and sociologists of equality. Judges are not suited to this role; they are ill-equipped, both forensically and intellectually, to make the sort of descriptive and normative inquiries that the substantive conception suggests. How are judges to decide between different sociological accounts of equality? How are they supposed to assess the level of subordination in society? Why should their moral views as to the justice of particular structures of subordination take precedence over the moral views of a majority in society?

The response to this argument is two-fold. First, if the Constitution commits the courts to achieving equality and if a substantive conception is the most convincing account of what that equality means, then it appears that the courts are committed to achieving that substantive conception notwithstanding the legitimate concerns about judges' limited capabilities in this area. Secondly and more importantly, it is not only the substantive conception which raises these concerns. The right process conception has its own sociological account of inequality, albeit an unconvincing one: inequality consists of (possibly

[16] See chapter eleven.

animus-inspired) irrational differentiation of individuals. The left process conception employs a slightly more sophisticated sociology of equality, focusing on prejudice-inspired classifications. Both these conceptions makes contentious value judgments (a) when they assess the rationality of differentiations, (b) when they decide that certain grounds of differentiation are of more concern than others, (c) when they adopt tests such as disparate impact or discriminatory purpose, (d) when they identify prejudice or hostility and (e) when they assess whether differentiation may be justified by other values or by the common good. The difference from the substantive conception is that these value judgments are usually made in a *sub silentio* way, informed by a sociological account of inequality which is rarely stated. The substantive conception foregrounds the value judgments and the sociological inquiry. One can disagree with its value judgments; one can question the strength of its sociological inquiry; but one cannot object simply because they exist.

In this regard, it is necessary to reconsider the claim of the right process conception to be the most legal and manageable of all the process conceptions. Although the doctrines of the right process conception are relatively easy to apply, they are not openly justified. Just as much as the substantive conception, they rest on contestable understandings of what constitutes inequality. The fact that the doctrines of the right process conception, once arbitrarily selected, are easy to apply scarcely renders the right process conception a convincing account of equality.

Conclusion

I have identified four conceptions of equality that are consistent with the equality guarantee contained in Article 40.1. After 65 years of judicial interpretation, the three process conceptions remain doctrinally plausible; the substantive conception no longer counts as a good interpretation of constitutional law.[17] In foreclosing the substantive conception, the courts have adopted a very narrow understanding of equality which is ill-equipped to deal with the serious problem of inequality in Irish society. Of the three process conceptions, the

[17] This mean not that the courts cannot cause a rupture with previous case law and adopt the substantive conception, but rather that it would be interpretatively unwarranted for them to do so.

left process conception is best equipped to deal with the problem of inequality, although it does distort the problem of that inequality to a certain degree.

Conclusion

The Irish courts have traditionally adopted a weak process conception of equality, based on the first half of Aristotle's injunction to treat like cases alike and unlike cases unalike. This conception of equality is weakened further by the courts' double deference to legislative judgment and by their often restrictive interpretation of the phrase "as human persons". A number of recent cases suggest a move, on the part of the courts, from a weak process conception of equality to a strong process conception of equality. In making this move, the courts have used language similar to that of the United States Supreme Court, suggesting the adoption of a right process conception of equality and a sceptical attitude to reverse discrimination. That said, this language may have been used without appreciation of its context. It can be argued that a left process conception of equality would cohere better with some of the earlier *dicta* of the courts interpreting the phrase "as human persons".

There are thus three currently plausible interpretations of Irish constitutional equality doctrine. The first treats the *dicta* in the *Employment Equality Bill case* and the *Great Blasket case* as wholly ill-considered dicta, out of line with the vast majority of equality doctrine. This interpretation suggests a return to the traditional, weak process conception of democracy. The second treats the *dicta* in the two cases as fully-considered and binding. This interpretation suggests a move to a right process conception of equality. The third suggests that the *dicta* in the two cases indicate a move to a stronger process conception of equality but that the contours of that conception are informed by the earlier injunctions against prejudice-based discrimination, such as the *dicta* of Walsh J. in *Quinn's Supermarket.* This amounts to a left process conception. As a matter of constitutional interpretation, each of these interpretations is open to the courts. The judges' choice will probably be based on their own personal understanding of what equality is.

I have argued for an anti-subordination doctrine as an alternative, substantive conception of Article 40.1. This conception, motivated by a belief in basic human equality, attempts to align law's account of inequality with the social reality of inequality. It suggests that inequality consists of the unjust subordination of historically subordinated status groups within society. For the reasons outlined in chapter twelve, I think this is the best understanding of equality,

the conception which best captures shared intuitions about what equality requires. I have argued that this substantive conception is a plausible interpretation of the words of Article 40.1 but is foreclosed by the case law interpreting those words. An adoption of the substantive conception is thus unlikely and would mark a complete rupture with previous cases.

Nevertheless, the substantive conception assists one's understanding of constitutional law in two ways. First, it demonstrates that constitutional law allows judges to choose between competing ideologies. Constitutional equality doctrine, although currently indeterminate as between weak process, right strong process or left strong process conceptions of equality, precludes the adoption of a substantive conception of equality. The courts have made an ideological choice of a process conception over a substantive conception. The precise character of that process conception is all that remains to be chosen.

Secondly, the substantive conception assists a critical understanding of constitutional equality. Equality doctrines can be understood as marking a boundary between the inequalities which law will address and the inequalities which law will not address. The law can decline to address an inequality in a number of ways. The discussion in chapter five, for instance, illustrates how the courts have accepted the idea of legitimate differentiation. More surreptitiously, however, the courts can decline to address an inequality by refusing to recognise that it is an inequality. Thus, in *Plessy v. Ferguson*,[1] the US Supreme Court refused to accept that racial segregation constituted discrimination against blacks and in *Norris v. Attorney General*,[2] the Irish Supreme Court refused to accept that the criminalisation of buggery constituted discrimination against homosexual men. In each case, the Court possessed a theory of equality to justify its conclusion: in *Plessy*, the Court relied on the tripartite conception of equality; in *Norris*, the Court relied on the weak process conception of equality.

Each of these conceptions of equality was egalitarian to a certain extent. The tripartite conception of equality remedied the inequality of chattel slavery. The weak process

---

[1] *Plessy v. Ferguson* 163 US 537 (1896).
[2] [1984] IR 36.

conception of equality remedied some facial sex discriminations. This egalitarian character provides a justificatory rhetoric which legitimises each conception of equality as the achievement of "true equality". This legitimisation discourages sceptical inquiry into the inequalities not addressed by the law. The danger is that one might too easily accept the claim of constitutional equality doctrine to have achieved "true equality", thus blinding oneself to the persistence of inequality. Elaboration of the substantive conception is one way of reminding oneself of the disjunction between equality and constitutional equality. It undermines the claims of law to have achieved equality and provides a critical position on what law has actually achieved.

For these reasons, this thesis illustrates two critical claims about law. First, law is indeterminate; judges must make free moral choices between competing conceptions of equality. Secondly, law is ideology. Although judges face significant choices, not all options are open. With regard to Irish constitutional equality doctrine, all plausible interpretations lie within the ideological spectrum of process equality. Constitutional law cannot perceive the substantive inequality which besets Irish society. Further, constitutional law proclaims that its inability to perceive this inequality is in fact the achievement of equality. This is ideology.

Bibliography

Abrams, "Equality and Impasse: Mobilizing Group-Based Perspectives in an Era of Group Blindness" in Douglas and Devins (eds), *Redefining Equality* (Oxford, 1998)

Aristotle, *Ethica Nicomachea* Translated by Ross (1925) and revised by Urmson (1973) (Oxford)

Aristotle, *Metaphysica* translated by Ross (Oxford, 1908)

Aristotle, *Politics* translated by Jowett (Oxford, 1885)

Asmal, "The Protection of Minorities in Ireland: The Role of National and International Law" in Duncan (ed.), *Law and Social Policy*

Baker, "Equality" in Healy and Reynolds (eds), *Social Policy in Ireland* (Oak Tree Press, 1998)

Balkin, "The Constitution of Status" 106 *Yale Law Journal* 2313 (1997)

Berger, *Government by Judiciary* (Harvard, 1977)

Berger, "Ronald Dworkin's *The Moral Reading of the Constitution*: A Critique" (`1997) 72 *Indiana Law Journal* 1099

Beytagh, "Equality under the Irish and American Constitutions: A Comparative Analysis" (1983) 18 (ns) *Ir. Jur.* 56

Binchy, "The Criminal Trespass Legislation: What Does it Do and is it Constitutional?" paper presented to conference, Law School, Trinity College, Dublin 23 July 2002

Bolger and Kimber, *Sex Discrimination Law in Ireland* (Round Hall Sweet and Maxwell, 2000)

Bork, *The Temptation of America* (Sinclair-Stevenson, 1990)

Brest, "Foreword: In Defense of the Antidiscrimination Principle" (1976) 90 *Harvard Law Review* 1

Brest, Levinson, Balkin and Amar, *Processes of Constitutional Decisionmaking* (4th ed., Aspen, 2000)

Butler and O'Connell, "A Critical Analysis of Ireland's Constitutional Review Group Report" (1988) 33 (ns) *Ir. Jur.* 237

Byrne and Binchy, *Annual Review of Irish Law 1990* (Round Hall, 1991)

Cahill, *The Framework of a Christian State* (MH Gill and Son, 1932)

Casey, "Changing the Constitution: Amendment and Judicial Review" in Farrell (ed.), *De Valera's Constitution and Ours* (Gill and Macmillan, 1988)

Casey, *Constitutional Law in Ireland* (3rd ed., Round Hall Sweet and Maxwell, 2000)

Colker, "Anti-Subordination Above All: Sex, Race and Equal Protection" 61 *New York University Law Review* 1003 (1986)

Connelly, "The Constitution" in Connelly (ed.), *Gender and the Law in Ireland* (Oak Tree Press, 1993)

Cox, "Constitutional Law – Constitutional Interpretation – Passive Judicial Activism – Constitutional Crime of Blasphemy" (2000) 22 *DULJ* 201

Report of the Constitution Review Group (Stationery Office, 1996)

Curtin, *Irish Employment Equality Law* (Round Hall, 1989)

Dooley, "Gendered Citizenship in the Irish Constitution" in Murphy and Twomey (eds), *Ireland's Evolving Constitution* (Hart Publishing, 1998)

Doyle, "The Duration of Primary Education: Judicial Constraint in Constitutional Interpretation" (2002) 10 *ISLR* 222

Dworkin, *Freedom's Law* (Harvard, 1996)

Dworkin, *Law's Empire* (Harvard, 1986)

Dworkin, Sovereign Virtue: The Theory and Practice of Equality (Harvard, 2000)

Dworkin, *Taking Rights Seriously* (1977, Harvard)

Ely, *Democracy and Distrust* (Harvard, 1980)

Fallon and Weiler, "Firefighters v. Stotts: Conflicting Models of Racial Justice" (1984) *Supreme Court Review* 1

Fanning, *Racism and Social Change in Ireland* (Manchester University Press, 2002)

Faughnan, *De Valera's Constitution: The Drafting of the Irish Constitution of 1937* (MA Thesis, UCD, 1988)

Faughnan, "The Jesuits and the Drafting of the Irish Constitution of 1937" (1988) 26 *Irish Historical Studies* 79

Feldman, *Discrimination Law* (Oxford, 2002)

Fiss, "Groups and the Equal Protection Clause" 5 *Philosophy and Public Affairs* 107 (1975)

Flathman, "Equality and Generlization: A Formal Analysis" in Roland and Chapman (eds), *Nomos 9: Equality* (Atherton Press, 1967)

Flynn, "Missing Mary McGee: The Narration of Woman in Constitutional Adjudication" in Quinn, Ingram and Livingstone (eds), *Justice and Legal Theory in Ireland* (Oak Tree Press, 1995)

Flynn, "To be an Irish Man – Constructions of Masculinity in the Constitution" in Murphy and Twomey (eds), *Ireland's Evolving Constitution* (Oxford, 1998)

Forde, Constitutional Law of Ireland (Mercier Press,1987)

Forde, "Equality and the Constitution" (1982) 17 (ns) *Ir. Jur.* 295

Freeman, "Legitimizing Racial Discrimination Through Antidiscrimination Law: A Critical Review of Supreme Court Doctrine" 62 *Minnesota Law Review* 1049 (1978)

Gardner, "Liberals and Unlawful Discrimination" (1989) 9 *OJLS* 1

Myles na Gopaleen, "An Cruiskeen Lawn" *The Irish Times*, 13 February 1937

Greene, *All Men are Created Equal: Some Reflections on the Character of the American Revolution* (Oxford University Press, 1976)

Grusky (ed), Social Stratification: Class, Race and Gender in Sociological Perspective (2nd ed., Westview Press, 2001)

Hajdin (ed.), *The Notion of Equality* (Ashgate, 2001)

Hardiman, "Inequality and the Representation of Interests" in Crotty and Schmidt (eds), *Ireland and the Politics of Change* (Addison, Wesley, Longman Ltd, 1998)

Hogan, "A Fresh Look at *Tilson's* Case" (1998) 33 (ns) *Ir. Jur.* 311

Hogan, "Constitutional Interpretation" in Litton (ed.), *The Constitution of Ireland 1937-1987* (IPA, 1988)

Hogan, Constitutional Law – Remedies for Inequality (1992) 14 *DULJ* 115

Hogan, "Directive Principles, Socio-economic Rights and the Constitution" (2001) 36 (ns) *Ir. Jur.* 174

Hogan, "Judicial Review and Socio-economic Rights" in Sarkin and Binchy (eds), *Human Rights, the Citizen and the State* (Round Hall Sweet and Maxwell, 2001)

Hogan, "The Constitution, Property Rights and Proportionality" (1997) 32 (ns) *Ir. Jur.* 373

Hogan, "The Supreme Court and the Equality Clause" (1998) 4 *Bar Review* 116

Hogan, "Unenumerated Personal Rights: *Ryan's* Case Re-evaluated" (1990-1992) 25-27 (ns) *Ir. Jur.* 95

Hogan and Whyte, *Kelly: The Irish Constitution* (3rd ed., Butterworths, 1994)

Humphreys, "Constitutional Interpretation" (1993) 15 *DULJ* 59

Humphreys, "Interpreting Natural Rights" (1993-1995) 28-20 (ns) *Ir. Jur.* 221

Kelly, "Equality Before the Law in Three European Jurisdictions" (1983) 18 (ns) *Ir. Jur.* 259

Kelly, *The Constitution: Law and Manifesto* in Litton (ed.), *The Constitution of Ireland 1937-1987* (IPA, 1988)

Kirby, *Stratification and Differentiation* (Macmillan Press, 1999)

Kull, *The Color-blind Constitution* (Harvard University Press, 1992)

Lamont and Fournier (eds), *Cultivating Differences: Symbolic Boundaries and the Making of Inequality* (University of Chicago Press, 1992)

Lenihan, "Constitutional Law – Valuation System for Agricultural Land" (1983) 5 *DULJ* 122

Longford and O'Neill, *Eamon de Valera* (Gill and Macmillan, 1970)

Lynch and Connelly, "Appendix 18 to the Report of the Constitution Review Group" in *Report of The Constitution Review Group* (Stationery Office, 1996)

McConnell, "Originalism and the Desegregation Decisions" 81 *Virginia Law Review* 947 (1995)

McCrudden, Equality and Socio-Economic Rights in the Contexts of a Global Economy Paper presented to the Equality Studies Centre Conference in UCD, 15 December 2000

McCrudden, "Introduction" in McCrudden (ed.), *Anti-Discrimination Law* (Dartmouth, 1991) *xi*

McDermott, "The Separation of Powers and the Doctrine of Non-justiciability" (2000) 35 (ns) *Ir. Jur.* 280

MacGréil, *Prejudice in Ireland Revisited* (Survey and Research unit, St. Patrick's College, Maynooth, 1996)

MacKinnon, "Reflection on Sex Equality under Law" 100 *Yale Law Journal* 1281 (1991)

Marguiles, "Standards of Review and State Action" (2002) 37 (ns) *Ir. Jur.* 23

Morgan, *A Judgment Too Far? Judicial Activism & the Constitution* (Cork University Press, 2001)

Morgan, "Judicial Activism – Too Much of a Good Thing" in Murphy and Twomey (eds), *Ireland's Evolving Constitution 1937-1997* (Hart Publishing, 1998)
Murphy, "Economic Inequality and the Irish Constitution" in Murphy and Twomey (eds), *Ireland's Evolving Constitution: 1937-1997* (Hart Publishing, 1998)

Note, "Interest Definition in Equal Protection: A Study of Judicial Technique" 108 *Yale Law Journal* 439 (1998)
Note, "Legislative Purpose, Rationality and Equal Protection" 82 *Yale Law Journal* 123 (1972)

O'Connell, "The Irish Courts and Equality Before the Law" (LL.M. Thesis, UCD, 1993)
O'Dowd, "The Principle of Equality in Irish Constitutional and Administrative Law" (1999) 11 *European Review of Public Law* 769
O'Hanlon, "Natural Rights and the Irish Constitution" (1993) 11 *ILT* 8
Oppenheim, "Egalitarianism as a Descriptive Concept" 7 *American Philosophical Quarterly* 143 (1970)
O'Reilly and Redmond, "Cases and Materials on the Irish Constitution" (Incorporated Law Society, 1980)

Perry, "Modern Equal Protection: A Conceptualisation and Appraisal" 79 *Columbia Law Review* 1023 (1979)
Phillips, "Inequality between Individuals, Injustice Between Social Groups – Remaking the Connection" Paper presented to Equality Studies Centre Conference, 15 December 2000
Pole, *The Pursuit of Equality in American History* (2nd ed., University of California Press, 1993)
Polyviou, *The Equal Protection of the Laws* (Duckworth, 1980)
Pope Leo XIII, *Rerum Novarum: Encyclical on Capital and Labour* (1891)
Pope Paul VI, *Gaudium et Spes: Pastoral Constitution on the Church in the Modern World* (1966)
Pope Pius XI, *Ubi Arcano Dei Consilio* (1922), at para. 58.

Quinn, "The Nature and Significance of Critical Legal Studies" (1989) 7 *ILT* 282

Rao, *Select Constitutions of the World* (2nd ed., Madras, 1934)

Rawls, "Justice as Fairness: Political not Metaphysical" " 14 *Philosophy and Public Affairs* 223 (1985).

Raz, "Principles of Equality" (1978) 87 *Mind* 321

Redenius, *The American Ideal of Equality: From Jefferson's Declaration to the Burger Court* (National University Publications, 1981)

Rousseau, *A Discourse on Inequality* (translated with an introduction and notes by Maurice Cranston) (Penguin, 1984)

Ryan, *Constitutional Law* (2001, Round Hall, Sweet and Maxwell)

Ryan, "Travellers move from car park to roadside" *The Irish Times*, 14 August 2002

Sabine and Thorson, *History of Political Theory* (4th ed., Dryden Press, 1973)

Sadurski, "Equality Before the Law: A Conceptual Analysis" (1986) 60 *ALJ* 131

Sartori, *The Theory of Democracy Revisited* (Chatham House Publishers, 1987)

Scannell, "Taxation of Married Women. Murphy" in O'Dell (ed.), *Leading Cases of the Twentieth Century* (Round Hall, Sweet and Maxwell, 2000)

Scannell, "The Constitution and the Role of Women" in Farrell (ed.), *De Valera's Constitution and Ours* (Gill & Macmillan, 1988)

Sher, "Diversity" 28 *Philosophy and Public Affairs* 85 (1999).

Siegel, "Civil Rights Reform in Historical Perspective: Regulating Marital Violence" in Douglas and Devins (eds), *Redefining Equality* (Oxford, 1998)

Siegel, "The Critical Use of History: Why Equal Protection no Long Protects: Evolving Forms of Status-Enforcing State Action" 49 *Stanford Law Review* 1111 (1997)

Siegel, "Discrimination in the Eyes of the Law: How 'Color Blindness' Discourse Disrupts and Rationalizes Social Stratification" 88 *California Law Review* 77 (2000).

Singer, "No Right to Exclude: Public Accommodations and Private Property" 90 *Northwestern University Law Review* 1283, at 1349 (1996)

Sunstein, "Sexual Orientation and the Constitution: A Note on the Relationship between Due Process and Equal Protection" 55 *University of Chicago Law Review* 1161 (1988)

Temple Lang, Private Law Aspects of the Irish Constitution (1971) *Ir. Jur. (ns)* 237
Tushnet, *Red, White and Blue: A Critical Analysis of Constitutional Law* (Harvard, 1988)
Twomey, "Bork's Originalism: Reconciling Judicial Constitutional Interpretation with the Rule of Law" (1996) 14 *ILT* 278

Von Leyden, *Aristotle on Equality and Justice: His Political Argument* (Macmillan, 1985)

Waldron, "The Substance of Equality" 89 *Michigan Law Review* 1350 (1991)
Walsh, "The Constitution and Constitutional Rights" in Litton (ed.), *The Constitution of Ireland 1937-1987* (IPA, 1988)
Weber, *Economy and Society* (Bedminster Press, 1968)
Westen, "The Empty Ideal of Equality" 95 *Harvard Law Review* 537 (1982)
Whelan, "Constitutional Amendments and the Competing Claims of Democracy" in Quinn, Ingram and Livingstone (eds), *Justice and Legal Theory in Ireland* (Oak Tree Press, 1995)
Whyte, "A Comment on the Constitution Review Group's Proposals on Equality" in Duncan and Byrne (eds), *Developments in Discrimination Law in Ireland and Europe* (ICEL, 1997)
Whyte, "Law and Poverty in Ireland" in Duncan (ed.), *Law and Social Policy* (Dublin, 1987)
Whyte, *Social Inclusion and the Legal System: Public Interest Law in Ireland* (IPA, 2002)
Williams, "The Idea of Equality" in Laslett and Runciman (eds), *Philosophy, Politics and Society (Second Series)* (Basil Blackwell, 1962)
Wolff, "An Introduction to Political Philosophy" (Oxford, 1996)
Wolff, "Fairness, Respect, and the Egalitarian Ethos" 27 *Journal of Philosophy and Public Affairs* 97 (1998)

Zander, *Inequalities Before the Law* (Open University Press, 1976)