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Constitutional Equality Law and the Right to Education

Tackling Poverty and Class Inequality through Public Interest Law

A Thesis Submitted for the Degree of Doctor of Philosophy

2017

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Summary and Methodology

This thesis is a study of the constitutional implications of inequality on the basis of poverty, social class and socio-economic status in the education system in Ireland. The core research question is whether the Constitution could protect a substantive conception of equality, and whether it could extend to poverty, social class and socio-economic status. The thesis then assesses whether activists could use litigation to provoke the political system to reform and equalise the provision of education. This involves a doctrinal assessment of what the law is and how it could develop, as well as a sociological and political assessment of the role of law.

There are four parts to the thesis, which reflect the four main areas of research. Part 1 is an analysis of equality theory. It considers a number of conceptions of equality. The most comprehensive conception from the research is substantive equality of condition, based on the writings of Sandra Fredman and Kathleen Lynch and John Baker. Part 1 also tests whether poverty, social class or socio-economic status could be a protected ground in equality law. It presents the theoretical arguments for the recognition of this ground, by analogising it to other grounds such as ethnicity or gender. It uses a comparative methodology, examining how other jurisdictions (Canada, the USA and the European Convention on Human Rights (ECHR)) treat poverty and social class in equality law.

Part 2 deals with Irish constitutional equality law and takes the theoretical research from Part 1 and tests how it applies to the Irish Constitution. Since Doyle's comprehensive assessment of Irish constitutional equality law in 2004, there have been some interesting cases. Based on these and the values underlying the previous cases, Part 2 argues that the best conception of equality for the Irish Constitution is substantive equality of condition. It also analyses how the courts have dealt with poverty and social class.

Part 3 addresses the right to education. It adopts an interdisciplinary approach and presents sociological research on the extent and effects of educational inequality. It analyses case law on the right to education and assesses the possibility of conjoined applications of the right to education with the right to

equality. Conjoined applications could overcome the principle of subsidiarity. This principle limits the powers of the State over the education system. Part 3 also uses a comparative methodology, looking at conjoined applications of rights under the Constitution of the USA, the Canadian Charter of Rights and Freedoms, and the ECHR.

Part 4 applies all of the legal, theoretical, comparative and interdisciplinary research to assess whether litigation could be a useful way of bringing about reform of the education system. It analyses the theory of public interest litigation and highlights a number of analogous uses of litigation strategies in Ireland, including both successful and unsuccessful examples. From these examples, it draws a number of lessons on how to maximise the effectiveness of public interest litigation.

The thesis ultimately concludes that litigation could be a useful tool. The chances of success, both constitutionally and politically, are slim. However, faced with limited alternatives, the decision to resort to litigation would be justified. The decision to launch litigation is best made by stakeholders, such as parents and children affected by the inequality, in consultation with law centres and non-governmental organisations.

The doctrinal parts of the thesis are based on the legal-analysis methodology, with case material available on legal databases and background information in textbooks and academic articles. Some difficulty arose with access to material from foreign jurisdictions, as they were unavailable at the Trinity College Library. This was mitigated by research trips to the Bodleian Library at the University of Oxford. The philosophical, sociological and political materials were collected following discussions with experts in these fields and through relevant textbooks and academic articles. All of the issues were the subject of conversations and debates with scholars and practitioners at conferences and other events.

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Introduction

The right to equality in the Irish Constitution exists in Article 40.1:

> 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.

The courts' approach to this provision has traditionally been restrictive, to the extent that Doyle has described it as a "constitutional backwater".[1] As well as restrictive in effect, the constitutional equality jurisprudence has been formulaic and narrow in theory. There have, however, been some hints from the Supreme Court in recent years that this area of law may have a more substantive and progressive future. The core research question in this thesis is whether the Constitution could protect a fully substantive conception of equality, and whether it could extend this protection to the ground of social class. In particular, I propose an interpretation of the Constitution that bases equality on comparative levels of disadvantage, rather than on the idea of "equal treatment". The right would be a prohibition on systemic, wrongful inequality.

To test the feasibility of this, I consider the potential application of the right to equality to the education system and examine whether it could be used to challenge social class inequalities within and between schools. Even though there is only limited scope for successful litigation in this area, there are significant constitutional benefits available in changing the discourse around equality. The cases on the right to equality have often been contradictory and theoretically deficient. The proposals in this thesis offer a route to a more coherent and defensible constitutional equality jurisprudence.

The background to the legal research in this thesis is the education system, which has a huge impact on the development of society. As Drudy says:

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[1] Oran Doyle, *Constitutional Equality Law* (Round Hall 2005) viii.

> Schools are the e institution in which all citizens of the state and also all immigrant chilen participate. Therefore, their potential for good or ill is enormous.[2]

That potential for ill is th subject of this thesis. The first great element of equal education, ensuring un:rsal access, has been met in Ireland, with school enrolment and completi rates both approaching 100%.[3] The system has not, however, managed to ure that everyone benefits equally from their time in school. Some of the ine alities are easily measureable: the quality of education provided in schools acr the State varies dramatically, with schools populated predominantly by middlclass children achieving the best reading and writing scores in primary scho and the best Leaving and Junior Certificate results.[4] Other inequalities are re subtle: for example, children are implicitly taught throughout their time inchool that working class traits (such as accents) are less socially valuable thamiddle class traits.[5]

Inequality in schools on e basis of religion is currently a major political issue in Ireland. The majority of hools are managed by religious groups (most of them Catholic) and these sools are able to discriminate in a limited way in admissions, by giving pference to applicants from the relevant religion when oversubscribed or if it inecessary to protect the school's ethos. The plight of non-Catholics has capted the public imagination; the lobby group EQUATE, which campaigns for relous equality in schools, recently commissioned a poll that suggests 82% of pple believe that the State should do more to ensure (religious) equality in edation.[6] While this kind of inequality may be harmful, the

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[2] Sheelagh Drudy, 'Quality d Equality at a Time of Austerity' (2011) 100(398) Studies: An Irish Quarterly Review 1, 182.

[3] Department of Educationd Skills, *Education at a Glance 2015: OECD Indicators: A Country Profile for Ireland: atistics Section* (November 2015) 6; Department of Education and Skills, *Retenn Rates of Pupils in Second Level Schools: 2008 Entry Cohort* (February 2015) 5.

[4] Emer Smyth and Selina Moy, 'Investing in Education: Combating Educational Disadvantage' (Research Ses Number 6, Barnardos and the Economic and Social Research Institute 2009) 7-

[5] Kathleen Lynch and Anneodge, *Equality and Power in Schools: redistribution, recognition and representan* (RoutledgeFalmer 2002) 63; Gerry MacRuairc, 'Where words collide: social class,hools and linguistic discontinuity' (2011) 32(4) British Journal of Sociology in Edation 541.

[6] EQUATE, *Opinion Poll* (Ober 2015) <http://www.equateireland.ie/#!opinion-poll/lktsn> accessed 3 Aut 2016.

people disadvantaged by religious inequality are politicy powerful enough to mobilise a large media and political campaign, with the sult that reform seems to be looming.

In contrast, the kinds of inequalities associated with perty, social class and socio-economic status do not evoke the same publioutcry. It is doubtful whether the same high numbers could be expected for commitment to social class equality in schools. Indicative of this is the lonrunning campaign by Barnardos to tackle the high costs borne by parentsf sending a child to school.[7] This undermines the State's obligation in Article ? of the Constitution to provide for free primary education. Despite Barnardos' reated arguments over several years that it would cost approximately €100 millicto guarantee truly free primary education,[8] slightly over 1% of the Department Education budget for 2015,[9] this kind of inequality rarely even evokes a minerial response. In the face of public apathy and the unsuccessful attemptsy the victims of the inequality to mobilise politically, a research question for ts thesis is whether the Constitution could have a role in provoking and bringing out reform.

In testing whether the courts have a role to play iresolving educational inequality, I ask whether there is a constitutional *oblition* on the State to equalise the education system. I also consider the recipcal issue; whether the State has a constitutional *power* to equalise the educan system if it wished. Throughout the thesis I address various theoretical and nstitutional arguments related to these issues. In the final chapter I draw thesogether by assessing whether a public interest litigation strategy (using the cts to provoke political reform of the system) could have a role in equalising the ucation system.

There are four parts to the thesis. Part 1 addresses equa theory. In chapter 1 I consider various understandings of equality. Equality is escription of a state of affairs between things; that they are of the same value on a par in some way.

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[7] Barnardos, *School Costs Survey 2016: Briefing Paper* (3 Augu2016) 7; for a different survey producing similar results, see Irish League of Credit Unis, *Back to School Costs 2016* (Irish League of Credit Unions, 13 July 2016) <http://www.creditunion.ie/communications/pressreleases/201title,10212,en.php> accessed 15 September 2016.

[8] Barnardos (n 7) 24.

[9] Department of Education and Skills, *Main Estimate Features* (15) <http://www.education.ie/en/Press-Events/Press-Releases/20Press-Releases/Budget-Main-Features-2015.pdf> accessed 4 Augus016.

In law, and when there is a human right to equality, it can be a vague concept; since anything can be equal to anything else, depending on what feature or characteristic we take to be relevant, it is meaningless simply to commit to equality. We have to specify what type of equality is legally important. Equality can be in reference to treatment (requiring the State to treat people identically) or it can be in reference to opportunities, results, conditions, etc. In chapter 1 I consider various ways in which we could understand equality. I argue that a human right to equality is best understood as a guarantee against systemic wrongful inequality where equality is defined according to substantive equality of condition. This is based on the multi-dimensional conceptions of equality outlined by Fredman[10] and Lynch and Baker.[11]

In chapter 2 I continue the theoretical analysis. Even with a legal understanding of equality, a right to equality is only workable if it applies to certain characteristics and contexts. Since anything can be equal to anything else depending on what characteristics are relevant, the law needs to specify the characteristics that are worthy of protection. In chapter 2 I argue that poverty, social class or socio-economic status should be a protected ground.

Part 2 of the thesis addresses Irish constitutional equality law. Chapter 3 takes the theoretical arguments from chapter 1 and examines how the courts define equality under Article 40.1 of the Constitution. I argue that, though the case law is at times contradictory, when dealing with a right to equality the courts define equality by reference to disadvantage rather than treatment. I suggest that the multi-dimensional conception of substantive equality of condition is the best way (in theory and according to precedent) to define equality under Article 40.1. I distinguish the Article 40.1 jurisprudence into four categories, demonstrating that there are true equality cases, which define equality according to disadvantage, and three other categories that do not deal with a right to equality but instead another value of consistency, rule of law or democracy. It is important to distinguish these categories in order to make Article 40.1 coherent.

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[10] Sandra Fredman, *Discrimination Law* (2nd, OUP 2011) 25-33.
[11] Kathleen Lynch and John Baker, 'Equality in Education: An equality of condition perspective' (2005) 3(2) Theory and Research in Education 131, 132-134.

In chapter 4 I take the theoretical arguments from chapter 2 and apply them to the Irish Constitution. I examine whether poverty, social class or socio-economic status could be protected under Article 40.1 as a presumptively proscribed ground of discrimination. The courts are developing the idea that certain grounds of equality warrant additional protection, such as gender or ethnicity. The core of the courts' reasoning is that these grounds are inherently tied to the dignity of the individual, though individual judges have suggested other ways of identifying grounds as well. I argue that the protection of poverty, social class and socio-economic status would be consistent with precedent and the values with which the courts interpret Article 40.1. I also consider whether it is arguable that the State has infringed Article 40.1 by failing to equalise the education system.

Part 3 deals with the right to education in the Irish Constitution. In chapter 5 I outline the extensive sociological research into inequality in the Irish education system. Some of these inequalities are immediately obvious, such as the requirement to pay fees for admission to some schools, while others are subtler, such as prejudice against working class characteristics and cultural expectations around success and failure.

In chapter 6 I analyse the right to education in Article 42 of the Constitution. I chart the evolution of the jurisprudence, through its peak of strength in the early 2000s to the more deferential approach that the courts have taken recently. I also outline the balance the courts strike between the rights and powers of the State, parents and school managers, such as religious groups. Chapter 6 ends by considering whether the State's management of an unequal education system violates Article 42.

In chapter 7 I consider the possibility of a conjoined application of the right to education in Article 42 with the right to equality in Article 40.1. A conjoined application would allow the courts to focus directly on the unequal provision of a public service, which means that such an application is the strongest basis for an argument that the State is acting unconstitutionally. In chapter 7 I outline how conjoined applications occur in Canada and the USA and under the European Convention on Human Rights. While a conjoined application is unusual under Irish law, it is not entirely novel. I argue that it would not be difficult for the courts to develop existing precedent in order to recognise conjoined applications. This

conjoined application would be the strongest basis for the argument that there is either a constitutional obligation or power to equalise the education system.

Part 4 outlines a potential public interest litigation agenda as a way of tacking inequality on the basis of poverty, social class and socio-economic status. In chapter 8 I take the three constitutional arguments, based on Article 40.1, Article 42 and a conjoined application of the two, and consider whether they could be used successfully in litigation. Success as a matter of public interest litigation is not contingent on actually winning the constitutional arguments in court. This is because it is more important to use the litigation in order to gather media attention and develop a political campaign for reform. In chapter 8 I consider some successful and unsuccessful analogous examples of this strategy. I then address how a government could reform the system without being vulnerable to constitutional challenge. Chapter 8 is thus about both the obligations and powers under which the State operates.

Ultimately, I conclude that it is difficult to foresee litigation on these issues being successful. All of the constitutional interpretations are arguable; they are based on precedent and on values the courts have identified in the Constitution, and it would not be difficult for the courts to find in favour of a plaintiff. The problem, however, is the deferential nature of the Irish courts when dealing with politically sensitive issues. Given the lack of public opposition to inequality on the ground of poverty and social class, it is also worth pausing to consider whether a public campaign for greater equality would have much chance of success. While there are some examples of campaigns successfully reversing public opinion over a period of time, the equal marriage referendum being one recent example, it is difficult to predict whether a campaign based around social class inequality could be as effective. Even if litigation on educational inequality were unsuccessful, however, the doctrinal proposals suggested in this thesis would be of significant benefit to the constitutional right to equality. Several recent Supreme Court cases reopen the possibility that the courts will adopt a coherent approach to 40.1. By developing the law, in line with the suggestions in this thesis, the courts will be able to salvage the equality guarantee and reconcile the disparate strands in the case law. This would bring overdue clarity to a difficult area of Irish constitutional law.

Ch 1: Types of Equality: Towards Substantive Equality of Condition

Sections

1. Conceptions of Equality
    - 1.1 Formal Equality
    - 1.2 Aristotelian Equality
    - 1.3 Equality of Opportunity
    - 1.4 Equality of Results or Resources
    - 1.5 Substantive Equality of Condition
    - 1.6 Alternative Definitions of Equality
2. Challenges for Substantive Equality of Condition
    - 2.1 Asymmetry of Measures
    - 2.2 Relativism
    - 2.3 Vagueness
    - 2.4 Interconnection and Interrelation

Introduction

Equality is an important but challenging human rights value. Throughout this thesis, I argue that the courts are (or at least ought to be) concerned with systemic wrongful inequality. In this chapter I consider alternative definitions, or conceptions, of equality. In section 1, I argue that the best conception of equality as a matter of human rights and constitutional law is "substantive equality of condition". This is based on the writings of Fredman, who outlines a conception of "substantive equality", and on those of Lynch and Baker, who propose "equality of condition". The overlaps between their conceptions are striking, which suggests that the authors have succeeded in meeting their stated objective of designing a comprehensive definition of equality.

In section 2 I outline some of the challenges with substantive equality of condition, both as a theoretical conception of equality and as a legal value. Throughout the thesis, I use this definition of equality and its challenges to inform the legal arguments based on Articles 40.1 and 42 of the Irish Constitution.

1. Conceptions of Equality

"Equality" is a description of a state of being. It is the label for two or more things that are even or have the same value. It is a principle that, in certain contexts, is empirically verifiable. It is also, as Dworkin puts it, "a popular but mysterious

political ideal."[1] In the transition from an abstract concept that describes the relative weight of things into a political ideal or value, the meaning of equality becomes difficult to state definitively or consistently. As Fredman says in seeking to define equality as a political ideal, "the more closely we examine it, the more its meaning shifts."[2]

As a political tool, "equality" is powerful currency. The problem, however, is that we cannot simply state that we like equality and leave it at that. As Sen demonstrates, every political theory in history has relied on some conception of equality. [3] For example, Sen argues that utilitarians, quintessentially non-egalitarians, believe in equal weight being placed on everyone's gains and losses. He argues that the debate is thus about the conception of equality, rather than whether there should be a commitment to equality of some kind.[4] In committing to equality, we have to specify equality of whom (on what grounds, such as poverty or gender), and equality in what way (treatment, condition, happiness, wealth, etc). We cannot claim to support equality in all contexts for all people. Such, of course, is practically impossible, but this is not a good objection to a theoretical conception of equality. It is also logically impossible to aspire to all people being equal in every way. For example, Dworkin shows that trying to find equality of welfare will lead to inequality of resources or dignity, or create inequality of some other kind.[5] It would also be impossible for the State to act (or even not to act) because every state action will directly discriminate on some ground and indirectly discriminate on another ground.[6] What matters is whether the kinds of inequalities that exist, and the direct and indirect discriminations created, are morally problematic. Doyle sums this up, building on arguments of Flathman:

---

[1] Ronald Dworkin, 'What is Equality? Part 1: Equality of Welfare' (1981) 10(3) Philosophy and Public Affairs 185, 185; for the view that equality is of rhetorical value only, see Joseph Raz, *The Morality of Freedom* (OUP 1986) 227-229; Peter Westen, 'The Empty Idea of Equality' (1985) 95 Harv LR 537.
[2] Sandra Fredman, *Discrimination Law* (2nd, OUP 2011) 1.
[3] Amartya Sen, 'Equality of What?: The Tanner Lecture on Human Values at Stanford University' (22 May 1979).
[4] Sen (n 3).
[5] Dworkin, 'What is Equality? Part 1' (n 1).
[6] Oran Doyle, 'Direct Discrimination, Indirect Discrimination and Autonomy' (2007) 27(3) OJLS 537, 541-542.

> Arguments generally characterised as egalitarian are in reality merely arguments that equality in one respect is more important than equality in another respect.[7]

Conclusions on the moral significance of inequalities in different respects are made according to policy and values. As Fredman demonstrates, these conclusions do not follow logically from a commitment to equality itself but rather from a value-based decision.[8]

In this chapter I consider the question, "equality in what way?" I argue that the best conception of equality (in a moral and political sense) that a state can commit to is substantive equality of condition. In later chapters I consider "equality of whom?" and address the Irish State's duties in response to the right to equality.

There are various seemingly competing conceptions of equality. Terms such as formal, Aristotelian, or substantive equality describe variously more or less expansive versions of the concept, while references to equality of opportunity, treatment, results, dignity, welfare or condition feature in the debates as well.[9] Different constitutions and international treaties also make various references to equality, for example with equal before the law, equal protection or equal benefit of the law.[10]

It is tempting to see these as competing conceptions. The more complex conceptions of equality, however, such as equality of dignity or substantive equality, do not reject the relevance of the more straightforward conceptions,

---

[7] Oran Doyle, *Constitutional Equality Law* (Thomson Round Hall 2004) 4; citing Richard Flathman, 'Equality and Generalization: A Formal Analysis' in J Roland Pennock and John Chapman (eds), *Nomos 9: Equality* (Atherton 1967) 49.

[8] Fredman, *Discrimination Law* (n 2) 2.

[9] Fredman, *Discrimination Law* (n 2) 8-33; Colm Ó'Cinnéide, 'Aspirations Unfulfilled: The Equality Right in Irish Law' in Donncha O'Connell (ed), *Irish Human Rights Law Review 2010* (Clarus Press 2010) 41-46; Colm Ó'Cinnéide, 'Fumbling Towards Coherence: The Slow Evolution of Equality and Anti-Discrimination Law in Britain' (2006) 57 NILQ 57, 59-64; Bob Hepple, *Equality: The New Legal Framework* (Hart 2011) 12-13; Mark Bell, 'Equality and the European Union Constitution' (2004) 33(3) ILJ 242, 246-247; Christopher McCrudden, 'Equality and Non-Discrimination' in David Feldman (ed), *Oxford Principles of English Law: English Public Law* (2nd edn, OUP 2009).

[10] Constitution of Ireland, Article 40.1; Constitution of the US, 14th Amendment; Canadian Charter of Rights and Freedoms, Section 15, Constitution of South Africa, Article 9; European Convention on Human Rights, Article 14 and Protocol 12, Article 1; International Covenant on Civil and Political Rights, Article 14.

such as equality of treatment. There is a moral assessment to be made about which conception to aspire to, but it is better to see this as a decision about which types of equality are included in the conception, rather than which single conception is the correct one. In the *Declaration of Principles on Equality*, for example, the specialists brought together by the Equal Rights Trust state that equal treatment is "an aspect of equality" and in Principle 1 offer a reasonably comprehensive version of equality:

> The right to equality is the right of all human beings to be equal in dignity, to be treated with respect and consideration and to participate on an equal basis with others in any area of economic, social, political, cultural or civil life. All human beings are equal before the law and have the right to equal protection and benefit of the law.[11]

Rather than incompatible conceptions of equality, the following are best thought of as types of equality that we think are morally significant. Each is an answer to the question, "equal in what way?" and the challenge is to find a way to protect the most important types of equality.

1.1 Formal Equality

The phrase formal equality has different meanings in the literature. The more common version of "formal equality", used for example by Fredman, Hepple, Ó'Cinnéide, and Bell, is synonymous with Aristotelian equality (that likes should be treated alike).[12] Doyle, however, distinguishes formal and Aristotelian equality, which is useful as it allows us to describe a separate type of equality, which we can then incorporate into a conception of substantive equality of condition.[13] In this chapter and thesis, I adopt Doyle's distinction.

---

[11] Equal Rights Trust, *Declaration on Principles of Equality – Principle 1* (2008); on the place for Aristotelian equality within substantive equality, see Lynn Smith and William Black, 'The Equality Rights' in Errol Mendes and Stéphane Beaulac (eds), *Canadian Charter of Rights and Freedoms* (5th edn, LexisNexis 2013) 953; Sandra Fredman, 'Providing Equality: Substantive Equality and the Positive Duty to Provide' (2005) 21 S Afr J on HR 163, 165-166; Ben Mitchell, 'Process Equality, Substantive Equality and Recognising Disadvantage in Constitutional Equality Law' (2015) 53 Irish Jurist 36.

[12] Fredman, *Discrimination Law* (n 2) 8-14; Hepple, *Equality: The New Legal Framework* (n 9) 18-19; Ó'Cinnéide, 'Aspirations Unfulfilled' (n 9) 42; Ó'Cinnéide, 'Fumbling Towards Coherence' (n 9); Bell (n 9).

[13] Oran Doyle, *Constitutional Equality Law* (n 7) 4, 10-11, 14-15.

Formal equality in the way Doyle uses it just means the consistent application of the law, or as Doyle puts it, "integrity in the application of rules".[14] It requires the state to take the law at face value and apply what it says. Since it is about application, the content of the law can be unequal, such as providing for slavery or enfranchising only landowning men. Provided the state applies it consistently to all people to whom it is said to apply or not apply, it will be consistent with formal equality. Formal equality thus exists in the application rather than making of law.

Formal equality is an important type of equality and there are good moral reasons to include it within the conception of equality protected by the right. No matter how egalitarian the content of the law, the right to equality can very easily be frustrated by officers of the state and courts if there is no obligation to ensure consistent application of the law.

1.2 Aristotelian Equality

The Aristotelian equality command can be paraphrased as "treat likes alike, and unalikes unalike".[15] This type of equality addresses the content of law and is thus partially substantive in its protection; in moving from formal to Aristotelian equality, Doyle says that equality "has become, to a certain extent, substantive 'equality in law'".[16] Aristotelian equality, however, is a formulaic approach to equality. It simply tells us how to treat people once we know whether they are alike or unalike, but it does not tell us anything about what it is to be equal (or when people are actually equal or alike). It simply dictates the process that the law and state must follow: when people are found to be the same in a relevant way, treat them equally and when they are found to be different in a relevant way, treat them unequally. Aristotelian equality is thus a type of process equality, because it is focused on telling the state how to act and does not address the circumstances, conditions or states of affairs of the people labelled as equals or

[14] Oran Doyle, *Constitutional Equality Law* (n 7) 14.
[15] Fredman, *Discrimination Law* (n 2) 8; Doyle, *Constitutional Equality Law* (n 7) 3.
[16] Doyle, *Constitutional Equality Law* (n 7) 15.

unequals. It is in this sense, of being a formula for state conduct, that Aristotelian equality can also be called "formal equality".[17]

In Holmes's language, Aristotelian equality is an "action-regarding" principle, because it is used to dictate how to do something (how to treat people), whereas the more fully substantive types of equality are "non-action regarding" principles because they describe a state of affairs (the condition of being equal or unequal).[18]

Aristotelian equality is a crucial element of a right to equality of any kind. Since the Aristotelian command does not dictate how to define equality, we can fill the formula with any definition of substantive equality that we choose.[19] Not only *can* we have a definition of equality while also subscribing to Aristotelian equality, we *must* have some definition of it, in order to answer the question "equality in what way?" This is because the Aristotelian command, by itself, is purely a formula and does not tell us when people are in fact equal or not. Without that knowledge from some other source, the formula is useless. This is because there are always some similarities and some differences between people. In order to apply the Aristotelian equality command, we need to know which similarities and differences are relevant and significant. The source of that information has to be a definition of equality. Aristotelian equality does not dictate the definition of equality but it does rely on there being some definition of equality. Similarly, if we subscribe to a substantive definition of equality, based on opportunity or results for example, we would also need a commitment to Aristotelian equality because, without it, there would be no guidance or formula for the state to follow once it had established that people are in fact equal or unequal.

Aristotelian and other definitions of substantive equality can be seen as though they are in tension. Fredman, for example, argues that her conception of substantive equality is designed to make up for the shortcomings of Aristotelian equality.[20] Many commentators, such as Bell,[21] McLaughlin,[22] MacKinnon,[23] are

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[17] Fredman, *Discrimination Law* (n 2) 8-14; Hepple, *Equality: The New Legal Framework* (n 9) 18-19; Ó'Cinnéide (n 9); Bell (n 9).
[18] Elisa Holmes, 'Anti-Discrimination Rights Without Equality' (2005) 68(2) MLR 175, 176.
[19] Mitchell (n 11) 38.
[20] Fredman, *Discrimination Law* (n 2) 8-19; Sandra Fredman, 'Facing the Future: Substantive Equality under the Spotlight' in Ockert Dupper and Christoph Garbers (eds)

similarly critical of Aristotelian equality. First, it relies on merit (which we could expand to include "need") as the only acceptable criterion on which to discriminate. Two problems arise with uncritical reliance on merit. First, the elements of merit have to be defined by a person and so cannot be truly objective because the individual making the decision may possess the stereotypes and prejudices that exist in society. Second, even a truly objective measure of merit would not compensate and account for the disadvantaged position of members of the out-group who have historically been excluded from benefits such as education, with the result that the further exclusion on the basis of merit perpetuates the inequality.[24] In combating these limitations, substantive equality of condition does not reject the role of merit, but the transformative dimension would require that the merit criterion be redefined to include positive traits of the out-group. For example, time spent out of formal work while caring for children could be recognised as a valuable source of skills for a job applicant. In a more extreme example, affirmative action measure for entry to universities in the United States would see membership of a disadvantaged racial group as itself an element of merit because diversity is provided.[25] In the context of the Irish education system, Lynch and Baker suggest tailoring the school curriculum to give greater recognition to working class cultural, for example in music and art courses.[26] An alternative way of dealing with merit under Aristotelian equality is to say that the redistribution dimension requires, temporarily, relaxing the merit

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Equality in the Workplace: Reflections from South Africa and Beyond (Juta 2009); available (2010) Oxford Legal Studies Research Paper 57/2010 <http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1649991> accessed 8 February 2014.

[21] Mark Bell, *Racism and Equality in the European Union* (OUP 2009) ch 2.

[22] Eithne McLaughlin, 'From Negative to Positive Equality Duties: The Development and Constitutionalisation of Equality Provisions in the UK' (2007) 6(1) Social Policy and Society 111.

[23] Catherine MacKinnon, 'Reflections on Sex Equality Under Law' (1990–1991) 100 Yale LJ 1281.

[24] Fredman, 'Facing the Future' (n 20).

[25] Measures of this kind were upheld by the US Supreme Court in *Grutter v Bollinger* (2003) 539 US 306.

[26] Kathleen Lynch and John Baker, 'Equality in Education: An equality of condition perspective' (2005) 3(2) Theory and Research in Education 131, 138-139.

criterion so as to facilitate greater access for members of the out-group to the social good.[27]

A second shortcoming of the traditional application of Aristotelian equality is that it assumes the ideal outcome is identical treatment. There is abstract appeal to equal treatment because it is premised on individual fairness but in the context of pre-existing disadvantage, neutral treatment risks perpetuating inequalities.[28] Since the Aristotelian command is abstract, whether its application tends towards neutral treatment depends on the sensitivity of the definition of equality. Applying the Aristotelian command to substantive equality of condition would overcome this feature of the traditional application.

A third limitation is that it is premised on the idea of an abstract and universal individual who is devoid of any identity characteristics. This feature is a product of a definition of equality that sees people as abstract entities. A substantive definition of equality, encompassing the recognition dimension of equality, can overcome this problem in the application of Aristotelian equality.

A fourth limitation is that formal equality is a purely relative concept, so that equality, on this conception, is satisfied as much by levelling down as by levelling up. Since equality is an inherently relative idea, this limitation applies to any definition of equality. I address this limitation in section 2 below.

A fifth limitation is that it is inherently individualistic, with the result that only the victim of discrimination can bring a claim (rather than another member of the disadvantaged group) and the only person responsible for remedying the inequality is the individual personally at fault for the discrimination.[29] Substantive equality recognises this and so the obligation to remedy inequalities in all four dimensions lies with those who have the capacity to bring about change, rather than just those responsible for causing inequality.[30] This problem is linked to the

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[27] Convention on the Elimination of All Forms of Discrimination against Women (New York, 18 December 1979) 1249 UNTS 13, 19 ILM 33 (1980), *entered into force* 3 September 1981, Art 4(1).
[28] Fredman, *Discrimination Law* (n 2) 2.
[29] Fredman, *Discrimination Law* (n 2) 13-14.
[30] Sandra Fredman, 'Equality as a Proactive Duty' (2012) 60 American Journal of Comparative Law 265, 265-266.

legal measures the state uses to protect equality, rather than with the definition of equality itself.

In reality, the Aristotelian command and the definition of equality are independent of each other, with each speaking about different things. Aristotelian equality is neither inherently good nor inherently bad. It is just a formula so that once we establish whether people are equal or unequal we know how to treat them.[31] Aristotelian equality can be as progressive or as regressive as the definition of equality upon which it is applied.[32]

Respect for Aristotelian equality has an important egalitarian history, and can be seen in dramatic examples such as the abolition of slavery, [33] and the decriminalisation of homosexuality.[34] In order to progress the equality agenda, there is no need to reject Aristotelian equality, but there is every need to adopt a progressive definition of equality itself. Fredman demonstrates that Aristotelian equality has struggled with the idea that while race is a protected characteristic, there are also instances in which it is a relevant characteristic that can justify different treatment.[35] That, however, is a problem with the definition of equality and thus a problem with how the courts carry out the Aristotelian command. It is not a fundamental flaw with the principle of Aristotelian equality itself because, as argued here, that formula can be filled with any chosen definition of equality. This would mean that the courts could recognise that race can be a relevant difference in cases of domestic abuse, to take a famous example,[36] and allow services targeted at disadvantaged racial groups in that context. This different treatment could be consistent with the Aristotelian command because the court would be using a definition of equality that is sufficiently sensitive to the substantive differences of condition for women of different racial groups.

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[31] Lynn Smith and William Black, 'The Equality Rights' in Errol Mendes and Stéphane Beaulac (eds), *Canadian Charter of Rights and Freedoms* (5th edn, LexisNexis 2013) 953.
[32] Mitchell (n 11) 38-39.
[33] Sandra Fredman, 'Providing Equality: Substantive Equality and the Positive Duty to Provide' (2005) 21 S Afr J on HR 163, 165-166.
[34] Robert Wintemute, 'Sexual Orientation and the Charter: The Achievement of Formal Legal Equality and Its Limits' (2003–2004) 49 McGill LJ 1143.
[35] Fredman, 'Providing Equality' (n 33) 166; see also, Kimberlé Crenshaw, 'Race, Reform and Retrenchment: Transformation and Legitimation in Anti-Discrimination Law' (1988) 101 Harv LR 1331; Nicholas Bamforth, 'Conceptions of Anti-Discrimination Law' (2004) 24(4) OJLS 693, 710.
[36] *R (Kaur) v London Borough of Ealing* [2008] EWHC 2062 (*Southall Black Sisters*).

1.3 Equality of Opportunity

To be useful, Aristotelian equality can only be applied in conjunction with a definition of equality. There are various contenders for this definition. One of the most popular is equality of opportunity, which is essentially the idea of social mobility. Fredman captures the idea of equality of opportunity:

> Using the graphic metaphor of competitors in a race, it is argued that true equality cannot be achieved if individuals begin the race from different starting points. ... Once individuals enjoy equality of opportunity, the problem of institutional discrimination has been overcome, and fairness demands that they be treated on the basis of their individual qualities ... Once all have equal opportunities, they should be judged on individual merit.[37]

Like with Aristotelian equality, Fredman is critical of how equality of opportunity is often used in law.[38] The problem is that there cannot be genuine equality of opportunity if the state applies the criterion of merit in an uncritical way to people who have been deprived of the opportunity to acquire merit.[39] Expanding this criticism, Fredman distinguishes procedural equality of opportunity, which removes procedural barriers, for example by introducing a transparent and open recruitment policy in a workplace, from substantive equality of opportunity, which ensures that everyone has an equal chance of satisfying the criteria for admission to the social good, for example through education and training.[40] In criticising the limitations of procedural equality of opportunity, Fredman alludes to the potential benefits of a substantive equality of opportunity conception:

> In practice, equality of opportunity is rarely used in its substantive sense when framing equality laws. Thus equality of opportunity, like equality of

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[37] Fredman, *Discrimination Law* (n 2) 18.
[38] Fredman, *Discrimination Law* (n 2) 18-19; For criticism of the concept itself, rather than the application, see Tim Macklem, 'Equality and Opportunity: Reconciling the Irreconcilable' (2005) 68(6) MLR 1016.
[39] Bob Hepple, 'Discrimination and Equality of Opportunity – Northern Ireland Lessons (1990) OJLS 408, 411.
[40] Fredman, *Discrimination Law* (n 2) 19

> results, remains at most a partial basis for grounding anti-discrimination laws.[41]

The problem with asserting the existence of equality of opportunity is that it lays the blame for failing to benefit from it, and failing to pull oneself out of poverty, at the feet of the person disadvantaged by poverty and inequality.[42]

Equality of opportunity is a politically powerful idea. As Wilkinson and Pickett demonstrate, social mobility has at least theoretical universal support and it is exceptionally rare for politicians to oppose equality of opportunity.[43] For example, in a book written by Obama before his election as President of the USA that is remarkably sensitive to the entrenched nature of inequality, he cannot avoid a few rhetorical flourishes asserting the myth of true social mobility:

> Throughout our history, education has been at the heart of a bargain this nation makes with its citizens: If you work hard and take responsibility, you'll have a chance for a better life.[44]

For the vast majority with a disadvantaged start in life, other than the few exceptionally lucky and/or talented, that is simply untrue. Equality of opportunity, for all its political potency, is a myth in countries with high income inequality, like Ireland.[45]

True social mobility is an essential part of substantive equality of condition. Its non-existence, which I consider in the context of education in Ireland in chapter 5, is a major source of inequality. Even if true equality of opportunity did exist, however, it would not be enough to achieve substantive equality and it would have to be complemented by a degree of equality of condition and circumstances.

To illustrate this, consider the school system in Ireland, which is segregated according to social class. As well as segregation, there are massive inequalities

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[41] Fredman, *Discrimination Law* (n 2) 19.
[42] McLaughlin (n 22) 114.
[43] Richard Wilkinson and Kate Pickett, *The Spirit Level: Why Equality is Better for Everyone* (Penguin 2010) 157.
[44] Barack Obama, *The Audacity of Hope: Thoughts on Reclaiming the American Dream* (Canongate 2006) 159.
[45] Wilkinson and Pickett (n 43) 17, 157-161.

in educational outcomes between different schools. If we define equality according to equality of opportunity, the problematic aspect of these inequalities is that some schools are advantaged relative to other schools. It is not the segregation itself that is a problem but the fact that this leads (or at least is related) to different educational outcomes. The solution, in order to achieve social mobility, is to increase the funding and educational resources available to the disadvantaged schools, in order to level up and reach equality of opportunity. The segregation, however, continues under this approach. The Irish State takes this approach, through the DEIS system, which I outline in chapter 5.

In order to explain how the segregation is unequal, equality of opportunity has to be complemented with equality of condition. While social mobility (equality of opportunity) is important, it is insufficient on its own as a definition of equality. As well as social mobility, an equal society should also provide a degree of equality in circumstances. Equality of opportunity is therefore a part, but only one part, of substantive equality of condition.

1.4 Equality of Results or Resources

An alternative way to define equality is in reference to results or outcomes. A related but more nuanced idea is equality of resources. Equality of results is a rough kind of substantive equality of condition. Like other definitions of equality, it is defined in reference to the contexts in which people find themselves, rather than in reference to the formula of how to treat people. It is thus a non-action regarding principle.

As with equality of opportunity, a degree of equality of results is an important element of substantive equality of condition. As Fredman says, "[e]quality of results is primarily concerned with achieving a fairer distribution of benefits",[46] which is a necessary feature of equality of condition. The criticisms that Fredman levels at equality of results as a legal conception of equality focus on what the definition fails to include. The problem is thus that it only provides partial equality protection:

[46] Fredman, *Discrimination Law* (n 2) 14.

> This is because monitoring of results does not necessitate any fundamental re-examination of the structures that perpetuate discrimination. A change in the colour or gender composition of a grade or sector, while to some extent positive, might reflect only an increasingly successful assimilationist policy. ... There is a danger too that a focus on equality of results pays too little attention to the equally important duty to accommodate diversity by adapting existing structures.[47]

This concern with excessive assimilation informs the type of equality protected in the recognition and transformative dimensions of Fredman's definition of substantive equality, which I consider below. It is also, as Ó'Cinnéide notes, what distinguishes Fredman's approach from that of Collins, who uses the criterion of social inclusion, which can be achieved by equality of results with less need for transformative or structural change.[48] While equality of results is not itself a comprehensive definition of equality, it is an important component of substantive equality of condition.

Dworkin, in the second in a trilogy of articles on equality, endorses "equality of resources".[49] His equality of resources is a version of equality of results, specifically in the context of economic position and wealth:

> [Equality of resources ensures] that people should have the same external resources at their command to make of them what, given these various features and talents, they can.[50]

What distinguishes Dworkin's equality of resources from a rougher equality of results is that he seeks to make it "ambition-sensitive", so that people can be rewarded for, and carry the risks of, effort, ambition and investment, but not "endowment-sensitive" which leads to entrenched inequality.[51] Presented in this way, Dworkin's theory is a component of substantive equality of condition, which involves true social mobility as well as an adequate degree of equality in the day-

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[47] Fredman, *Discrimination Law* (n 2) 16.
[48] Ó'Cinnéide, 'Fumbling Towards Coherence' (n 9) 62-63; Hugh Collins, 'Discrimination, Equality and Social Inclusion' (2003) 66(1) MLR 16.
[49] Ronald Dworkin, 'What is Equality? Part 2: Equality of Resources' (1981) 10(4) Philosophy and Public Affairs 283; Dworkin, 'What is Equality? Part 1' (n 1); Ronald Dworkin, 'What is Equality? Part 3: The Place of Liberty' (1987) 73 Iowa LR 1.
[50] Dworkin, 'What is Equality? Part 2' (n 49) 307.
[51] Dworkin, 'What is Equality? Part 2' (n 49) 311.

to-day circumstances and conditions of life. It is thus useful to consider this definition of equality of resources when outlining the redistribution dimension of substantive equality of condition below.

1.5 Substantive Equality of Condition

Substantive equality of condition is shorthand for a multidimensional conception of equality. This is the most comprehensive definition of equality that we could use to give meaning to the Aristotelian equality command. Fredman and Lynch and Baker have presented complementary versions of this definition of equality. In short, substantive equality of condition requires two things: first, true social mobility, and second, greater equality in circumstances so that no one is disadvantaged too greatly, and so that any privilege that does exist cannot be entrenched across generations. Substantive equality of condition is fundamentally about removing the disadvantage some people experience, rather than removing the differences between people.[52] This distinguishes it from the more simplistic definitions of equality based on opportunity or results, which can be satisfied by requiring people to conform to dominant norms. That act of conforming, or assimilating, removes or reduces the differences between people in order to achieve equality. Substantive equality of condition, in contrast, is based on the idea that the differences between people can be valuable parts of their identity, and thus seeks to achieve equality by removing the disadvantage, rather than the differences.

Like other definitions of equality, it is a non-action regarding principle because it is disadvantage-focused rather than treatment-focused. [53] Of course, a commitment to substantive equality of condition will dictate how the State must treat people, but it defines what equality actually is according to the state of affairs in society, rather than by reference to that treatment.[54]

Substantive equality of condition is a comprehensive definition of equality that includes several types of equality within the same conception, including equality

[52] Fredman, 'Providing Equality' (n 18) 163.
[53] Mitchell (n 11) 39.
[54] Fredman, 'Providing Equality' (n 18) 183.

of opportunity and results as well as recognition and distributive inequalities.[55] Fredman as well as Lynch and Baker sets out these various types of equality as "dimensions" of substantive equality, with Fredman noting four dimensions of "substantive equality" and Lynch and Baker presenting five dimensions of "equality of condition". [56] There are significant similarities between these definitions, which augurs well for the claim that a substantive equality of condition based on these dimensions is a state of the art conception of equality.

The first type or dimension of equality is material and refers to inequality of capital. Fredman refers to this as the *redistribution dimension*. This type of equality requires the cycle of economic disadvantage suffered by members of out-groups to be broken, so that no groups are systematically excluded from material wealth. [57] Lynch and Baker refer to this dimension as equality of resources, and emphasise that it covers various kinds of capital: economic (income and wealth), social (family and social networks), cultural (strength of educational credentials), and health.[58] Using Dworkin's writings on equality of resources, it is possible, at least in theory even if it is difficult in practice, to conceive of equality as requiring a degree of parity of resources but still allow for risks, investments and efforts to be reflected in resources.

In an education context this type of inequality is known as "educational disadvantage", whereby a qualitative analysis shows that one person or group receives inferior education to another, and/or works with inferior education resources.[59] This phenomenon is described in s.32(9) of the Education Act 1998 as:

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[55] Sandra Fredman, 'Redistribution and Recognition: Reconciling Inequalities' (2007) 23 SA J HR 214, 225.
[56] Fredman, *Discrimination Law* (n 2) 25-33; Lynch and Baker (n 26) 132-134; see also Kathleen Lynch and Anne Lodge, *Equality and Power in Schools: Redistribution, Recognition and Representation* (RoutledgeFalmer 2002) 7-12.
[57] Fredman, *Discrimination Law* (n 2) 26.
[58] Lynch and Baker (n 26) 132; Pierre Bourdieu, *Distinctions* (Routledge 1984).
[59] Emer Smyth and Selina McCoy, 'Investing in Education: Combating Educational Disadvantage' (Research Series Number 6, Barnardos and the Economic and Social Research Institute 2009) 13-17.

> ...the impediments to education arising from social or economic disadvantage which prevent students from deriving appropriate benefit from education in schools.[60]

At this stage, it is worth emphasising that including distributive inequalities within the definition of substantive equality of condition does not necessarily bring law into the realm of politics or compel the courts to grapple with political issues. This is because the enforcement of equality law is a separate matter entirely to the definition of equality itself. There may well be limits on the courts' powers to remedy distributive inequalities but they do not prevent the definition of equality from recognising that such inequalities exist.[61] This is important because, as Ó'Cinnéide demonstrates, common law jurisdictions have traditionally prioritised civil and political rights over socio-economic rights, which denies social justice campaigners access to the language of human rights.[62] Recognising economic inequality as an issue of equality is thus an important first step.

The second type of equality is the *recognition dimension*, which requires equal recognition of the dignity and worth of all people.[63] Lynch and Baker refer to equality of respect and recognition as a kind of interculturalism, in which an equal entitlement to rights is accepted and difference is appreciated rather than merely tolerated.[64] This type of equality is about promoting "respect for the equal dignity and worth of all" by redressing "stigma, stereotyping, humiliation, and violence" based on membership of a protected group.[65] In developing this dimension, Fredman has relied on the work of Fraser and Honneth,[66] to reflect the idea that identity is a socially created phenomenon that can, therefore, be affirmed and protected by adjusting social norms in order to respect minority

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[60] Dympna Glendenning, *Education and the Law* (2nd edn, Bloomsbury Professional 2012) 279.
[61] For discussion of the limits of the enforcement of substantive equality, see Sandra Fredman, 'Positive duties and socio-economic disadvantage: bringing disadvantage onto the equality agenda' (2010) European Human Rights Law Review 290, 303.
[62] Colm Ó'Cinnéide, 'Bringing Socio-economic Rights Back into the Mainstream of Human Rights: The Case-law of the European Committee on Social Rights as an Example of Rigorous and Effective Rights Adjudication' (2009) 13(1) Revista Europea de Derechos Fundamentales 259.
[63] Fredman, *Discrimination Law* (n 2) 28.
[64] Lynch and Baker (n 26) 133.
[65] Fredman, *Discrimination Law* (n 2) 28.
[66] Nancy Fraser and Axel Honneth, *Redistribution or Recognition* (Verso 2003) 13

identities.[67] In the education context, Lynch and Lodge outline how this type of inequality exists as "domination" and "symbolic misrepresentation or non-representation" in schools.[68] Dealing with social class inequality, Wilkinson and Pickett explain how society builds recognition inequality upon distributive inequalities:

> We should perhaps regard the scale of material inequalities in a society as providing the skeleton, or framework, round which class and cultural differences are formed. Over time, crude differences in wealth gradually become overlaid by differences in clothing, aesthetic taste, education, sense of self and all the other markers of class identity.[69]

The third type of inequality is about structural barriers to social equality; to achieve equality, institutions in society have to adapt and facilitate diversity so that members of different groups are accommodated rather than required to assimilate to dominant norms.[70] Fredman describes this as the *transformative dimension*. This type of equality distinguishes substantive equality of condition from other definitions of equality. Under a simple definition of equality of results, for example, there will be assimilationist pressure on out-groups to conform to the norms of the dominant group.[71] Such pressures force individuals to choose between personal benefits and the characteristics of their group-membership.[72] It is in response to the unfairness of forcing individuals to assimilate and excluding those who will not or cannot assimilate that the transformative dimension requires physical and societal infrastructures to be adjusted to accommodate the needs of different groups.

The fourth type of equality, the *participative dimension*, relates to the capacity to participate fully in society, both socially and politically.[73] One of the ways in which substantive equality of condition is comprehensive is that, in the participative dimension, account can be taken of inequality in the non-public

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[67] Fredman, 'Redistribution and Recognition' (n 55) 215.
[68] Lynch and Lodge (n 56) 181.
[69] Richard Wilkinson and Kate Pickett, *The Spirit Level: Why Equality is Better for Everyone* (Penguin 2010) 28.
[70] Fredman, *Discrimination Law* (n 2) 30.
[71] Fredman, *Discrimination Law* (n 2) 11.
[72] Will Kymlicka, *Multicultural Citizenship* (Clarendon 1995) ch 5.
[73] Fredman, *Discrimination Law* (n 2) 31.

realm. The public-private divide is well entrenched in liberal democracies but this distinction operates to conceal many inequities from the scrutiny of the courts, such as unequal gender power structures in domestic life.[74] There are, of course, limits on the reach of law's remedial powers into the private realm. Such limits do not sensibly apply to a definition of equality, however. Without addressing the questions of whether law can do anything about it, it is essential when defining equality to recognise that people are social creatures and that true equality is unattainable while participation in any field of society is denied, or offered on unequal terms, to certain groups.[75]

The latter two of Fredman's dimensions are captured in what Lynch and Baker describe as equality of power.[76] In their view, the central aim of equality of condition is to remove power imbalances and they argue that a major part of achieving this requires increasing political and social participation. In addition, Lynch and Baker suggest that equality in work and learning are required because both of these are instrumentally important in a person's life but also intrinsically important to a sense of satisfaction.[77] Interestingly, not least because it is unusual to a lawyer's ears, Lynch and Baker also argue that equality of love, care and solidarity is an important dimension of equality of condition.[78] They recognise that society cannot provide for this directly, but they suggest that it could be restructured so as to facilitate it by placing greater value on unpaid care work and giving affective education about care and love. This dimension thus has some similarities with Fredman's transformative dimension.

1.6. Alternative Definitions of Equality

There are endless ways to define equality. Since equality is an abstract concept, the state of being of the same value as something else, it can be applied to anything. Attempts to define "equality" are not defining the concept itself, but are defining the units of comparison, such as opportunities, results or conditions. Unsurprisingly, therefore, many commentators have proposed different definitions of substantive equality.

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[74] Fredman, *Discrimination Law* (n 2) 33.
[75] Fredman, *Discrimination Law* (n 2) 32.
[76] Lynch and Baker (n 26) 133.
[77] Lynch and Baker (n 26) 133-134.
[78] Lynch and Baker (n 26) 133; Lynch and Lodge (n 56) 11-12.

Doyle, for example, builds upon Balkin's writings to argue that a guarantee of equality should be based upon an anti-subordination principle and that the paradigm inequality is based on stratification in society through status and hierarchy.[79] Ó'Cinnéide supports "equality of respect", which is based on a combination of the anti-subordination principle with a prohibition on prejudiced or irrational distinctions.[80] Réaume takes another approach, and focuses on the types of inequalities that impinge dignity.[81] Though Réaume does not use the terminology, this approach makes "equality of dignity" the answer to the question, "equality in what way?"

These definitions, and many others,[82] are alternative ways of giving meaning to an equality guarantee. Given that substantive equality of condition has been designed by Fredman and Lynch and Baker to be comprehensive, these alternative definitions are often the same types of equality that are protected by it. Dignity, for example, has a close relationship with the recognition dimension.[83] The anti-subordination principle involves the same types of equality as the participative, recognition and transformative dimensions.[84] Thus, in defining equality as substantive equality of condition in this thesis I do not wish to reject the relevance or merits of alternative definitions.

2. Challenges for Substantive Equality of Condition

Substantive equality of condition is a comprehensive definition of equality. This, however, raises a number of challenges, because it expands the influence of equality and potentially brings it into conflict with other values. In the remainder

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[79] Doyle, *Constitutional Equality Law* (n 7) 221.
[80] Ó'Cinnéide, 'Aspirations Unfulfilled' (n 9) 53-54.
[81] Denise Réaume, 'Discrimination and Dignity' (2003) 63 Louisiana LR 645, 648-650; see further Tarunabh Khaitan, 'Dignity as an Expressive Norm: Neither Vacuous Nor a Panacea' (2012) 32 OJLS 1; Judy Fudge, 'Substantive Equality, the Supreme Court of Canada, and the Limits to Redistribution' (2007) 23(2) S Afr J on HR 235; McCrudden (n 9), Owen Fiss, 'Groups and the Equal Protection Clause' (1976) 5 Philosophy and Public Affairs 107, Colm Ó'Cinnéide, 'Fumbling Towards Coherence: The Slow Evolution of Equality and Anti-Discrimination Law in Britain' (2006) 57 NILQ 57.
[82] See also, Catherine Barnard and Bob Hepple, 'Substantive Equality' (2000) 59(3) CLJ 562; Wilkinson and Pickett (n 43); John J Macionis and Ken Plummer, *Sociology: A Global Introduction* (5th edn, Pearson 2012) chs 8-10; Robert Nisbet, *The Sociological Tradition* (8th edn, Transaction Publishers 2007) ch 5.
[83] Fredman, *Discrimination Law* (n 2) 28-30.
[84] Doyle, *Constitutional Equality Law* (n 7) 221-227.

of this chapter, I consider four issues: asymmetry, relativism, vagueness and interconnection.

2.1 Asymmetry of Measures

Fredman argues that substantive equality is asymmetric, in that it protects the disadvantaged rather than all people:

> Unlike formal equality, substantive equality is expressly asymmetric ... Thus instead of aiming to treat everyone alike, regardless of status, substantive equality focuses on the group which has suffered disadvantaged: women rather than men, black people rather than whites, people with disabilities rather than able-bodied, or gay people, rather than heterosexuals.[85]

This means that members of the disadvantaged group can bring equality claims but members of the dominant group cannot. It is important to clarify an important distinction in this idea of asymmetry. There can be asymmetry in the ability to use equality measures, such as claims based on indirect discrimination, because they are designed to help the disadvantaged. This, however, is not the same as saying that there is asymmetry of protection by the right to equality. Everyone has a right to equality, but for those in advantaged positions, there is usually no inequality that they need to challenge. For example, a redistributive measure designed to help the poor indirectly discriminates against the wealthy but it does this in order to increase equality rather than create inequality. There is thus asymmetry in treatment in order to achieve greater symmetry in condition. There is, however, no asymmetry in equality protection because the wealthy are not being given an unequal disadvantage because they are still in an advantaged position. If the redistribution measure went so far as to put an unequal disadvantage on the wealthy group, then the right to equality for the group members would become operable. Substantive equality of condition is thus symmetrical in its protection, which means it is asymmetrical in who can make equality arguments.

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[85] Fredman, *Discrimination Law* (n 2) 26.

While the redistribution dimensions fits with the idea of asymmetry outlined above, other dimensions may be less comfortable. The recognition dimension, for example, is more inclined to symmetry in access to equality arguments. The facts of *D v Ireland*[86] present such a situation. The Criminal Law (Sexual Offences) Act 2006 criminalises sexual intercourse and other sexual acts with minors but also creates immunity from prosecution for underage girls who engage in vaginal sexual intercourse. There is no equivalent immunity for boys so the law directly discriminates against boys on the grounds of sex. On a strictly asymmetrical approach, only members of the disadvantaged groups can bring equality claims, which in the context of gender inequalities means that women and not men can bring a claim. This would be logical if the measure were designed to remedy female disadvantage, such as an affirmative action measure for employment. However, taking the asymmetry necessary to tackle disadvantage and applying it to all inequalities creates the perverse outcome in which dignity harms, and consequent recognition inequalities, cannot be remedied. The recognition dimension is one where symmetry will at times be necessary because it is premised, not on remedying disadvantage, but on protecting dignity, which is stated to be universal. For example, the male applicant in *D v Ireland* challenged the discrimination on the basis that it relied on the stereotype of boys being the responsible actors in cases of underage sex and girls as passive victims. It would of course be possible to argue that the law was unconstitutional for perpetuating harmful stereotypes of women (that they are passive and vulnerable) but this would fail to acknowledge directly the negative stereotype perpetuated of men. In this way, the recognition harm could be reconceptualised as harming the out-group (girls) but this would then be denying the universality of dignity. The applicant (a boy) would also not have had standing to bring such a challenge.

In a situation such as this, the direct discrimination causes dignity harm to both groups. Using a truly asymmetrical approach, the right to equality would not be useful and instead the claim would have to be based a right to dignity itself. However, given the historical link between direct discrimination and the right to equality and the fact that most legal systems seek to use equality mechanisms to

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[86] *D v Ireland* [2012] 2 ILRM 305.

deal with issues like this, it is worth trying to fit this issue into the right to equality. This can be achieved by seeing asymmetry as a functional description of how the right to equality operates, rather than a fundamental principle about the scope of its protection. Everyone has a right to equality, including members of advantaged groups, but people can only bring equality claims if they can establish that they are experiencing the negative effects of inequality. The result is that in general, though not exclusively, equality measures are there for the disadvantaged.

2.2 Relativism

As Holmes argues, equality is inherently relative, in the sense that we cannot measure whether one person is in an equal position without comparing their condition to that of another person.[87] The only way to avoid relativism when dealing with prohibitions on discrimination is to avoid reliance on equality; rather than protecting equality itself, prohibitions on discrimination could instead be rationalised as protecting liberty and autonomy.[88] The inevitability of relativity, however, does not mean that a comparator is strictly necessary; as Bell and others demonstrate, there are instances where it is apparent, even without a comparator, that an inequality exists.[89]

It is unavoidable that equality is a relative concept; the idea of being equal, even, or in the same condition only makes sense if it is relative to something or someone else. There is thus always a possibility of levelling down inherent in a right to equality. There are two checks against such levelling down, however. The first is theoretical and rights based. This is, as Fredman argues, that levelling down can violate dignity, which can be a breach of a right to dignity or can itself be a breach of the right to equality if it is has unequal effects.[90] The second is political and pragmatic and would apply even if there were no breach of dignity or other rights. As I argue further in later chapters, once equality is defined by condition rather than treatment, it is politically difficult for the state to level

[87] Holmes (n 18) 175.
[88] Deborah Hellman, 'Equality and Unconstitutional Discrimination' in Deborah Hellman and Sophie Moreau (eds), *Philosophical Foundations of Discrimination Law* (OUP 2013); John Gardner, 'Liberals and Unlawful Discrimination' (1989) 9 OJLS 1; John Gardner, 'On the Ground of Her Sex(uality)' (1998) 18 OJLS 167; Doyle, 'Direct Discrimination, Indirect Discrimination and Autonomy' (n 6).
[89] Mark Bell, 'A Hazy Concept of Equality' (2004) 12(2) Feminist Legal Studies 223, 226.
[90] Fredman, 'Facing the Future' (n 20).

down.[91] This is because levelling down involves the state intervening and removing the benefits enjoyed by the advantaged group; defined according to disadvantaged or condition, equality cannot be satisfied by neutral treatment and instead would require the removal of the benefit. In the education context in Ireland, for example, substantive equality of condition is not satisfied by the State providing equal access to non-fee paying schools and providing an equal entitlement to set up independent schools or pay to attend fee-paying schools. Equality could only be achieved if the State intervened by improving educational outcomes of the disadvantaged and integrating the schools (levelling up) or by removing the entitlement to pay for fee-paying schools or set up independent schools (levelling down). Once we define equality according to disadvantage, the prospect of levelling down becomes politically difficult. As I argue in chapter 5, the commitment in Article 42 of the Irish Constitution to respect for "private schools" and to support "private and corporate educational initiative" is a constitutional barrier to levelling down. It also reflects the pragmatic reality that it would be politically difficult to level down.

The relativism of equality is also useful because it allows us to explain poverty as a matter of inequality, rather than as a matter of inadequate resources. The two competing approaches to defining poverty are "absolute" and "relative". Relative poverty is much more useful, particularly when dealing with a highly developed country like Ireland. As Wilkinson and Pickett demonstrate:

> Rich people tend, on average, to be healthier and happier than poor people in the same society. But comparing rich countries it makes no difference whether on average people in one society are almost twice as rich as people in another.[92]

In countries where absolute deprivation of basic needs for food and shelter is uncommon, poverty makes more sense when measured relatively. It is the relativity of poverty that explains the persistence of social problems described by Wilkinson and Pickett. Their research shows a pattern, that when countries go

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[91] However, the political response to the Supreme Court in *Hyland v Minister for Social Welfare* [1989] IR 624, which expanded entitlement to a social welfare entitlement, was to impose a more widespread restriction on the entitlement; Gerry Whyte, *Social Inclusion and the Legal System: Public Interest Law in Ireland* (2nd edn, IPA 2015) 263-264.
[92] Wilkinson and Pickett (n 43) 13.

from poor to rich, measures of health and social progress improve (eg life expectancy, crime rates). However, they then level off and there is a point at which getting richer still does not continue to improve wellbeing. Instead, they argue that a point comes where health or social improvements are only achieved by decreasing inequality, rather than by increasing the society's wealth overall.[93] There are thus good reasons to treat poverty as an issue of inequality, and to treat equality as a relative concept.

2.3 Vagueness

A third issue with defining equality according to condition is that it can be vague with contestable outcomes when used as a legal concept. This can make it a difficult principle for courts and lead to accusations of judicial creativity. I deal with this in detail in chapters 2 and 4. In short, a degree of vagueness is inevitable in a system that provides for judicial review of legislation based on a sparse constitutional text. While equality can be vague, and the Irish Article 40.1 is no exception, I argue that it is no more vague that other constitutional values.

As Fredman points out, the multi-dimensional conception of substantive equality does not lead to easy answers in determining how the dimensions interact, but it does provide the full explanation of equality itself.[94] The principle of equal treatment is easy for the courts to interpret and apply; the courts are only asked to recognise when unequal treatment has occurred and, in such cases, decide whether there is an adequate justification for the unequal treatment. The creative part of judicial analysis seems only to be required at justification stage. With substantive equality of condition, in contrast, the courts would be tasked with an additional stage of analysis because, since substantive equality does not give a clear indication of what equality looks like on the ground, the courts have to decide, first, what actually is equal and then, secondly, if the measure in question is unequal, whether or not the inequality is justified. Having two stages of analysis appears to increase the scope for judicial creativity. However, it may actually increase the transparency of judicial reasoning, which over time reduces the scope for vagueness. This is because, as demonstrated in section 1 above, the application of the equal treatment principle still relies on a definition of

[93] Wilkinson and Pickett (n 43) 5-10.
[94] Fredman, 'Equality as a Proactive Duty' (n 30).

equality (which influences the question of justification). In many instances, the courts simply fail to articulate that definition, which leaves the reasoning concealed. If the courts use a definition based on substantive equality of condition, it increases the transparency of this part of the analysis.

2.4 Interconnection and Interrelation

Since substantive equality of condition is comprehensive, it overlaps with all the aspects of life that feed into people's condition and circumstances. This raises the problem that it is difficult to achieve equality of one type without simultaneously tackling other types of inequality. Relevant to this thesis, for example, the factors that contribute to educational inequality are themselves types of inequalities, such as wealth inequalities (in the redistribution dimension), cultural barriers (in the transformative dimension), inequality of access and power (in the participative dimension) and problems of stigma or prejudice and accent or language barriers (in the recognition dimension). This highlights the circularity of the challenge posed by educational inequality: poor education contributes to social inequality, while social inequality contributes to poor education. The only solution is, as Minnow argues in the context of racial educational inequality in the US,[95] and Lynch and Moran argue in relation to social class inequality in Irish schools,[96] to strive for equality in the education context while also seeing this interconnection and striving for equality in other parts of society as well. I address this issue in detail in chapter 5.

Conclusion

Defining equality as a moral, political and legal conception is challenging. There are multiple alternative conceptions, which sometimes are in tension with each other. Often, however, they are simply different types of equality, different answers to the question 'equality in what way?' Consequently, these different types of equality can be placed alongside each other as part of a comprehensive definition of equality. Substantive equality of condition, developed by Fredman and Lynch and Baker, is based on this idea and includes various types or

[95] Martha Minow, *In Brown's Wake* (OUP 2010) ch 5.
[96] Kathleen Lynch and Marie Moran, 'Markets, Schools and the Convertibility of Economic Capital: The Complex Dynamics of Class Choice' (2006) 21 British Journal of Sociology of Education 221, 223, 226-228.

"dimensions" of equality. I believe this is the best definition of equality and in this thesis I examine whether and to what extent the Irish courts could apply substantive equality of condition in the Constitution.

Ch 2: Grounds of Equality Protection

Sections

1. Identifying Grounds in Equality Law
2. Poverty as a Ground of Equality
    2.1 Defining Poverty, Socio-Economic Status and Social Class
    2.2 Poverty in Equality Law
3. Objections to Poverty as a Ground in Equality Law
    3.1 Fundamental Objection
    3.2 Democratic Objection
    3.3 Prioritising Socio-Economic Rights over Equality
    3.4 Vagueness Objection

Introduction

To legislate is to discriminate; all distinctions are directly discriminatory on some ground, while every act of neutral treatment is indirectly discriminatory on some ground as well.[1] To assert that someone is entitled to the right to equality implies answers to the questions, equal to whom and equal in what way? Consequently, a constitutional equality guarantee is not a prohibition on all inequalities in all circumstances. It is not a bar to distributing advantages and disadvantages unequally in all instances; it only prohibits certain kinds of inequality in certain instances. To improve its coherency, the guarantee can provide the grounds on which equality is guaranteed, either through an explicit textual list or implicitly through judicial identification. An act of the state that is not directly or indirectly discriminatory on these grounds will not be a "true equality" case. In some constitutional systems, for example under the Canadian Charter of Rights and Freedoms, cases that do not implicate the protected grounds are inadmissible. As I discuss in chapter 4, these cases are admissible in Ireland but the courts treat them differently to true equality cases. Under either approach, the choice of whether a ground receives equality protection is of crucial significance.

One of the most interesting debates in equality theory is whether poverty, socio-economic status or social class could plausibly be a protected ground in equality law. In this chapter, I consider the role played by grounds in equality law and

[1] Oran Doyle, 'Direct Discrimination, Indirect Discrimination and Autonomy' (2007) 27(3) OJLS 537.

examine the principles used to identify the grounds that are worthy of protection. After establishing these principles, I construct a theoretical case for the recognition of poverty, socio-economic status or social class as a protected ground in equality law. In chapter 4, I contextualise these theoretical arguments in the Irish Constitution and argue for the recognition of poverty, socio-economic status or social class as a presumptively proscribed ground of discrimination under Article 40.1.

In section 1 I examine the theory of ground selection. This is one of the most divisive issues in equality law, with courts, lawyers and academics disagreeing both on the particular grounds that deserve protection and on the principles that should be used in their identification. The central questions are whether a single principle, such as dignity or autonomy, justifies the protection of all grounds or whether different grounds are protected for different reasons. In section 1 I reject the argument that a single principle can justify the protection of every ground of equality. Instead, I argue that constitutional guarantees of equality are concerned with wrongful systemic inequality. The question of whether inequality is systemic is a matter of social fact and, though the evidence can be confusing and unclear, it is possible to prove the existence or absence of such inequality. The question of whether that inequality is wrongful is a moral question. I suggest that this moral question is answered in different ways for different grounds, and that consequently it is unduly restrictive to limit equality protection only to those grounds that can be identified by a single principle.

In section 2 I consider the theoretical case for poverty, socio-economic status or social class as a protected ground. There are various ways to define this kind of inequality and I consider all three versions of the ground. Many economists analyse inequality in terms of poverty and wealth inequality, and courts have occasionally been receptive to these arguments. As I argue in chapter 4, I suspect Irish judges would have greater tolerance for arguments on the ground of poverty than on social class. On the other hand, the nature of inequality in the school system is easier to comprehend through an analysis of socio-economic status or social class. This is because class and status can account for the subtler inequalities in the system, such as valuable social connections available to some families or the biases that exist in favour of middle class values and

traits. As a result, I consider the nature of inequality on all three versions of the ground (poverty, socio-economic status and social class).

In section 3 I rebut a number of arguments against the judicial recognition of poverty, socio-economic status or social class as a ground of equality law. In particular, I seek to overcome concerns about moral and democratic legitimacy and practical objections based on vagueness and uncertainty.

All of the arguments developed in this chapter are expanded and contextualised to Ireland in chapter 4. The two chapters can be read in conjunction.

1. Identifying Grounds in Equality Law

One of the greatest challenges for an equality theorist is to explain why it is that discriminations on certain grounds are more problematic from an equality perspective than others; why, for example as Khaitan asks, is discrimination on the basis of gender or ethnicity more problematic than discrimination on the grounds of eye-colour or football club fandom (setting aside the potential indirect discriminations on the basis of ethnicity or religion that could be associated with these)?[2] The most persuasive answers are those that place the reason in the context of the given society; gender discrimination is problematic in a society that has a systemic[3] problem of inequality between the sexes. There is nothing special about the biological difference between people according to the characteristic of sex, but what is relevant is the hierarchy and inequality that is socially created around that difference.[4] In Ireland, groups defined by eye-colour are not subject to systemic disadvantage. Consequently, in Ireland at least, there is no need for eye-colour to be a protected ground of equality. It is, of course, perfectly conceivable that a society could exist with endemic eye-colour discrimination but no gender discrimination, in which case the positions would be reversed and eye-colour would be a protected ground but gender would not.

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[2] Tarunabh Khaitan, 'Prelude to a Theory of Discrimination Law' in Deborah Hellman and Sophie Moreau (eds), *Philosophical Foundations of Discrimination Law* (OUP 2013); Deborah Hellman, *When is Discrimination Wrong?* (Harvard University Press 2008) 15-21.
[3] Doyle describes this feature as "endemic" inequality; Doyle, 'Direct Discrimination, Indirect Discrimination and Autonomy' (n 1).
[4] Catherine MacKinnon, 'Reflections on Sex Equality Under Law' (1990-1991) 100 Yale LJ 1281, 1296.

The debates about grounds are thus about identifying whether systemic inequality exists on a certain ground, and whether that inequality is wrongful.

Both of these factors are necessary; systemic inequality on the basis of paedophilia exists in Irish society, in the sense that it is criminalised to act upon it and is universally condemned, but it would be absurd to argue that this inequality is wrongful. Conversely, the systemic inequality that persists on the ground of gender, such as lower pay and employment rate and gender hierarchy in social situations, is wrongful. The difference between the grounds is the moral legitimacy of the condition; having a certain gender is not harmful to anyone else and it has no necessary correlation with ability or merit. That someone can hold a particular gender and still engage fully with society is thus morally positive. On the other hand, paedophilia is extremely harmful without serving a valuable goal, and is thus morally negative. The systemic inequality on the ground of gender is therefore wrongful, while that on the ground of paedophilia is not.

To assert that someone is entitled to the right to equality implies answers to the questions, equal to whom and equal in what way? In chapter 1 I deal with the latter question, the way in which people are "equal", when defining conceptions of equality. In this chapter I address the identification of grounds, as an answer the former question. Unless certain grounds are identified as especially worthy of protection, every decision, whether to treat people neutrally, or treat them differently, or simply not to act at all, will be directly discriminatory on some ground and indirectly discriminatory on some other ground. To prevent this, the authors of equality laws have to distinguish between certain characteristics and conditions, choosing what grounds to protect and how expansively they are to be defined.[5] These authors include the drafters, the voters or politicians (if the constitution is brought into force by referendum or otherwise), and the judges who interpret the text. The degree of influence given to each depends on the nature of the constitutional guarantee of equality in question. Statutory law generally provides an explicit list of protected grounds, which in Ireland consists of gender, civil status, family status, sexual orientation, religion, age, disability, race, and membership of the Traveller community.[6] In such laws, the decision on

[5] Aileen McColgan, 'Reconfiguring discrimination law' (2007) Public Law 74, 75-76.
[6] Employment Equality Act 1998, s.6; Equal Status Act 2000, s.3.

what grounds to protect is made by the drafter and only the expansiveness of their protection falls to the judges to decide. Constitutional texts are usually more open-ended, either giving an indicative list and leaving it to the judiciary to identify analogous grounds or leaving the grounds entirely unspecified.[7] The former approach is seen in modern documents, such as Section 15 of the Canadian Charter and Article 14 of the European Convention on Human Rights, while the latter exists in older texts, such as Article 40.1 of the Irish Constitution and the Fourteenth Amendment of the United States Constitution.

These decisions on the identification and definition of grounds carry risks of rigidity. First, there is the danger of essentialisation because the protected ground can be seen as the defining feature of a person's identity, overlooking the infinite variability of identity. As McColgan demonstrates, there is no perfect solution to this problem because equality law cannot operate in the absence of particular grounds but it is a danger to which courts should be alive and can militate by recognising intersectional inequality (which is discrimination on the basis of two grounds simultaneously but not on either in isolation) and by not requiring discrimination necessarily to be motivated by prejudice.[8] Second, there is the danger that judicial precedent binds the decisions on grounds. The open-ended nature of constitutional guarantees of equality is important because it allows the protected grounds to be adjusted to account for social changes. This is crucial because wrongful systemic inequality can arise on the basis of any characteristic or distinction between people at different points in time. An unwillingness to reconsider the identification of grounds, if evidence of new wrongful systemic inequalities exists, can frustrate the purpose of the equality guarantee.

As a result, judges have to decide what grounds to protect and how expansively to define them based on the social conditions present at the time of the case. I am not suggesting that these conditions change quickly; racial inequality in the US has persisted throughout the full history of the Fourteenth Amendment, while in Ireland gender inequality has not vanished since the enactment of the Constitution. While the grounds may not change with any frequency, the courts

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[7] Sandra Fredman, *Discrimination Law* (OUP 2011) 118-130.
[8] McColgan (n 5) 78-79, 91-92.

should be prepared to identify new grounds in equality law if wrongful systemic inequality can be demonstrated, without feeling constrained by a previous decision that refused to recognise the ground.

Courts around the world use a range of tests for the existence of wrongful systemic inequality, such as whether the ground defines a discrete and insular minority or a group subject to historical disadvantage, or whether distinctions on that basis would unfairly limit the autonomy or violate the dignity of people. A central question of the debate on the choice of grounds is whether these principles are unified by a single master principle or whether each test is an independent justification for the protection of each ground. Put another way, are discrete and insular minorities protected because their dignity is at stake, or because they are excluded from the political system, or because they have historically been discriminated against? Do all of these criteria point to a single explanation for the choice of grounds, or is each an independent reason for protection? Réaume, for example, argues in the Canadian context that dignity is the unifying principle for the choice of analogous grounds under Section 15 of the Charter of Fundamental Rights and Freedoms.[9] Indeed, McLachlin J of the Canadian Supreme Court has gone so far as to state that the various criteria used by the courts to identify grounds (such as, historical disadvantage, minority status and immutable nature) are all based on dignity.[10] Hydra-like, the debate then shifts to the significant problem of how to define dignity, and whether it is even an appropriate principle to use.[11] Other academics argue that liberal-autonomy principles are the best ways to identify grounds. Moreau, for example, suggests that the grounds protected in statutory equality laws are those that are "normatively extraneous" to the exercise of deliberative freedoms (ie choices about how to live).[12] Ely, in developing his famous "representation-reinforcing" theory, sees access the political system, rather than dignity or autonomy, as the

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[9] Denise Réaume, 'Discrimination and Dignity' (2003) 63 Louisiana Law Review 645; see also, Judy Fudge, 'Substantive Equality, the Supreme Court of Canada, and the Limits to Redistribution' (2007) 23(2) South African Journal on Human Rights 235.

[10] *Miron v Trudel* [1995] 2 SCR 418, [131]; Beverley McLachlin, 'Equality: The Most Difficult Right' (2001) 14 Supreme Court Law Review (2d) 17; Réaume (n 9) 660.

[11] Tarunabh Khaitan, 'Dignity as an Expressive Norm: Neither Vacuous Nor a Panacea' (2012) 32 OJLS 1.

[12] Sophie Moreau, 'What is Discrimination?' (2010) 38(2) Philosophy & Public Affairs 143, 155-157; see also, Re'em Segev, 'Making Sense of Discrimination' (2014) 27(1) MLR 47.

touchstone for identification of grounds, such that groups that are not served effectively by the political system are deserving of protection.[13]

Fredman, on the other hand, argues that the search for a master principle is unnecessary, and that the protection of different grounds can be justified in different ways.[14] Having argued that the aim of an equality guarantee is to protect against wrongful systemic inequality, Fredman's approach is the most attractive. What makes something morally right or wrong is not determined exclusively by one principle, but by an analysis of many values and principles. The problem with this, as noted by Fredman, is that judges then exercise a wide discretion.[15] The analysis of whether a group is subject to systemic inequality is a matter of social fact, which, to the extent that anything can be objectively demonstrated, can be established by evidence. The question of whether it is morally wrong is, of course, not capable of being objectively determined. Even if there is an objectively true moral position, establishing categorically that one (fallible) person's view is correct over that of another person is impossible. In lieu of provable objective moral truth, the will of the majority can be used as a proxy. As Hogan and Whyte demonstrate, the means of establishing the opinions and mores held by the public can be inaccurate, making them an unreliable tool in judicial interpretation.[16]

Instead, democratic societies resolve these issues by assigning decision-makers. Some of these decisions are assigned by society to the legislature, some to the executive and some to the judiciary. The interpretation of a guarantee of equality in written constitutions, including Ireland's, falls to the judiciary. As a consequence both of the vague, open-ended wording of equality guarantees like Article 40.1, and the position of the judiciary as decision-makers in constitutional interpretation, judges have the constitutional authority to decide whether the systemic inequality experienced by a group is morally wrong. In making that decision, judges should follow the principles and values expressed in the Constitution as far as they can. If the constitutional text fails to give the answer,

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[13] John Hart Ely, *Democracy and Distrust: A Theory of Judicial Review* (Harvard University Press 1980) 103.
[14] Fredman, *Discrimination Law* (n 7) 139; see also, McColgan (n 5).
[15] Fredman, *Discrimination Law* (n 7) 139.
[16] Gerard Hogan and Gerry Whyte, *Kelly: The Irish Constitution* (4th edn, LexisNexis Butterworths 2003) 25-28.

either explicitly or by highlighting the moral principles that are determinative, the judge has to use her own moral judgment. It is unnecessary to limit the analysis of the moral wrongness of the inequality by resorting only to one principle, be it dignity, democracy or autonomy, because those moral principles do not exist in isolation. Instead, whether it is morally wrong is as multi-faceted a question as with any other moral question in life.

This claim does not assert that judges can interpret according to the "natural law", an approach that has been discredited in Ireland by Clarke and other Irish academics.[17] The problem with the natural law approach is that it relies on an order of law higher than the constitutional text. The claim proposed here is the opposite; judges are interpreting the constitution and it is only when the text, indicated philosophies and clues in the constitution run out that the decision-maker's own moral view becomes relevant. Even then, the moral view is only relevant, not because it is more important than the constitution, which is the claim of natural law, but because society has assigned a decision-maker to address this issue, and a decision must be made. This claim about interpretation is derived from the view that a constitution does not have an inherent meaning, and that meaning is given to be through the act of judicial adjudication.[18] I develop this claim about interpreting constitutions in the Irish context in chapter 4. In the remainder of this section I rebut the rule of law concerns that appear to arise with the use judge's moral views in this way. In essence, I argue that the apparent rule of law concerns are really challenges to the power to strike down state action, and not to this particular conception of how that power is exercised.

This explicit use of judges' moral views poses a threat to the rule of law, in the sense that judges are guided by their own views rather than neutral principles of

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[17] Desmond Clarke, 'Interpreting the Constitution: Essentially Contested Concepts' in Oran Doyle and Eoin Carolan (eds), *The Irish Constitution: Governance and Values* (Thomson Round Hall 2008) 102-103; Hogan and Whyte (n 16) 32.

[18] A notably explicit proponent of this view was Ronald Dworkin, *Freedom's Law* (Oxford University Press 1996) 2; Ronald Dworkin, *Justice in Robes* (Harvard University Press 2006), 57; Irish judges have occasionally come close to acknowledging this. In *McGee v Attorney General* [1974] IR 284, 318-319, Walsh J came close, saying 'The judges must, therefore, as best they can from their training and their experience interpret these rights in accordance with their ideas of prudence, justice and charity.' More tentative acknowledgment occurred in *Re Article 26 and the Health (Amendment) (No 2) Bill 2004* [2005] IESC 7, [120]. See, Oran Doyle, *Constitutional Law: Text, Cases and Materials* (Clarus Press 2008) 462-463.

law. There are two responses to this problem. The first is to point out that the vague, open-ended language of the Constitution's guarantee of equality is not capable of providing neutral principles for the determination of the protected grounds, meaning that there is no alternative to the approach outlined here. The only textual acknowledgment of the question of grounds is the phrase, "as human persons", which does not dictate the aspects of the human condition that are worthy of protection. As Hogan demonstrated with the unenumerated rights doctrine, the huge discretion afforded to judges is a product of the text of the Constitution.[19]

The rule of law principles that desire objective decision-making cannot apply with the same rigour to constitutional questions as they can to statutory law questions. When a judge interprets a statute, she is applying the law as written by the legislature. If a judge faced a statutory law that contained language as vague as is found in a constitution, she would have to face the rigorous rule of law concerns squarely; in Ireland, that would mean striking it down as unconstitutionally vague. [20] When she answers a constitutional question, however, she occupies a different role. In constitutional matters, judges are assigned by society as decision-makers and law-creators, rather than simply appliers of law. The rule of law concerns with objective decision-making cannot be as rigorous as with statutory law because that would prevent judges ever interpreting a constitution in a manner that would check the power of the legislature. This would see the pursuit of objectivity outweighing other values in a substantive conception of the rule of law, such as protection of human rights and limits on the exercise of power by the majority. When answering constitutional questions, judges have an important societal role, which cannot be made consistent with absolute objectivity in decision-making. The best that can be done is that judges are required to be transparent in their reasoning, respect the established principles of constitutional law, and exercise the significant power assigned to them by society in good faith. The role of lawyers, academics and civil society in the process is to establish the arguments for the recognition of

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[19] Gerard Hogan, 'Unenumerated Personal Rights: Ryan's Case Re-evaluated' (1990-1992) 25-27 Irish Jurist 95; Doyle, *Constitutional Law* (n 18) 108.
[20] *Webster v Dun Laoghaire/Rathdown County Council* [2014] IEHC 181; *McInerney v DPP* [2014] IEHC 181; *Douglas v DPP* [2013] IEHC 343.

particular grounds, in the hope that the judge as decision-maker can be persuaded to agree. If society disagrees with the outcome, the Constitution can be changed. In Ireland, this majoritarian pressure-valve exists in the ability to amend the Constitution through a simple majority in a referendum. In the seventy nine years since its enactment, thirty five referenda have been held and the Constitution has been amended twenty nine times, including eight times in direct response to decisions of the courts.[21] This prevents judges being supreme in the legal order. Instead, Perry speaking generally, and Whyte in the Irish context, describe the courts' position as "judicial penultimacy", because the courts can protect minority interests and check the power of majoritarian politics but do not have final authority on the matter and can always be overridden by a sufficiently committed political system.[22] In Ireland, as Ó'Cinnéide notes, the supreme, or sovereign, authority is commonly said to be "the people",[23] but is more accurately described as a combination of the dominant political actors of the day in addition to the majority of voters in a referendum. Alternatively, judges with different views can be appointed to the courts, in the expectation that the decision will be overruled.

The second response to the rule of law concern is to point out that limiting the moral analysis just to one principle (dignity, democracy or autonomy) does not significantly improve objectivity because each of these is a vague moral standard in its own right. The problem of objectivity is thus one inherent in the power to strike down legislation under a constitutional guarantee of equality. Consequently, I support an approach to the grounds question that most directly tackles the issue of wrongful systemic inequality, which is to ask a judge to analyse the issue and decide, rather than to try to filter the analysis through a

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[21] Whyte notes seven example by 2015, after which the referendum on same sex marriage inserted Article 41.4 into the Constitution, overturning the High Court decision in *Zappone v Revenue Commissioners* [2008] 2 IR 417 (HC); Gerry Whyte, *Social Inclusion and the Legal System: Public Interest Law in Ireland* (2nd edn, IPA 2015) 65-66.

[22] Whyte (n 21) 58-59, 65-68; Michael Perry, *Towards a Theory of Human Rights: Religion, Law, Courts* (Cambridge University Press 2007) 107; O'Mahony notes the need still for judicial restraint, as a protection against 'knee-jerk' constitutional amendments, Conor O'Mahony, 'Constitutional Amendment and Judicial Restraint: How Restrained should an Irish Court be?' in Eoin Carolan (ed), *The Constitution of Ireland: Perspectives and Prospects* (Bloomsbury Professional 2012) 161.

[23] Colm Ó'Cinnéide, '"The people are the masters". The Paradox of Constitutionalism and the Uncertain Status of Popular Sovereignty within the Irish Constitutional Order' (2012) 48 Irish Jurist 249, 250-251, 273.

mediating principle of dignity, democracy or autonomy. That approach does not increase objectivity or predictability, and at best leads to inferior equality protection because some grounds that ought to be protected are overlooked, and at worst reduces accountability because the judge's moral views can be shoehorned into the relevant determining principle (dignity, etc). The trade-off from a tiny, if any, increase in objectivity is thus a decrease in honesty, transparency and equality. In constitutional questions, the best checks on the power of the judiciary are a strong ethic of good faith, a diligent legal profession and academia that are able to critique and challenge the moral reasoning of judges, and an engaged political system and civil society that is willing to assert the power to change the Constitution as desired.

2. Poverty as a Ground of Equality

If we accept that the superior courts have the authority to strike down legislation and state actions that violate a right to equality, and that as a result of open-ended constitutional texts the judges have to decide what grounds of equality to protect, we can begin to construct a case for the recognition of poverty, socio-economic status or social class as a ground.

2.1 Defining Poverty, Socio-Economic Status and Social Class

These three alternative grounds are closely related, though the kinds of inequality they cover are not fully synonymous. I define all three in more detail below, when seeking to rebut the challenge that equality protection on this ground would be unworkable due to vagueness. Poverty may be the easiest of the grounds to apply because it involves drawing a line across the spectrum of wealth and saying that anyone below the line is subject to poverty. The challenge with this exercise is deciding where to draw that line. This is an exceptionally complex task, without consensus even on the starting point.[24] First, a definition of absolute poverty is fixed to the basic needs of a person, which do not change across time or in different societies. As Foster explains:

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[24] Poverty has been the subject of huge amounts of research; it is not through lack of concern or interest from academics and researchers that poverty persists; see Paul Spicker, *The Idea of Poverty* (Policy Press 2007); Colin Menton, *An Investigation of the Measurement of Poverty in Ireland* (IPA 2007).

> An absolute poverty line is a fixed (group-specific) cutoff level **Za** that is applied across all potential resource distributions. In comparisons over time, for example, the standard is unchanged even in the face of economic growth (although provisions are made for changes in price levels) ...[25]

The United Nation's *Copenhagen Declaration* states:

> Absolute poverty is a condition characterised by severe deprivation of basic human needs, including food, safe drinking water, sanitation facilities, health, shelter, education and information.[26]

Despite resembling a list of socio-economic rights, Spicker cautions that the minimalistic way in which severe deprivation is understood prevents it being used to tackle inequality.[27] It is in this minimalistic way that Ó'Cinnéide argues that the ECHR could be used to protect against "destitution, degrading living conditions or similar manifestations of extreme poverty".[28] Second, relative poverty is based on the idea of inequality within society, rather than absolute deprivation of needs.[29] This means that what counts as poverty depends on the society in which it is placed. This is the sense in which I use poverty in this thesis. I consider below a number of ways of drawing a poverty line across the spectrum of wealth in society.

Socio-economic status, on the other hand, relates to the consequences of poverty, rather than the fact of poverty itself. Socio-economic status measures disadvantage according to a number of needs, such as the nature and quality of education, health or employment. The "unemployed", for example, constitute a group defined by socio-economic status.

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[25] James Foster, 'Absolute verses Relative Poverty' (1998) 88(2) American Economic Association Papers and Proceedings 335, 336

[26] United Nations World Summit, *Copenhagen Declaration on Social Development* (14 March 1994) A/CONF 166/9, [19].

[27] Spicker (n 24) 12-14.

[28] Colm Ó'Cinnéide, 'A Modest Proposal: Destitution, State Responsibility and the European Convention on Human Rights' (2008) 5 EHRLR 583, 583-592.

[29] Spicker (n 24) 14-15; Amartya Sen, 'Poor, Relatively Speaking' (1983) 35 Oxford Economic Papers 153; Foster (n 25); Peter Townsend, *Poverty in the United Kingdom: A Survey of Household Resources and Standards of Living* (Penguin 1979) 88; Joanna Mack and Stewart Lansley, *Poor Britain* (George Allen & Unwin 1985) 15-26.

Social class can be defined in several ways. Most famously, Marx defined class in terms of positions in the production process: proletariat or workers, and bourgeoisie or capitalists.[30] The contemporary use of class is generally similar to socio-economic status, relating to economic position and to other issues such as education, health and residence. The Census in Ireland, for example, provides information on both social class and socio-economic status, using a series of divisions that are remarkably similar.[31] The reason I include separate reference to socio-economic status and to social class is because social class, even if just in a colloquial sense, captures the recognition inequalities more vividly than the somewhat technical socio-economic status. This is particularly important in analysing inequality in schools, because so many of the actors in the school environment, such as teachers, students and policy-makers, articulate the inequality at stake in terms of social class rather than socio-economic status. A particularly prevalent example of this is accents, which are more commonly described as an indicator of social class rather than of "socio-economic status". It is in this more nebulous sense, as a form of identity rather than simply description of employment status, that I use the term "social class".

Jones provides a functional definition of the contemporary working class identity.[32] This is based, first, on someone who sells their labour to another, retaining the traditional Marxian notion of class, and second, in a job that lacks autonomy and control over how that labour is used. This includes a Weberian understanding of social stratification, which is that the ability to exercise power is a significant indicator of hierarchy.[33] The third criterion is that either the job is often of low status, insecure and poorly paid, or the community in which the person lives and operates is low status. It is this criterion in particular that distinguishes contemporary understandings of class from Marxian conceptions

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[30] Spicker (n 24) 53; Robert Nisbet, *The Sociological Tradition* (8th edn, Transaction Publishers 2007) 202-208; John J Macionis and Ken Plummer, *Sociology: A Global Introduction* (5th edn, Pearson 2012) ch 10.
[31] Central Statistics Office, *This is Ireland: Highlights from Census 2011, Part 2* (CSO 2012) 28-29.
[32] Owen Jones, *Chavs: The Demonization of the Working Class* (Verso 2012) 144-145.
[33] Nisbet (n 30) 182, 213; Macionis and Plummer (n 30) 273-274, ch 10.

and it is based on Bourdieu's analysis of hierarchy based on various types of capital, such as economic, social, cultural and symbolic.[34]

Socio-economic status and social class are defined by reference to working adults, which is then applied to their dependents and children. The same or similar analysis could be used under all three versions of the ground. As noted in the introduction to this chapter, I use all three because I suspect courts will be more susceptible to poverty than to class-based arguments, while some of the inequalities experienced by children within schools are better understood as a matter of social class or socio-economic status. However, the argument I present here and in chapter 4 is sufficiently broad to be adapted to any version of the ground.

2.2 Poverty in Equality Law

One of the core aims of Fredman's substantive conception of equality is for the definition of equality to be as comprehensive as possible. The first (redistribution) dimension is focused on the systemic material disadvantages suffered by certain groups. Poverty is one of the most glaringly obvious forms of inequality but discrimination and equality law has traditionally disregarded it. Instead of seeing poverty as analogous to ethnicity or gender, which are described as "status" inequalities, it was seen as a matter of welfare inequality and thus in the realm of politics and the welfare state.[35] For example, when assessing the scope for the ECHR to tackle deprivatio and extreme poverty, Ó'Cinnéide relies on the rights to life (Article 2), freedom from degrading treatment (Article 3) and private life (Article 8) but does not see much relevance of the guarantee of non-discrimination in Article 14.[36] Statutory discrimination law traditionally has used negative measures, such as prohibitions on direct and indirect discrimination, to deal with status inequalities and has not dealt with socio-economic inequality

[34] Pierre Bourdieu, *Distinctions: A Social Critique of the Judgment of Taste* (Routledge 1984); Pierre Bourdieu, *Language and Symbolic Power* (Polity Press 1991); Gerry MacRuairc, 'Where Words Collide: Social Class, Schools and Linguistic Discontinuity (2011) 32(4) British Journal of the Sociology of Education 541; Macionis and Plummer (n 30) 263-264

[35] Sandra Fredman, 'Facing the Future: Substantive Equality under the Spotlight' in Ockert Dupper and Christoph Garbers (eds) *Equality in the Workplace: Reflections from South Africa and Beyond* (Juta 2009); Ralph Winter, 'Poverty, Economic Equality, and the Equal Protection Clause' (1972) Supreme Court Rev 41.

[36] Ó'Cinnéide, 'A Modest Proposal' (n 28) 584, 586.

directly. Equality law in many national and international jurisdictions has reflected this distinction between two spheres of equality, leaving the socio-economic inequality to the political field to be tackled through positive welfare measures.[37] Underlying this distinction between status and welfare inequalities is the view that poverty is purely a matter of socio-economic disadvantage, with none of the kinds of harms associated with status inequality, such as the prejudice of racism or sexism. Conversely, status inequality is seen as purely recognition harm-based, without necessarily involving socio-economic disadvantage.[38]

There are numerous disparate arguments in favour of recognising poverty, socio-economic status or social class as a ground in equality law, which I will consider in four parts.

First, there is the extent of the overlap between the two traditional spheres of equality, such that the distinction is largely artificial. Fredman argues that a failure to tackle socio-economic inequality exacerbates efforts to achieve status equality because status groups who are discriminated against will also suffer socio-economic disadvantage, which feeds back into the unequal status.[39] In Principle 14 of the *Declaration of Principles on Equality*, the international coalition of equality and human rights experts came to the same conclusion:

> As poverty may be both a cause and consequence of discrimination, measures to alleviate poverty should be coordinated with measures to combat discrimination, in the pursuit of full and effective equality.[40]

Brodsky and Day note this overlap between spheres of equality in order to argue that poverty and socio-economic disadvantage should be treated as an issue in

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[37] Sandra Fredman, 'Redistribution and Recognition: Reconciling Inequalities' (2007) 23 South African Journal of Human Rights 214, 214-215; (USA) *San Antonio Independent School District v Rodriguez* (1973) 411 US 1, 93 SCt 1278; (Canada) *Gosselin v Quebec (Attorney General)* [2002] 4 SCR 429; (EU) *Ministerul Justiţiei si Libertăţilor Cetăţenesti v Agafiţei* [2011] 3 CMLR 33; but see the UK dealing with socio-economic inequality indirectly in *R (Tigere) v Secretary of State for Business, Innovation and Skills* [2015] 1 WLR 3820 and *Rutherford and A v Secretary of State for Work and Pensions* [2016] EWCA Civ 29.

[38] Fredman, 'Facing the Future' (n 35).

[39] Fredman, 'Redistribution and Recognition' (n 37).

[40] Equal Rights Trust, *Declaration of Principles on Equality – Principle 14* (2008).

gender inequality.[41] Treating poverty as an issue of ethnicity or gender inequality is certainly welcome from the perspective of any of those status groups. Brodsky and Day make their suggestion as a way of judicialising poverty, in light of the reluctance of courts to engage with the issue. It is thus a second-best suggestion and the difficulty from the perspective of full substantive equality is that, although the overlap between traditional status groups and socio-economically disadvantaged groups is significant, it is not perfect, which means that certain disadvantaged groups, such as poor white men, homeless people or people with drug additions, will fall between the gaps in the group definitions.[42] It also leads to a piecemeal understanding of poverty as an equality issue. More fundamentally, it reconceives of social class or wealth-based hierarchy as an aspect of ethnic inequality, despite the different causes and experiences of each.[43]

In contrast to the traditional distinction, a more comprehensive understanding of the role of equality law is seen in the (unimplemented) s.1 of the United Kingdom's Equality Act 2010. This would have imposed a positive duty on public authorities to have due regard to the impact of their actions on socio-economic inequality. The previous government of the UK committed not to bring the socio-economic inequality duty into effect, and there is no indication that it will be revived.[44] A more dramatic example of a comprehensive understanding of equality comes from the Canadian Human Rights Act Review Panel, who recommended that "social condition" should be a protected ground.[45] Interestingly, the Panel's rationale focused mainly on the near-immutable nature of social condition:

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[41] Gwen Brodsky and Shelagh Day, 'Denial of the Means of Subsistence as an Equality Violation' (2005) Acta Juridica 149.
[42] Martha Jackman, 'Constitutional Contact with the Disparities in the World: Poverty as a Prohibited Ground of Discrimination Under the Canadian Charter and Human Rights Law' (1994-1995) 2 Rev Const Stud 76, 78; Fredman, 'Redistribution and Recognition' (n 37) 228.
[43] Jones (n 32) 223-224, 243-244.
[44] John Wadham, Anthony Robinson, David Ruebain and Susie Uppal, *Blackstone's Guide to The Equality Act 2010* (2nd edn, OUP 2012) 150.
[45] Canadian Human Rights Act Review Panel, *Promoting Equality: A New Vision* (Department of Justice 2000) <http://publications.gc.ca/collections/Collection/J2-168-2000E.pdf> (accessed 20 October 2014); Sandra Fredman, 'Positive Duties and Socio-Economic Disadvantage' (2010) 3 European Human Rights Law Review 290, 294.

> Research done for the Panel shows that poverty is immutable in the sense that it is beyond the control of most poor, at least over considerable periods of their lives. There is evidence that poverty is inherited because individuals whose parents were poor are more likely to live in poverty. Similarly, there is a correlation between one's educational level and that of his or her parents. Our research also shows that while people may move from social assistance to a low-paying job to employment insurance, few actually move into income levels high enough to escape their condition of poverty.[46]

Explicit socio-economic status protection in human rights law exists in several jurisdictions in Canada, including Quebec, New Brunswick, and the Northwest Territories, as well as in South Africa and Belgium.[47]

Secondly, and more fundamentally, there is a positive argument in favour of recognising poverty, socio-economic status or social class as a ground, which is that this inequality is more than mere material disadvantage and is itself a basis on which the recognition harms of prejudice, stereotyping and bias often occur.[48] These harms arise in the recognition dimension of Fredman's conception of substantive equality. Numerous writers note the dignity violations associated with measures that discriminate against poor people, compounding the material harm of the measure with an expressive one. For example, Brodsky and Day note that cuts in social welfare are often politically justified by stereotypes of the unemployed as lazy or incompetent,[49] which, as is well-documented, cumulate in scapegoating working class and poor people as responsible for their own disadvantaged position.[50] This transforms social welfare from a measure that

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[46] Fredman, 'Positive Duties and Socio-Economic Disadvantage' (n 45); for similar arguments in the context of the Canadian Charter, see Bruce Porter, 'Expectations of Equality' (2006) 33 Supreme Court Law Review (2d) 23 (available on SSRN, <http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2470375> (accessed 20 October 2014)).

[47] Mel Cousins, 'The European Convention on Human Rights, non-discrimination and social security: great scope, little depth?' (2009) 16(3) Journal of Social Security Law 120, 128-129.

[48] Jackman, 'Constitutional Contact with the Disparities in the World' (n 42) 103-104.

[49] Brodsky and Day (n 41) 156-158.

[50] Anne Daguerre, 'The Unemployed and the Moral Case for Benefit Sanctions' (2015) 22(3) Journal of Social Security Law 154; Martha Jackman, 'Charter Equality at Twenty: Reflections of a Card-Carrying Member of the Court Party' (2006) 20 National Journal of

supports equality into a source of shame and stigma. On this basis, Michelman argues that though it would be inaccurate to consider the poor to be a cohesive and unitary (or discrete) group, there are certainly recognition and dignity harms and inequalities associated with poverty.[51] The UN Committee on Economic, Social and Cultural Rights has expressed a similar view, highlighting the stigmatic recognition harms associated with poverty:

> Individuals and groups of individuals must not be arbitrarily treated on account of belonging to a certain economic or social group or strata within society. A person's social and economic situation when living in poverty or being homeless may result in pervasive discrimination, stigmatisation and negative stereotyping which can lead to the refusal of or unequal access to the same quality of education and health care as others, as well as the denial of or unequal access to public places.[52]

The extent of these recognition harms has received attention in the Irish courts, which I address in chapter 4. They were also partially recognised in the Canadian Supreme Court case of *Gosselin v Quebec*.[53] In *Gosselin*, the Court held by 5:4 that cuts in social welfare were not in breach of Section 15 of the Charter. The minority of four judges, however, held that the measures were discriminatory; their reasoning was based, not on the material harms suffered by the cuts in welfare, but on the expressive harms of the underlying stereotypical assumptions that the unemployed were lazy and unwilling to work.[54] Poverty, social class and associated grounds have not been recognised by the Canadian courts as

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Constitutional Law 115, 118; Andrew Arden and Caroline Hunter, 'For Whom is Social Housing?' (2011) 14(11) Journal of Housing Law 95; Joe Wills, 'The world turned upside down? Neo-liberalism, socioeconomic rights, and hegemony' (2014) 27(1) Leiden Journal of International Law 11; Jackman, 'Constitutional Contact with the Disparities in the World' (n 42) 90-95; Fredman, 'Facing the Future' (n 35); Jones (n 32) 137; Brodsky and Day (n 41) 163-164.

[51] Frank Michelman, 'Welfare Rights in a Constitutional Democracy' (1979) Washington Uni LQ 659, 678.

[52] Committee on Economic, Social and Cultural Rights, 'General Comment No. 20 Non-Discrimination in Economic, Social and Cultural Rights' E/C.12/GC/20 (2009) [35]; Fredman, 'Positive Duties and Socio-Economic Disadvantage' (n 45) 294.

[53] *Gosselin v Quebec (Attorney General)* [2002] 4 SCR 429.

[54] *Gosselin v Quebec (Attorney General)* [2002] 4 SCR 429, [405], [407], see especially Bastarache and LeBel JJ; Jackman, 'Constitutional Contact with the Disparities in the World' (n 42) 158.

analogous grounds under Section 15,[55] though there is significant academic support for their recognition.[56]

Thirdly, this prejudice exists not merely in an inter-personal context but is also pervasive in society, which causes institutionalised discrimination. This results in many major inequalities in the participation dimension, which is another positive argument for recognition of the ground. Loffredo, in the context of the US, writes powerfully of the institutional barriers that systematically exclude the poor to the benefit of the rich in many facets of society.[57] Jackman, focusing particularly on the legal system, notes similar biases in the Canadian context. [58] In a demonstration of the extent to which the different dimensions of equality overlap, many of the exclusionary barriers that deny equality to poor people in the participation dimension are not formal legal barriers at all; rather, they are cultural barriers created though inadequate education, low levels of "aspiration" to middle class values owing to hostility and prejudice, and unawareness of rights, entitlements and opportunities, and disenchantment with the political system. Whether formal or cultural, barriers to the poor participating in ordinary life are pervasive, stretching from the more tangible parts of public life, such as education, employment, housing, health, and service provision, to the less tangible parts of valuable networking and social groupings.[59]

Exclusion from the political system receives particular attention in the literature. This is partly because of the dominant influence of the US Fourteenth Amendment jurisprudence on equality theory, where exclusion from the political

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[55] See also, *Masse v Ontario (Ministry of Community and Social Services)* (1996) CarswellOnt 338, 134 DLR (4th) 20 (Ont Div Ct); *Polewsky v Home Hardware Stores* (1999) CarswellOnt 3500, 68 CRR (2d) 330 (Ont SCJ) [57]; *Feberated Anti-Poverty Groups of British Columbia v Vancouver (City)* (2002) CarswellBC 607, [2002] BCJ No 493 (BC SC) [289]; *Falkiner v Ontario (Director of Income Maintenance)* (2002) CarswellOnt 1558, 59 OR (3d) 481 (Ont CA) [18]; Jackman, 'Charter Equality at Twenty' (n 50).

[56] Lynn Smith and William Black, 'The Equality Rights' in Errol Mendes and Stéphane Beaulac (eds), *Canadian Charter of Rights and Freedoms* (5th edn, LexisNexis 2013) 998; David Wiseman, 'Competence Concerns in Charter Adjudication: Countering the Anti-Poverty Incompetence Argument' (2006) 51 McGill LJ 503; Jackman, 'Charter Equality at Twenty' (n 50).

[57] Stephen Loffredo, 'Poverty, Democracy and Constitutional Law' (1993) 141(4) UPennLR 1277, 1319.

[58] Jackman, 'Constitutional Contact with the Disparities in the World' (n 42) 90-95.

[59] Richard Wilkinson and Kate Pickett, *The Spirit Level: Why Equality is Better for Everyone* (Penguin 2010); Jones (n 32).

process is a significant consideration when determining whether a group is a "discrete and insular minority" and therefore a suspect classification. One of the most famous rejections of poverty as a protected ground in equality law is *San Antonio Independent School District v Rodriguez*,[60] in which the Supreme Court of the United States refused to subject discrimination against the poor to strict scrutiny on the basis that the poor are not a discrete and insular minority. It is worth bearing in mind, however, that Justice Powell for the majority held that the alleged discrimination at issue was on the basis of "district wealth", which he distinguished from "wealth". Thus, despite being seen as a rejection of poverty as a protection ground, *San Antonio* may not be fatal to the use of equality in this way. Loffredo argues that the purpose of protecting discrete and insular minorities in US equality law is as a proxy for groups excluded from the political process, and that had the US Supreme Court focused that rationale directly rather than on the empirical question of being discrete and insular, then the Court could easily have found poverty to be a suspect classification.[61] The political connotations of *Rodriguez* were significant. The litigants challenged the system of funding public schools through local taxation, which meant schools in wealthy areas had far more resources than those in disadvantaged areas. The case arose following a series of Supreme Court cases in which the court appeared to be creeping towards the recognition of poverty as a suspect classification.[62] Had it been successful, the impact on the education and political systems would have been as profound as *Brown v Board of Education of Topeka*.[63]

Loffredo considers and rejects the argument that low voter turnout and low political participation amongst the poor obviates the need for judicial intervention because there is a ready-made solution to political exclusion available; encourage more voting and political activity. Such an argument, according to Loffredo, is formal in the extreme, because it expects an unrealistic level of

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[60] *San Antonio Independent School District v Rodriguez* (1973) 411 US 1, 93 SCt 1278.
[61] Loffredo (n 57).
[62] *Griffin v Illinois* 351 US 12 (1956); *Douglas v California* 372 US 353 (1963); *MLB v SLJ* (1996) 519 US 102, 117 SCt 555 136 LEd 2d 473; Jesse Choper, Richard Fallon, Yale Kamisar and Steven Shiffrin, *Constitutional Law: Cases – Comments – Questions* (10th edn, Thomson West 2006) 1424-1438.
[63] *Brown v Board of Education of Topeka* (1954) 347 US 483.

engagement from someone who may be struggling to survive and who has inadequate skills to engage with and create political arguments.[64] Jackman similarly highlights that the near impossibility of running for office when facing poverty is reflected also in barriers to participating at a lower level of the political organisations. On an individual level hurdles, such as limited literacy and not having a stable address, can inhibit political engagement.[65] Additionally, on a collective level, the poor may be numerous but often are not politically organised and lack the resources to start a political movement. In particular, the degradation of the trade union movement has contributed to this political isolation.[66]

Finally, there are the material inequalities suffered due to poverty. These constitute the harms of the distributive dimension, and the third positive argument for recognition of the ground. I have left these arguments until last for two reasons. First, they are the most obvious of the harms associated with poverty[67] and so to an extent it is unnecessary to highlight them. Secondly, in line with the traditional distinction between welfare and status inequalities set out above, arguments about purely distributive inequalities tend not to be persuasive before the courts. Especially since the development of the presumptively proscribed grounds in Ireland is still in the early stages, it is prudent to map the argument for poverty as a ground to the criterion of dignity harm, which has so far appeared dominant. Consequently, the second of these four arguments listed above is the most significant in an Irish context.

There is a huge volume of analysis on the material inequalities caused by poverty and inequality based on socio-economic status or social class.[68] I consider those affecting the education system in Ireland in chapter 5. The foregoing arguments demonstrate the extent to which poverty, socio-economic status and social class

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[64] Loffredo (n 57) 1327-1329.
[65] Jackman, 'Constitutional Contact with the Disparities in the World' (n 42) 98.
[66] Lionel Fulton, 'Worker Representation in Europe: Ireland – Trade Unions' (European Trade Union Institute, 2015) <http://www.worker-participation.eu/National-Industrial-Relations/Countries/Ireland/Trade-Unions> (accessed 10 February 2015); John Hood, 'What influence do unions have on inequality?' (The Equality Trust, 9 September 2015) <https://www.equalitytrust.org.uk/what-influence-do-unions-have-inequality> (accessed 10 February 2016);
[67] Fredman, 'Redistribution and Recognition' (n 37).
[68] Wilkinson and Pickett (n 59).

are analogous to other "status" grounds in equality law, such as gender or ethnicity. The question now is whether the court can have a legitimate role in addressing such inequalities.

3. Objections to Poverty as a Ground in Equality Law

In section 2 I sought to counter the claim that poverty is different in nature to status inequalities, such as on the basis gender or ethnicity. Having achieved that, however, there are a number of objections to this ground of equality that have to be overcome. These objections reflect the debate over judicially enforceable socio-economic rights, in that they concern the proper role of the State (or at least the judiciary) in dealing with disadvantaged groups. The main argument in the debate focuses on the different understandings of democracy and the doctrine of the separation of powers. Even if that debate were settled in favour of allowing the judiciary to engage with economic disadvantage, there is also disagreement over whether that should be through an equality guarantee or through socio-economic rights. Another debate is discrete to equality law, which is the question of whether poverty, social class or socio-economic status could be defined with sufficient precision to be a ground of equality. This concern arises with the identification of any ground but is exacerbated when dealing with poverty.

3.1 Fundamental Objection

A core issue in the debate over the justiciability of poverty is the proper role of the state with regard to redistribution. One body of thought, which I will call the fundamental objection, argues that there is no legitimate basis on which the state can redistribute wealth, and thus no basis on which the courts can deal with issue of poverty.[69] Winter, for example, argues that redistribution and greater economic equality is undesirable, even if brought about through political-democratic means, because he argues that such measures inevitably reduce the overall prosperity of society by failing adequately to reward the productive

[69] For a review of this objection, see Colm Ó'Cinnéide, 'Aspirations Unfulfilled: The Equality Right in Irish Law' in Donncha O'Connell (ed), *Irish Human Rights Law Review 2010* (Clarus Press 2010) 46-48.

members of the community.[70] Another notable advocate for this view is McCloskey, who defends liberalism on the basis that the conditions of "the wretched of the earth" are most effectively and quickly improved by economic growth driven by private enterprise.[71] In the US constitutional law, this view manifests itself in the State Action Doctrine, which means that constitutional protections only apply to governmental classifications and do not have horizontal effect between citizens. Under this doctrine, the state is not responsible for independently arising disadvantage. As Michelman explains, this perspective sees poverty in absolute terms, rather than discrimination or inequality, and thus beyond the state's responsibility.[72]

The fundamental objection can be challenged in three ways. First, it relies on the flawed assumption that the disadvantage suffered by the poor exists independent of the state. Picketty demonstrates that unchecked capitalist systems in rich countries tend to concentrate wealth, because returns on capital exceed income from labour:

> In slowly growing economies [such as wealthy industrialised countries], past wealth naturally takes on disproportionate importance, because it takes only a small flow of new savings to increase the stock of wealth steadily and substantially. If, moreover, the rate of return on capital remains significantly above the growth rate for an extended period of time (which is more likely when the growth rate is low, though not automatic), then the risk of divergence in the distribution of wealth is very high. ... Under such conditions it is almost inevitable that inherited wealth will dominate wealth amassed from a lifetime's labour by a wide margin, and the concentration of capital will attain extremely high levels – levels

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[70] Winter (n 35) 61-85.

[71] Deirdre McCloskey, *The Bourgeois Virtues: Ethics for an Age of Commerce* (University of Chicago Press 2006); Deirdre McCloskey, *Bourgeois Dignity: Why Economics Can't Explain the Modern World* (University of Chicago Press 2010); Deirdre McCloskey, *Bourgeois Equality: How Ideas, Not Capital or Institutions, Enriched the World* (University of Chicago Press (forthcoming) 2016) (summary available <http://deirdremccloskey.org/docs/pdf/McCloskey_IdeasEnrichedTheWorld.pdf> accessed 5 February 2016).

[72] Frank Michelman, 'Foreword: On Protecting the Poor through the Fourteenth Amendment' (1969-1970) 83 Harv LRev 7, 10.

potentially incompatible with the meritocratic values and principles of social justice fundamental to modern democratic societies.[73]

A state's preservation of a market-based system, therefore, points towards state responsibility for the inequality. While a market-system brings advantages, a moral argument can be made for the State intervening to correct its inegalitarian effects. Second, even accepting the fundamental objector's terms that the disadvantage is independently created, it is possible to rebut the conclusion that this prevents legitimate redistribution by the State. In contrast to the fundamental objector's view of government as an independent entity that imposes on individual autonomy, and therefore limited in its power to interfere with social structures, many theorists subscribe to a more communitarian view of democratic government as an emanation of society itself.[74] As I discuss in chapter 4, it is unquestionable that, according to the Irish Constitution, the Irish Nation and society exist as antecedent to the State, and that the State is created by society in order to achieve the "common good". Under this view, there is no especially significant distinction between inequalities created by government action and those created by other social factors; both are similarly open to State intervention in the interests of the common good. Society is entitled to confront those unequal structures, and entitled to choose to do so collectively through the institutions of the State. Even Hogan, for example, who does not support enforceable socio-economic rights, argues that a constitutional system that condemns the poorest in society to destitution is not fulfilling its function as a basic law framework for society.[75] As considered in chapter 4, Whyte has demonstrated that the Irish Constitution involves an amalgamation of both liberal and communitarian philosophies of government.[76]

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[73] Thomas Piketty, *Capital in the Twenty-First Century* (Harvard University Press 2014) 25-26, 22-27, 228-229, 424, 571.

[74] Sandra Fredman, 'Affirmative Action and the European Court of Justice: A Critical Analysis' in Jo Shaw (ed), *Social Law and Policy in an Evolving European Union* (Hart 2000) 174; Whyte (n 21) 31; Nisbet (n 30) 53; Peter Cookson, 'First Person Plural: Education as Public Property' in Bruce Biddle (ed), *Social Class, Poverty, and Education: Policy and Practice* (RoutledgeFalmer 2001) 40.

[75] Gerard Hogan, 'Directive Principles, Socio-Economic Rights and the Constitution' (2001) 36 Irish Jurist 174, 198.

[76] Whyte, *Social Inclusion* (n 21) 51.

Third, the fundamental objection relies on an absolute definition of poverty, rather than a relative one. Poverty reduction, particularly in McCloskey's view, is best achieved by generating wealth that raises the prosperity of the whole of society. According to this understanding, the fact that the conditions of the wealthiest improve exponentially faster than the conditions of the poorest is unimportant, provided the overall condition for those at the bottom of the social spectrum improve in real terms. This is what McCloskey describes as "the Bourgeois Deal": let me make money in the first act, and by the third act I will make you all rich.[77] The fundamental objection is unconcerned with inequality and only aims to address basic needs. The problem with limiting our understanding of poverty in this way is that it overlooks many negative feature that are directly related to being a matter of inequality rather than basic needs, such as stigma and prejudice, weak educational and employment opportunities, and low political participation. Those dimensions of the condition of poverty are explained by the inequality of poverty and wealth, rather than the absolute deprivation of resources. The stigma with being poor is not because it is inherently stigmatising only to have a certain level of income; it is because relative to that income, someone else has significantly more. Wilkinson and Pikett, in their famous book *The Spirit Level*, offer a compelling explanation for these other negative features of poverty.[78] Their evidence demonstrates that, in dealing with wealthy developed states, it is not the overall level of wealth in society that dictates whether people live in poverty, but the level of inequality across society. They prove that more equal societies perform better in every measure of social progress, from lower crime rates to better health and educational outcomes, than unequal countries, even if the gross domestic product (GDP) of unequal comparator countries are higher.[79] Not only do the equal countries perform better overall, the outcomes for the people at the top of the social spectrum are actually better:

> What the studies do make clear, however, is that greater equality brings substantial gains even in the top occupational class and among the richest or best-educated quarter or third of the population, which includes

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[77] McCloskey, *Bourgeois Equality* (n 71) 22.
[78] Wilkinson and Pickett (n 59) 5-10, 29.
[79] Wilkinson and Pickett (n 59) 18-20, 174, ch 13.

> the small minority of the seriously rich. In short, whether we look at states or countries, the benefits of greater equality seem to be shared across the vast majority of the population.[80]

This last fact, in particular, is a major blow to the fundamental objection because it demonstrates that once a country reaches a certain level of economic development, further social progress is only achieved by equalising wealth, rather than by pursuing profit. As a result, in developed countries poverty is not caused by a lack of resources but, as Whyte,[81] Murphy,[82] and others[83] have argued, by a concentration of the resources that do exist into just a few sectors of society.

The fundamental objectors tend to belong to the economic school of free-market capitalism, which is at endless debate with left-wing theory, the resolution of which is obviously beyond this chapter and a constitutional law research project. Suffice it to note that there is significant opposition to the fundamental objectors and a strong view that economic productivity and social progress increase with economic redistribution, [84] such that the fundamental objection alone is insufficient to delegitimise the claim that poverty, social class or socio-economic status ought to be a protected ground.

An alternative objection under this heading is the claim that it is impossible or impractical to seek to remove inequality because once one issue is equalised, another that we thought unimportant suddenly becomes significant. This objection is less fundamental but is still a potential barrier to the project of this thesis. Tocqueville stated this concern:

> When inequality of conditions is the common law of society, the most marked inequalities do not strike the eye; when everything is nearly on the same level, the slightest are marked enough to hurt it. Hence the desire

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[80] Wilkinson and Pickett (n 59) 181, ch 13.
[81] Gerry Whyte, 'Law and Poverty in Ireland' in William Duncan (ed), *Law and Social Policy* (DULJ 1987) 90-91.
[82] Tim Murphy, 'Economic Inequality and the Constitution' in Tim Murphy and Patrick Twomey (eds), *Ireland's Evolving Constitution 1937–1997: Collected Essays* (Oxford Uni Press 1998) 172.
[83] Wilkinson and Pickett (n 59) 13; Piketty (n 73) 228-229.
[84] Wilkinson and Pickett (n 59); Michelman, 'Welfare Rights' (n 51) 679; Joseph Stiglitz, *The Price of Inequality* (Penguin 2013).

> for inequality always becomes insatiable in proportion as equality is more complete.[85]

This objection simply demonstrates the fact that all people cannot be made equal in all circumstances. It does not, however, show that inequality cannot be reduced. On the contrary, the course of human history has shown many examples of reduced inequality, and as Wilkinson and Pickett demonstrate, there are a number of wealthy developed states that are significantly more equal than others.[86] Nor does this objection account for the fact that inequality on certain grounds can be more harmful than others. It all comes back to the context of the society; inequality on the ground of gender is more harmful than on the ground of eye-colour in Ireland. As a result, we can focus our attention on the gender ground and neglect the eye-colour ground. If, however, inequality on the eye-colour ground were to expand, attention could shift to the eradication of that inequality. There are innumerable differences between people, individually and between groups. Any of them could become socially significant in the future, but in the meantime it is those that are used to create hierarchies that are deserving of equality protection.[87]

3.2 Democratic Objection

A second body of thought, which I will call the democratic objection,[88] argues that whether or not there are sound economic arguments for redistribution, it is a matter for the democratic political process and not for the judiciary. The arguments are similar to the separation of powers concerns that arise in the Irish context and have been occasionally adopted with enthusiasm by the Irish Supreme Court.[89] I consider this objection in more detail and in an Irish context in chapter 4. Before then, it is worth emphasising that such objections can only be levelled at using the equality guarantee to remedy inequalities in the distributive dimension and do not apply with equal force when dealing with the recognition

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[85] Quoted in Nisbet (n 30) 188.
[86] Wilkinson and Pickett (n 59) 280-281.
[87] David DuBois, 'Family Disadvantage, the Self, and Academic Achievement' in Bruce Biddle (ed), *Social Class, Poverty, and Education: Policy and Practice* (RoutledgeFalmer 2001) 133-169.
[88] Whyte, *Social Inclusion* (n 21) 12.
[89] Gerry Whyte, 'A Tale of Two Cases – Divergent Approaches of the Irish Supreme Court to Distributive Justice' (2010) 32 DULJ 365.

harms associated with poverty. The material harm of poverty (having to do without) can be separated from the recognition harm of being poor (stigma and low social status). This is because the democratic objectors' primary concern is with distributive matters of state funds. There is no relevant difference between the recognition harms associated with poverty as a ground and with other grounds such as gender or ethnicity. Since many democratic objectors accept that an equality guarantee can cover recognition inequalities on the grounds of ethnicity or gender, there is no valid democratic objection to covering recognition inequalities on the ground of poverty.[90]

More fundamentally, Loffredo provides a powerful critique of the democratic objectors' use of a majoritarian democratic philosophy, arguing that it presupposes a democratic legitimacy and capacity to partake that are more fiction than reality.[91] He argues that for the courts, in the US context, to treat poverty as anything other than a suspect classification is counterintuitive because in that jurisdiction the touchstone for identifying grounds of equality law is that a group is a "discrete and insular minority", which is used as a proxy for exclusion from the political process.[92] The rationale for applying a lower standard of review for non-suspect classifications is that the democratic process provides a better check against discrimination and inequality than does the judiciary. Given the extent to which the poor are excluded from the democratic process, Loffredo argues that, rather than being concerned with the democratic implications of treating poverty as a suspect classification, there should instead be greater concerns about the legitimacy of a purportedly democracy system that systematically excludes such large swathes of society.[93] A powerful response to the democratic objectors is to highlight the anti-democratic features of poverty, thus demonstrating that democracy is enhanced, rather than harmed,

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[90] Perhaps unsurprisingly, the Irish courts have used equality to protect against dignity-based harms associated with poverty in *King v Attorney General* [1981] 1 IR 233; *Dillon v DPP* [2008] 1 IR 383; see ch 4.
[91] Loffredo (n 57) 1293.
[92] *United States v Carolene Products Company* (1938) 304 US 144, footnote 4; Loffredo (n 57) 1298; William Clune, 'The Supreme Court's Treatment of Wealth Discrimination under the Fourteenth Amendment' (1975) Supreme Court Rev 289.
[93] Loffredo (n 57) 1351.

by treating poverty as a ground of equality.[94] That this may lead to radical, even anti-majoritarian,[95] consequences is, in Loffredo's view, to be welcomed:

> ... the prospect of radical consequences is itself the function of untoward political marginalization. It exists by virtue of the prodigious body of purportedly neutral laws that invariably disadvantage lower class and minority citizens. On a principled approach, the expectation of far reaching consequences should militate in favor of heightened judicial intervention, not against it.[96]

3.3 Prioritising Socio-Economic Rights over Equality

The third objection, even for proponents of an active judiciary, is the claim that it is better to deal with poverty through socio-economic rights than through a guarantee of equality. Some, such as Michelman[97] in the US or Whyte[98] in Ireland, argue for socio-economic rights as the best constitutional method for dealing with disadvantage. Others take an intermediate approach, seeing equality as an alternative when socio-economic rights are unavailable, such as O'Connell who suggests using Article 40.1 equality in light of the Supreme Court's rejection of implied socio-economic rights.[99] The opposite approach, such as that taken by Brodsky and Day, focuses on equality rather than rights; they argue that poverty should be seen as a facet of sex or racial inequality so that Section 15 equality in the Canadian Charter includes a right to compel the government to ensure that everyone has adequate food, clothing and housing.[100] This debate does not take place directly between proponents of either socio-

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[94] Sandra Fredman, 'Providing Equality: Substantive Equality and the Positive Duty to Provide' (2005) 21 S Afr J on HR 163, 175-176; Jackman, 'Charter Equality at Twenty' (n 50) 125.

[95] John Hart Ely, *Democracy and Distrust: A Theory of Judicial Review* (Harvard University Press 1980).

[96] Loffredo (n 57) 1353.

[97] Michelman, 'Welfare Rights' (n 51).

[98] Whyte, *Social Inclusion* (n 21); Gerry Whyte, 'Judicial Capacity to Enforce Socio-Economic Rights' (2014) 37 DULJ 203; Gerry Whyte, 'Discerning the Philosophical Premises of the Report of the Constitution Review Group: An Analysis of the Recommendations on Fundamental Rights' (1998) 2 Contemporary Issues in Irish Law and Politics 216, 235-236; Hogan (n 19) 175-176.

[99] Rory O'Connell, 'From Equal Before the Law to the Equal Benefit of the Law' in Oran Doyle and Eoin Carolan (eds), *The Irish Constitution: Governance and Values* (Thomson Round Hall 2008).

[100] Brodsky and Day (n 41) 153; see also, Murphy (n 82).

economic rights or a substantive equality guarantee (in some case the advocates are in both camps), but rather between each of them and opponents of an active judiciary in this field. The debate between a preference for rights or equality is a secondary issue in each debate.

The looming danger with using an equality guarantee to challenge socio-economic disadvantage is the prospect of levelling down. Proponents of equality are often at pains to overcome this potential weakness in their arguments. The levelling down concern is set out and explained by Fredman:

> ... the absence of substantive underpinning means that a claim of equal treatment can be met by removing a benefit from the relatively privileged group (levelling down). In a famous US case, the city of Jackson in Mississippi was ordered to desegregate its four 'whites only' swimming pools, together with its single 'blacks only' pool. Instead, it decided to close down all its public swimming pools. It was held that identical treatment had been applied to both whites and blacks and that therefore there was no breach of the equality guarantee.[101]

As this shows, the possibility of levelling down primarily relies on a neutral treatment definition of equality. Under a more substantive definition, such as defining equality according to disadvantage as I urge in chapters 1 and 3, levelling down is far less likely to occur (even though it is theoretically possible). This is because equality will not be satisfied by merely neutral treatment by the state. In the swimming pool example, the neutral treatment of removing all public swimming pools does not achieve equality at all because privately run pools continue to exist that are only available to white people, whether by direct or indirect discrimination. For levelling down to satisfy a substantive conception of equality, the state would have to go further and remove the inequality in the spread of disadvantage, imposing the disadvantage on everyone (ie by banning swimming pools, whether private or public). That is far less likely to occur given that the politically powerful would also have to suffer the disadvantage, thus providing a check against levelling down that does not exist when defining

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[101] Fredman, *Discrimination Law* (n 7) 10; referring to *Palmer v Thompson* (1971) 403 US 217, 91 SCt 1940.

equality according to neutral treatment. I pursue this idea further in chapter 8 by arguing that it would be politically impossible to level down in the education system if the court used a substantive conception of equality. The levelling down concern remains relevant in Ireland because of the tendency of Irish judges to define equality according to neutral treatment rather than disadvantage. In response, I would refer to arguments I make in chapter 3 that equality is more coherently defined by disadvantage than treatment, and that therefore levelling down is a less realistic way of achieving equality than levelling up.

Fredman suggests an alternative means of preventing levelling down, which is to base substantive equality on an enhancement of each individual's worth in the eyes of society.[102] This means that levelling down can never achieve substantive equality because it involves harming individuals, rather than benefitting them. This is a strong theoretical basis for avoiding levelling down but it relies on the introduction of a second value into the equality analysis, that of improving the position of the individual. Given the preference of the Irish courts for process rather than full substantive equality, as analysed in chapter 3, it would be ambitious to rely on such a strong conception in order to avoiding the levelling down concern. Consequently, I think a reliance on the political reality argument to rebut the levelling down concern is more persuasive.

If the levelling down concern can be overcome, there is a significant benefit to using an equality guarantee to tackle disadvantage, rather than socio-economic rights. A core difficulty with socio-economic rights is how to define the entitlement; debates about the meaning and appropriateness of a minimum core are difficult and inexact. In contrast, equality is an inherently relative principle, which means that there is a clear benchmark against which to measure the spread of advantages and disadvantages. If one person is disadvantaged relative to another, then inequality has arisen and there is no need at this initial stage to be concerned with minimum core elements. (Those issues arise later in the analysis, as they do again with socio-economic rights, when determining whether the inequality is justified and deciding what remedy to impose.) Rather than

[102] Fredman, *Discrimination Law* (n 7) 21.

denying the relativism of equality,[103] at least in the context of poverty, socio-economic status and social class, as Moreau does for example, I think it better to change the measure of relativism from treatment to disadvantage.[104] It is unequal to treat people neutrally if there are unequal disadvantages, while conversely there is no inequality to treat people differently if that removes unequal disadvantages. The relative nature of equality is thus to be welcomed because it gives far greater clarity than a minimum core of a right could do, and because a substantive definition of equality can harness political reality as a check against levelling down in a way that is unavailable to a neutral treatment definition of equality.

Whether rights or equality individually are stronger, it is widely accepted that each has something to offer in the protection against poverty and disadvantage. The best approach is harness both protections together,[105] which is the basis of the conjoined application of the right to education in conjunction with the right to equality, for which I argue in chapter 7.

3.4 Vagueness Objection

An interesting objection to the use of poverty as a ground in equality law is that a group defined by poverty, socio-economic status or social class is vague. The Canadian Human Rights Act Review Panel, for example, recommended using "social condition" as the defining criterion because it saw poverty as too vague and debatable.[106] Winter argues against the recognition of poverty as a suspect classification in the US because, using the absolute rather than relative definition, it does not give a clear line below which people are in poverty.[107] The Constitution Review Group raised similar concerns, when it considered whether to propose an explicit right to freedom from poverty and social exclusion for the Irish Constitution, finding that poverty is "not susceptible to objective determination":

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[103] For discussion, see, Sophie Moreau, 'Equality Rights and the Relevance of Comparator Groups' (2006) 5 J L & Equality 81, 88-92.
[104] Smith and Black (n 56) 981 also support the relative nature of equality.
[105] Fredman (n 94); Sandra Liebenberg and Beth Goldblatt, 'The Interrelationship Between Equality and SE Rights under South Africa's Transformative Constitution' (2007) 23(2) South African Journal on Human Rights 335.
[106] Canadian HRA Review Panel (n 45).
[107] Winter (n 70) 98-99.

> It would then become a matter for judges in particular cases to determine what constitutes poverty (absolute or relative) and what minimum income would be needed, according to circumstances, to overcome it. Government and Oireachtas would have no discretion as to what amount of revenue could, or should, be raised from the public to fund the remedial requirement.[108]

The apparent problems with defining poverty are two-fold. First, the "poor" are not a homogenous group, and second, wealth and poverty are spread across a spectrum, as a result of which it is difficult to identify the point at which poverty starts. Before addressing both concerns, it is worth noting that vagueness is prevalent in many constitutional law concepts. Murphy argues that many human rights, such as the right to freedom of expression, are not susceptible to objective determination.[109] Similarly the concept of property has been notoriously complex in Irish constitutional law.[110] Faced with the indeterminacy of human rights, the rule of law is preserved not by having predictable, objective outcomes, but by ensuring that courts follow transparent decision-making processes and fostering an ethic of good faith amongst judges. Keeping with the freedom of expression example, the outcome in a given case may be unpredictable but the tests to be applied by the court are determined by precedent. It is through good faith application of these tests that the judiciary respect their constitutional position, rather than by confining their decision-making only to objectively determinable issues.

On the specific objections to poverty as a ground, we can overcome the fact that the poor is not a homogenous group; no group protected in equality law is homogenous, and it is actually a feature of discriminatory stereotyping to essentialise an individual according to a single characteristic of ethnicity, gender, disability, age or poverty.[111] Attempting to see the members of any protected group exclusively according to the characteristic that defines them as a group

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[108] The All-Party Oireachtas Committee on the Constitution, *Report of the Constitution Review Group* (Stationary Office 1996) 210.
[109] Murphy, 'Economic Inequality and the Constitution' (n 82) 172.
[110] Hogan and Whyte (n 16) 1971-1978.
[111] Fredman, *Discrimination Law* (n 7) 264-265.

will conceal innumerable differences between the individuals.[112] This is true of gender as a ground as much as it is true of poverty, and this demonstrates that homogeneity is certainly not necessary for a group to be protected by equality law.

However, the second version of the vagueness objection is more substantial and it is in response to this objection that the arguments presented in this thesis are at their most vulnerable. The problematic way in which poverty is a vague condition is the fact that it is on a spectrum; people are recognised as poor by comparing them to those who are rich and there is a spread of wealth across a spectrum in society. Similarly, socio-economic status divisions are sometimes contradictory, with one feature of a person's job indicating high status, such as the ability to exercise control over how to work, while another suggests low status, such as low income. Social class is also a difficult concept, largely because identification (including self-identification) according to class is contestable and the boundaries between social classes are blurred.

In defining grounds in equality, vagueness is not unique to poverty, socio-economic status and social class. Bell shows that ethnicity, for example, is not exclusively a genetic phenomenon that separates groups, but is primarily a social construction and involves a spectrum of identities.[113] The disability ground also forms a useful analogy. Everyone has a range of capacities and weaknesses that are on a spectrum of abilities but the law draws a line across that spectrum and is binary (people are either disabled or able-bodied). As Bickenbach *et al* explain:

> Disability is not a human attribute that demarks one portion of humanity from another ... it is an infinitely various but universal feature of the human condition. No human has a complete repertoire of abilities, suitable for all permutations of the physical and social environment. Scientifically speaking, there are no inherent or intrinsic boundaries to the range of variation in human abilities; ability-disability is a continuum and

[112] McColgan (n 5) 78-79.
[113] Mark Bell, *Racism and Equality in the European Union* (OUP 2008) ch 1.

> the complete absence of disability, like the complete absence of ability, is a limiting case of theoretic interest only.[114]

The law, necessarily being cruder than the reality of a spectrum, takes a point on the spectrum and says that a certain collection of capabilities constitutes a legal disability. The important feature is that, in response to a spectrum of conditions, the law can create binary categories of disabled and able-bodied.

By analogy, one way poverty could be defined is by drawing a line across the spectrum of wealth inequality and affording protection to those below a certain threshold. This threshold approach is used in the UK's Child Poverty Act 2010. There are various lines drawn in the Act.[115] For example, s.5 designates a household as experiencing "absolute low income":

> (2) ... if its equivalised net income for the financial year is less than 60% of the adjusted base amount.
>
> (3) "The adjusted base amount", in relation to a financial year, is the base amount adjusted in a prescribed manner to take account of changes in the value of money since the base year [1 April 2010].

The problem with the absolute low-income approach is that it loses connection with the social context in which poverty is experienced. Rather than defining poverty according to its contemporary reality, it is defined accorded to a fixed point in history and simply adjusted for inflation. An alternative is to define poverty relative to the average social conditions of society. Townsend defines relative poverty as "the lack of resources necessary to permit participation in the activities, customs and diets commonly approved by society."[116] This is the approach taken by the Constitution Review Group, when it considered whether to propose an explicit right to freedom from poverty and social exclusion for the Irish Constitution:

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[114] Jerome Bickenbach, Somnath Chatterji, EM Badley and TB Üstün, 'Models of disablement, universalism and the international classification of impairments, disabilities and handicaps' (1999) 48 Social Science and Medicine 1173, 1182; building upon Irving Zola, 'Toward the necessary universalizing of a disability policy' (1989) 67 The Milbank Quarterly 401; see also, Fredman, *Discrimination Law* (n 7) 96-97.
[115] See, Fredman, 'Positive Duties and Socio-Economic Disadvantage' (n 45) 296-297.
[116] Townsend (n 29) 88; Mack and Lansley (n 29) 15, describe being poor as being "excluded from the way of life that most people take for granted".

> People are living in poverty, if their income and resources (material, cultural and social) are so inadequate as to preclude them from having a standard of living which is regarded as acceptable by Irish society generally. As a result of inadequate income and resources people may be excluded and marginalised from participating in activities which are considered the norm for other people in society.[117]

As an example of this s.3(2) of the UK's Child Poverty Act 2010 designates a household as experiencing relatively low income "if its equivalised net income for the financial year is less than 60% of median equivalised net household income for the financial year." O'Connor and Staunton point out that the resources in question should include but not be limited to income, because some people with low incomes are rich, while others with an average income can be resource deprived due to expenses, such as having a high number of dependants.[118]

It would be difficult for the judiciary to define poverty with much specificity. The point at which the threshold should be drawn is an economic and sociological question that is significantly influenced by ideology. Interestingly, when courts in Ireland and elsewhere have grappled with poverty issues, they have avoided defining the group according to specific levels of resources.[119] Instead, they have left the group as self-evident. The problem with using a poverty line definition of the ground is also that it becomes difficult to explain, from an equality perspective, why any inequality in resources levels should be tolerated. A belief that everyone in society is entitled to absolutely the same level of resources is an extreme political view, largely discredited in constitutional democracies not least because it violates several fundamental rights and is inconsistent with the economic development model that has proven successful. McLachlin CJ of the Supreme Court of Canada, writing extra-judicially, captures this tension:

> A market-based representative democracy necessarily tolerates a certain degree of disparity, economic and otherwise. It is perhaps for this reason that the Canadian equality experience, expressed in human rights

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[117] *Report of the Constitution Review Group* (n 108) 207.
[118] Nat O'Connor and Cormac Staunton, *Cherishing All Equally: Economic Inequality in Ireland* (TASC 2015) 11-12.
[119] *Redmond v Minister for the Environment* [2001] 4 IR 61; *King v Minister for the Environment (No 2)* [2007] IR 296.

> legislation as well as in the enumerated grounds of section 15, focuses on particular sources of inequality which have historically proven unjust and harmful to the affected individuals and to society as a whole.[120]

A right to equality on this ground is not an entitlement to absolute sameness of resources, but it can be a protection against unfairness and harmful inequality. A degree of resource inequality is a necessary consequence of market economies, and it may even serve positive economic objectives, but when it causes inequality within the four dimensions of substantive equality it first of all violates the guarantee of equality and second of all leads to economic and social disadvantages, as demonstrated by Piketty, Wilkinson and Pickett, and others.[121] The political system can respond to those problems in two ways, either by solving them at source with redistribution of wealth, or by tackling the consequences, such as by creating universal entitlement to services that are within the four dimensions of equality. The judiciary cannot engage in redistribution but it can have a role in tackling the consequences of inequality. An example of this comes from the House of Lords interpretation of the Human Rights Act 1998. In *RMJ*,[122] the House of Lords held that homelessness is a protected status under Article 14 of the ECHR.[123] The social security system at the time in the UK provided a disability premium to those who needed it, but rough sleepers were excluded from this additional entitlement to which they would otherwise have been entitled. The House of Lords ultimately held the discrimination was justified, but it found that homelessness is a status protected by Article 14.

In order to protect the right to equality on the ground of poverty, socio-economic status or social class, without collapsing it into a requirement for absolute parity of resources, the courts can tackle the exclusion of groups of people from life chances[124] (the participation dimension) as well as dignity violations caused by prejudice and stigma (the recognition dimension). Defining the ground according

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[120] Beverley McLachlin, 'Equality: The Most Difficult Right' (2001) 14 Supreme Court Law Review 17, 20-21.
[121] Piketty (n 73) 228-229; Wilkinson and Pickett (n 59).
[122] *R (M) v Secretary of State for Work and Pensions (RJM)* [2008] 3 WLR 1023.
[123] Cousins (n 47) 120.
[124] Michael Connolly, 'Social mobility, education and the European Convention on Human Rights' (2013) European Human Rights Law Review 152, 153.

to socio-economic status or social class is more suitable to this than a poverty line and avoids confronting the resource distribution question directly. These inequalities correlate closely, though not perfectly, with inequalities along the poverty-wealth spectrum. As noted above, these versions of the ground are defined in relation to working adults, with children and dependents deriving their status and class from those adults.

Contemporary understandings of socio-economic status and social class come from Weber, who identified three modus of stratification: "class position" meaning economic position, "status" meaning social prestige, and "power".[125] In their application, these three criteria can contradict. As a result, measures of socio-economic status in sociological research tend to focus on the first two criteria and limit them to the employment context. Status and power in non-employment contexts are assumed to correlate with these measures. The Census in Ireland measures socio-economic stratification according to the "level of skill and educational attainment of their occupation":[126]

A – employers and managers

B – higher professional

C – lower professional

D – non-manual

E – manual skilled

F – semi-skilled

G – unskilled

H – own account workers

I – farmers

J – agricultural workers

Z – other

[125] Macionis and Plummer (n 30) ch 10.
[126] Central Statistics Office (n 31) 28.

It also conceptualises social class in similar terms:[127]

1 – professional workers

2 – managerial and technical

3 – non-manual

4 – skilled manual

5 – semi-skilled

6 – unskilled

7 – all others

Piketty adopts a simple definition of social class based on the spectrum of wealth, with the bottom 50% as "working class", middle 40% "middle class, and top 10% "upper class".[128] Defined in this way, social class does not explain anything beyond socio-economic status. This conception of social class focuses on the nexus of employment, but neglects issues of identity. Jones argues that class identity, particularly within the working class in the UK, is fragmenting.[129] However, it retains currency in popular discourse about identity. When aligned with socio-economic status, the concept of social class can account for the peripheral social issues that tend to correlate (imperfectly) with socio-economic status. A paradigmatic example is stigma associated with accents, which are widely understood in class rather than status terms.

The conception of social class in this thesis is based on identity as much as on employment or wealth. The following is an identity-based spectrum of social class:[130]

Upper class (including working rich)

Upper middle class (based on high earning and wealth, with prestigious education and employment, and political influence)

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[127] Central Statistics Office (n 31) 29.
[128] Piketty (n 73) 246-252.
[129] Jones (n 32) 97-98, 141-142.
[130] I have adapted this from a framework presented by Macionis and Plummer (n 30) 324-330.

Service middle class

Lower middle class (national average)

Skilled working class

Unskilled working class (including traditional unionised working class and modern insecure workers)

Unemployed working class

Excluded classes, including homeless people and Traveller communities

It is possible to state a spectrum of social classes and to describe typical characteristics of each class. There are two vagueness concerns with social class. First, the boundaries between social classes are fluid, in contrast to the traditional Marxist understanding of class.[131] This problem is no different in type to the vagueness that exists at the boundary between different ethnic groups, though it may be larger in scale. The second vagueness problem is with individual identification. It can be extremely difficult to assign a particular person to a definite social class. Connolly captures the challenge:

> Social class is not an easy thing to pin down, especially for a legal discourse. Discrimination on the ground of being "posh" or being "common" is an elusive concept. It is easier to witness than reduce to writing, especially in legal terms.[132]

Individual identification, including self-identification, can be contestable.[133] Part of the problem is that the social class spectrum is so heavily infused with stigma, so that working class identities are demonised and presented in media and popular discourse as something to be ashamed of,[134] while many upper class and upper middle class people adopt a kind of reverse class snobbery, preferring

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[131] Nisbet (n 30) 206-207.
[132] Connolly (n 124) 154.
[133] Jones (n 32) 141-142.
[134] Gerry MacRuairc, 'Where words collide: social class, schools and linguistic discontinuity' (2011) 32(4) British Journal of Sociology in Education 541, Kathleen Lynch and Anne Lodge, *Equality and Power in Schools: redistribution, recognition and representation* (RoutledgeFalmer 2002) 63; Jones (n 32).

to identify themselves as average or normal and refusing to acknowledge their exceptionally privileged positions.

Challenges with individual identification on the social class spectrum are not fatal to its use as a ground in equality law, however. Social class as an identity is analogous to ethnicity; though there is a spectrum between groups, in that it can be difficult to fit people into rigid classes, a functional categorisation of different classes exists. Like all grounds in equality law, there is a penumbra of uncertainty at the fringes of the groups but a sufficiently defined core to allow equality law to function. The ability to name core or typical features of different class groups can allow the judiciary to analyse state action for direct or indirect discrimination against those features.

The ground could be judicialised analogously to religion. Plaintiffs alleging discrimination on the ground of religion are given complete latitude to define their own religious beliefs.[135] The courts then accept that set of beliefs as fixed and true for that person and test, first, whether discrimination on those beliefs has occurred, and second, whether the discrimination is justified. Judicialising social class would be even easier. A plaintiff could self-identify according to class, as a procedural way of determining standing, and then the court could then test whether discrimination on the basis of the core features of that selected social class has occurred. If necessary, a court could test whether the self-identification is sincere and reasonable.

Returning to the questions that are posed by a right to equality (and set out in the introduction and section 1 above), to assert that someone is entitled to the right to equality implies answers to the questions, equal to whom and equal in what way? In answering the first question for the ground considered in this thesis, we can choose between poverty, socio-economic status or social class. Of the three versions of the ground, poverty is the easiest to apply, once a line is chosen, because it requires a simple assessment of someone's resources. The problems with poverty, however, are first that the line in question is contestable and ideologically influenced, and second that it draws the judiciary into difficult questions of redistribution of wealth. Socio-economic status is the easiest

[135] *Campbell and Cosans v UK* (1982) 4 EHRR 293.

version of the ground to apply to any given person, because it involves a clinical assessment of the nature of that person's occupation and its position in the economic system. The problem with socio-economic status is that, despite being based on Weber's ideas of status and power, it fails to capture the more subtle aspects of inequality that exists on this ground; those that are tied into identity. Social class is the best compromise ground, because it relies on the socio-economic status spectrum as a root, but encompasses the identity issues as well. Social class is vague, but I argue that it is not fatally so.

The theory of a right to equality that is concerned with wrongful systemic inequality based on Fredman's four dimensions of equality points towards social class as the best version of the ground at issue. In light of the political sensitivities around social class inequality, however, theory and practice on this ground are likely to be different. I suspect that judges are likely to be unsympathetic to claims based on social class. This is largely because Irish judges tend to come from communities that seek to reject or minimise the existence of social class inequalities and hierarchies. Impressive survey research from 2004 conducted by Carroll sought to elicit the views of serving superior court judges on their place within the social class spectrum.[136] Notwithstanding Carroll's demonstration that judges are the quintessential Irish upper class,[137] the judges' responses to questions about class were a lot more complex than their answers to questions about race, employment and geography. Carroll interpreted this as significant reluctance on the part of the judges to identify themselves according to one class or another; some of them went so far as to assert that social classes do not exist in Ireland.[138]

As a practical matter, judges may therefore be reluctant to address social class issues through equality law. The fact that previous cases in Ireland and elsewhere have used poverty as the ground suggests that framing the litigation outlined in chapter 8 in terms of poverty rather than social class may be more likely to succeed. However, the significant reluctance on the part of judges to engage with social class issues reaffirms that it is the best version of the ground

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[136] Jennifer Carroll, 'You Be the Judge A Study of the Backgrounds of Superior Court Judges in Ireland in 2004 Part I' (2005) 10(5) Bar Review 153.
[137] Carroll (n 136) 154.
[138] Carroll (n 136) 169.

as a matter of equality theory. That reluctance is a product of prejudice, stigma and hierarchy, not on the part of the individual judges but on the part of the social system in which we all live. It is controversial to label someone against their will as a member of a certain class, not because people are absolutely entitled to choose their own class, but because there is so much emotional baggage associated with social class inequality. That baggage is caused by the huge inequalities that persist in the recognition and participation dimensions on this ground. The reason law struggles to deal with social class inequality is because it is so pervasive across all aspects of life in Ireland, and so entrenched in the fabric of society as to become almost invisible to an uncritical observer. The fact that judges are so uncomfortable recognising their upper class position is a clear indication of how far there is still to go before the true extent of social class inequality can be acknowledged, let alone dismantled.

Conclusion

In this chapter I have presented the theoretical case for the recognition of poverty, socio-economic status or social class as a protected ground in equality law. In chapter 4 I continue these arguments and contextualise these arguments to the Irish Constitution. In summary, there are three stages to the argument. First, I establish in section 1 that the best way of identifying grounds in equality law is to look for morally wrongful systemic inequality, rather than to focus on a single principle, such as dignity, autonomy or democracy. Second, in section 2 I show that the inequalities experienced on the ground of poverty, socio-economic status or social class are analogous to other more established grounds in equality law. Finally, in section 3 I rebut objections to this use of equality law, based on economics, democracy and vagueness.

Social class divisions and identity are not inherent to people; they are socially constructed identities and hierarchies. They do not "exist" in the sense of being biologically determined, but they do exist as a matter of social fact. We can measure the inequality on this ground and we can see its operation in every aspect of daily life. Since the inequality is socially constructed, it can be changed and even removed by social responses. The most direct way to remove the inequality is for the state to acknowledge its existence; ignoring social class

inequality, or purporting to have a class-blind state, will not prevent the societal causes of social class inequality from continuing. The best way of removing the inequality is for the state to take measures to tackle the consequences of inequality, and to prevent it at source by redistribution. The judiciary can have a role in the former response. By recognising the existence of social class inequality the state is not legitimising or endorsing the inequality, or even implying that it is natural or inevitable. Instead, it is simply counteracting a proven social fact in the most direct way. This argument is a defence of equality law on the ground of any socially constructed hierarchy, be it for example ethnicity, gender or religion. The fact that social class inequality is still at the periphery of equality law, however, makes it worth articulating this defence of the judicialisation of the ground.

Carolan shows that the persistence of this kind of inequality, like all wrongful systemic inequalities, is inconsistent with republican values of equality and citizenship.[139] For those reasons alone there is an obligation on a republic to seek to eradicate inequality on the basis of poverty, socio-economic status or social class. Contextualised to Ireland, that obligation is all the stronger because, as I argue in chapter 4, the guarantee of equality in the Constitution can be interpreted as a protection against social class inequality.

[139] Eoin Carolan, 'Recovering the Republic? Democratic Representation and the Theory of Mixed Government' (2012) 48(2) Irish Jurist 173.

Ch 3: Constitutional Equality Law: The Recognition of Disadvantage and Substantive Equality of Condition

Sections

1. Current State of Constitutional Equality Law: The Guiding Principle of Equality
    1.1. Neutral treatment as the guiding principle of equality
    1.2. Unsuitability of the neutral treatment principle to Article 40.1
    1.3. Relative levels of disadvantage as the guiding principle of equality
    1.4. Case law consistent with relative levels of disadvantage as the guiding principle of equality
    1.5. Communitarian features of the Constitution: harmonious interpretation of Article 40.1
2. Doctrinal limitations to comprehensive equality protection
3. Precedent
4. Educational Inequality and Article 40.1

Introduction[1]

Despite the lofty language often associated with equality, the right to equality in the Irish Constitution has traditionally been interpreted in a restrictive manner. Article 40.1 states:

> 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.

The courts often say that this provides a guarantee of process equality, in which the State is obliged to be neutral between its citizens. Several recent constitutional equality cases, however, show the problems associated with conflating the obligation of neutrality with a principle of neutral treatment. In this chapter, I assess the current state of constitutional equality law, which has evolved somewhat since Doyle analysed this area of law in 2004.[2] The courts

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[1] Parts of this chapter were published in, Ben Mitchell, 'Process Equality, Substantive Equality and Recognising Disadvantage in Constitutional Equality Law' (2015) 53 Irish Jurist 36.

[2] Oran Doyle, *Constitutional Equality Law* (Round Hall 2005) chs 4-8.

have consolidated the developments identified by Doyle relating to protected grounds of equality (which he described as the presumptively proscribed grounds of discrimination). In addition, several recent cases suggest that a substantive conception of equality is developing, or at least that several substantive features could be accommodated with the existing process equality approach to Article 40.1.

In chapter 1 I outline several alternative types (or "conceptions") of equality. In this chapter I examine the doctrine of Irish constitutional equality law and highlight the extent to which the cases focus on relative levels of disadvantage, rather than treatment, when defining equality. To explain the apparent inconsistency between the cases that use a disadvantage-based definition of equality and those that focus on equality of treatment, I argue that, while there is a variety of types of cases that make use of Article 40.1, only some of them are true equality cases in the sense of dealing with a right to equality. In essence, true equality cases are based on a claim that a systemic wrongful inequality exists (such as prejudice or exclusion from an opportunity). In contrast, a number of the cases that refer to Article 40.1 are not based on a claim that such an inequality has been created, but rather that justice requires generally consistent treatment. Distinguishing these types of cases is important and helps to confine the conceptual equality argument to its proper place.

In section 1 I identify the guiding principle of equality in the true equality cases under Article 40.1. I consider and reject the appropriateness of a definition of equality based on neutral treatment and argue instead that equality has to be defined according to relative levels of disadvantage. This approach involves a harmonious interpretation, respecting both the liberal-democratic and communitarian philosophies underlying the Constitution.

In section 2 I suggest that this approach to equality should place three equality duties on the State. First, the State should not discriminate directly on any ground where to do so would create systemic wrongful inequality. Secondly, it should not discriminate indirectly on these grounds. Thirdly, it should take positive steps to compensate for existing disadvantage on these grounds. In section 2 I challenge the doctrinal restrictions that have prevented the courts

from recognising the second and third of these duties. I consider which grounds the courts should protect against in chapters 2 and 4.

In section 3 I distinguish the various cases citing Article 40.1. The purpose is to demonstrate that the courts could apply a disadvantaged-based definition of equality in one category of cases, the true equality cases, while still using Article 40.1 as a guarantee of consistent treatment in other contexts. There are at least four categories of cases in the recent jurisprudence. First, several cases deal with the democratic process. Second, there are cases seeking generally consistent treatment under public law principles of consistency, legality, reasonableness and the rule of law. Third, there are cases dealing with equality of arms in litigation. Fourth, there are cases concerning equality and inequality, paradigmatically those addressing the presumptively proscribed grounds of discrimination. The core argument is that, in this latter category, the definition of equality has to be based on relative levels of disadvantage rather than neutral treatment because what is at stake is a right to equality itself. In the other categories, various other rights arise, such as the right to vote. These cases rely on the language of "equality" but they are not based on a right to equality. Consequently, the definition of equality in these cases can be based on neutral treatment, without undermining the arguments put forward here, which is that true equality cases should use a definition based on relative levels of disadvantage.

Finally, in section 4 I consider whether Article 40.1 could be used to challenge the existence of inequality on the basis of poverty, social class and socio-economic status in the education system. I summarise the kinds of inequalities at issue, which I cover in detail in chapter 5. In chapters 6 and 7 I consider constitutional challenges to these inequalities under the right to education in Article 42 in isolation and as part of a conjoined application with Article 42.

1. Current State of Constitutional Equality Law: The Guiding Principle of Equality

In chapter 1 I outline various conceptions of equality and demonstrate that a process conception of equality (based on the Aristotelian command) does not determine how equality itself is to be defined. Even with a commitment to

Aristotelian equality, the courts need a guiding principle in order to identify when a state of equality exists. In this chapter I examine how the Irish courts have defined the guiding principle of equality under Article 40.1. In referring to the "guiding principle", I am examining how the courts have defined what it means to be "equal" and how they determine whether a given State measure is consistent with equality or derogates from it. I do not mean the guiding principle to be the "most common" or default outcome of the analysis; rather, the guiding principle ought to dictate the outcome of the analysis. Thus, the guiding principle will dictate whether neutral or non-neutral treatment is required in order for the State action to be consistent with equality. This section begins with a rejection of the idea that neutral treatment can be the guiding principle, or defining feature, of equality under Article 40.1. I then suggest that concern for relative levels of disadvantage is a principle that can define equality. In subsection 1.3 I define relative levels of disadvantage according to the dimensions of substantive equality of condition from the work of Fredman and Lynch and Baker, which I outline in chapter 1. In subsections 1.4 and 1.5 I demonstrate that this multi-dimensional understanding of equality is consistent with the Constitution.

1.1. Neutral treatment as the guiding principle of equality

The proposition that Article 40.1 is a commitment to neutral treatment, rather than a guarantee of equality, is a recurring feature in constitutional equality law.[3] In recent cases, there are two strands of this. First, both the High and Supreme Courts have occasionally described the right in Article 40.1 as a right to "equal treatment", rather than a guarantee of equality. Second, there are cases that make use of somewhat ambiguous language of "strict equality".

In the first group, Article 40.1 is interpreted, not as a right to equality, but as a right to neutral treatment.[4] The Supreme Court in *Fleming v Ireland*,[5] for example,

[3] Mullally offers a powerful critique of how the courts have used formal understandings of equality to frustrate attempts to achieve substantive equality in Ireland; Siobhán Mullally, 'Substantive Equality and Positive Duties in Ireland' (2007) 23 S Afr J on HR 291, 292.
[4] Despite the similar language of "equal treatment" the Irish court's approach is different to the approach of the Court of Justice of the European Union when dealing with the principle of equal treatment; see Mark Bell, 'The Principle of Equal Treatment: Widening and Deepening' in Paul Craig and Gráinne de Búrca (eds), *The Evolution of EU Law* (2nd edn, OUP 2011).
[5] *Fleming v Ireland* [2013] 2 ILRM 73 (SC).

made repeated reference to the "principle of equal treatment",[6] and used it to describe a claim of indirect discrimination as a novel and inappropriate claim under Article 40.1:

> The court does not consider that the constitutional principle of equal treatment before the law, as interpreted and applied in its judgments, extends to categorise as unequal the differential indirect effects on a person of an objectively neutral law addressed to persons other than that person.[7]

The Court used the neutral treatment principle as determinative of the equality analysis; once neutral treatment existed, the State's obligations under Article 40.1 were satisfied. Similar language can be seen in several High Court judgments, for example in *Unite v Minister for Finance*[8] and *O'B v Minister for Justice, Equality and Law Reform*.[9]

The second group of cases are those that refer to the notion of "strict equality". The Supreme Court adopted this phrase in *MD v Ireland*[10] and it has found favour in some subsequent High Court judgments.[11] The phrase "strict equality" has an ambiguous meaning. In *MD v Ireland*, the Supreme Court stated an understanding of equality based on the Aristotelian command to treat likes alike and unalikes unalike.[12] This understanding of equality (as treating likes alike and unalikes unalike) cannot rely on neutral treatment as its guiding principle because the purpose of the Aristotelian analysis is to determine whether or not neutral treatment is required. It would be circular simply to restate that abstract command as the guiding principle. However, the court also stated, "Thus strict equality is the norm laid down by Article 40.1."[13] Taken independently of the commitment to Aristotelian equality, strict equality would seem to be a reference to neutral treatment; indeed, the court appears to qualify strict equality (rather

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[6] *Fleming v Ireland* [2013] 2 ILRM 73 (SC) [120], [123], [133] and [136].
[7] *Fleming v Ireland* [2013] 2 ILRM 73 (SC) [136].
[8] *Unite v Minister for Finance* [2010] IEHC 354.
[9] *O'B v Minister for Justice, Equality and Law Reform* [2009] IEHC 423.
[10] *MD v Ireland* [2012] 2 ILRM 305.
[11] *Akpekpe v Medical Council* [2013] IEHC 38; *Doherty v Referendum Commission* [2012] IEHC 211.
[12] *MD v Ireland* [2012] 2 ILRM 305, [41]-[42].
[13] *MD v Ireland* [2012] 2 ILRM 305, [41]-]42]

than explain it) by saying, "*However*, the article recognises that perfectly equal treatment is not always achievable."[14] This interpretation based on neutral treatment has been adopted by the High Court in *Akpekpe v Medical Council*,[15] in which Kearns P, quoting from *MD*, adopted the language of strict equality and held that Article 40.1 provides a "right to equal treatment". Kearns P held that the strict equality norm was not absolute, to the extent that distinctions are permissible provided they are not arbitrary, but it is clear from the judgment that strict equality was taken as being synonymous with the principle of neutral treatment. A similar interpretation occurred in *Doherty v Referendum Commission*,[16] in which Hogan J relied on the reference to strict equality in *MD* to hold that complete neutrality of treatment is required in the referendum process. These cases show an ambiguity in the use of "strict equality" but with a tendency for it to mean neutral treatment.

1.2. Unsuitability of the neutral treatment principle to Article 40.1

In section 3 below, I argue that the principle of neutral treatment is appropriately used in certain cases that make reference to Article 40.1. However, these types of cases are not true equality cases in that they are not concerned with a claim for equality itself (with wrongful systemic inequality) but rather are claims under the general obligations of consistency, legality and reasonableness that make up the rule of law. Though they use the language of equal treatment and are occasionally litigated using Article 40.1 as a platform, they are not dealing with a right to equality itself, but rather a general value of justice. I argue that in cases dealing with a claim for equality itself, such as *Fleming v Ireland*, the use of the neutral treatment principle is inappropriate.

The arguments in this thesis rely on the view that Article 40.1 contains a right to equality, rather than merely a right to neutral treatment.[17] This is evident in a

[14] *MD v Ireland* [2012] 2 ILRM 305, [42] (emphasis added).
[15] *Akpekpe v The Medical Council* [2013] IEHC 38.
[16] *Doherty v Referendum Commission* [2012] IEHC 211.
[17] Daly, assuming that Article 40.1 does grant a right to equality, uses the Article to argue that the Constitution as a whole is concerned with equality rather than with discrimination: Eoin Daly, 'The Constitution and the Protestant Schools Cuts Controversy: Seeing the Wood for the Trees' (2010) 1 Irish Journal of Legal Studies 84.

recent *obiter* statement of O'Donnell J. in *Murphy v Ireland*,[18] in which he hinted that a guarantee of equality itself is the rationale for protecting against discrimination:

> [Article 40.1] set an egalitarian and essentially republican tone which is perhaps reinforced by the specific provisions of Article 40.2 prohibiting titles of nobility and honour. It is therefore a vital and essential component of the constitutional order.[19]

A liberty rationale, in contrast to an equality rationale, places the emphasis on the individual being treated as an individual,[20] which would have led to neutral treatment being the guiding principle of Article 40.1.

Further evidence that Article 40.1 is concerned with equality rather than with liberal individualism comes from the clear statement of the Supreme Court in *MD*, that the first and second sentences of the Article are to be read together, with the second sentence explaining the meaning of the first sentence, rather than derogating from it:

> It follows also that the first and second sentences of Article 40.1 should not be treated as if they were in separate compartments... The second sentence is concerned with what the first sentence means.[21]

If the two sentences are needed to understand the meaning of being "held equal before the law", it is impossible for neutral treatment to be the guiding principle of equality. The second sentence clearly envisages non-neutral treatment and, thus, equality in Article 40.1 cannot rely on neutral treatment as a guiding principle. This statement by the Supreme Court is significant and welcome. However, it is important to acknowledge that this is different to the previous understanding of the relationship between the first and second sentence. Traditionally, the second sentence has been seen as a qualification to (or derogation from) the guarantee of equality, rather than an explanation of its

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[18] *Murphy v Ireland* [2014] 1 IR 198.
[19] *Murphy v Ireland* [2014] 1 IR 198, [33].
[20] Deborah Hellman, 'Equality and Unconstitutional Discrimination' in Deborah Hellman and Sophie Moreau (eds), *Philosophical Foundations of Discrimination Law* (OUP 2013) 55–57, ch 3.
[21] *MD v Ireland* [2012] 2 ILRM 305, [44].

content. This occasionally leads to its description as a "proviso" to the equality guarantee.[22]

It is worth emphasising that this argument – that the guiding principle of equality is not neutral treatment – is not the same as arguing that equality does not require neutral treatment; in very many instances the outcome most conducive to equality will be one based on neutral treatment. The point being made is simply that the guiding principle of equality in Article 40.1 cannot be the principle of neutral treatment because of, in Fredman's words, the "apparent paradox" that "equal treatment can in effect lead to inequality, while unequal treatment might be necessary in order to achieve equality".[23] In other words, the guiding principle must be able to tell us when neutral treatment is required by equality.

1.3. Relative levels of disadvantage as the guiding principle of equality

Rather than neutral treatment, a concern for relative levels of disadvantage can and should be used as the guiding principle of equality in Article 40.1.[24] This would be consistent with another body of recent High and Supreme Court cases, as well as some older precedent,[25] where the courts did not articulate an explicit definition of equality but their reasoning is consistent with a disadvantage-based definition. Explicitly adopting a definition of equality based on disadvantage is a way of conceptualising the practice in these cases and giving greater clarity to the equality analysis.

In defining "disadvantage", I argue in section 1.5 below that the substantive equality of condition conception, which I outline in chapter 1, is a suitable definition for equality under Article 40.1 of the Constitution. Fredman and Lynch

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[22] Gerry Whyte, 'Constitutional Litigation and Disability Rights' (2012) Irish Jurist 303, 308; John Kelly, 'Equality Before the Law in Three European Jurisdictions' (1983) 2 Irish Jurist 259; Francis Beytagh, 'Equality under the Irish and American Constitutions: A Comparative Analysis—1' (1982) 17(1) Irish Jurist 56; *Re Philip Clarke* [1950] IR 235; *Draper v Attorney General* [1984] IR 277; more recently, see Colm Ó'Cinnéide, 'Aspirations Unfulfilled: The Equality Right in Irish Law' in Donncha O'Connell (ed), *Irish Human Rights Law Review 2010* (Clarus Press 2010) 56.

[23] Sandra Fredman, *Discrimination Law* (2nd edn, OUP 2011) 2.

[24] See, Owen Fiss, 'Groups and the Equal Protection Clause' (1976) 5 Philosophy and Public Affairs 107; Fiss argues that the anti-discrimination principle is merely a mediating principle for the equal protection clause in the US and that a group disadvantage principle is a better mediating principle for the right to equality.

[25] *State (Nicolaou) v An Bord Uchtála* [1966] IR 567, 639.

and Baker have published extensively on this conception of equality.[26] In summary, it involves four dimensions. First, under the *redistribution dimension*, the cycle of economic disadvantage suffered by members of out-groups will have been broken, so that no protected groups are systematically excluded from material wealth.[27] Second, under the *recognition dimension*, all people will receive equal recognition of their dignity and worth.[28] Third, under the *transformative dimension*, society's institutions will have been adapted to facilitate diversity so that members of different groups are accommodated rather than required to assimilate to dominant norms.[29] Fourth, under the *participative dimension*, society will have developed to the point where members of all groups will have the capacity to participate fully in society, both socially and politically.[30] In referring to relative levels of disadvantage, I use this phrase broadly to mean inequality under any of these four dimensions of equality.

This is patently a theory of substantive equality, in that it is focused on the inequalities themselves and on whether laws are conducive towards equality. By making reference to this theory under a process conception, I rely on the argument above; that a process conception is formal and does not itself define equality. Thus, I suggest that substantive equality of condition gives us a description of an equal society and the process conception then imposes an obligation on the State to be neutral, which means there is an obligation to make reasonable efforts to avoid inequalities under the four dimensions. Under a process conception, these efforts would be the "inputs", the reasonableness of

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[26] Fredman, *Discrimination Law* (n 23) 25–33; Sandra Fredman, 'Equality as a Proactive Duty' [2012] 60 American Journal of Comparative Law 265; Sandra Fredman, 'Facing the Future: Substantive Equality under the Spotlight' in Ockert Dupper and Christoph Garbers (eds), *Equality in the Workplace: Reflections from South Africa and Beyond* (Juta 2009); Kathleen Lynch and Anne Lodge, *Equality and Power in Schools: Redistribution, Recognition and Representation* (RoutledgeFalmer 2002) 7-12; Kathleen Lynch and John Baker, 'Equality in Education: An equality of condition perspective' (2005) 3(2) Theory and Research in Education 131, 132-134.

[27] Fredman, *Discrimination Law* (n 23) 26; For the courts to enforce a remedy under a redistributive dimension of equality, the Supreme Court would first have embrace distributive justice, which it has traditionally rejected (see *TD v Minister for Education* [2001] 4 IR 247, *Sinnott v Minister for Education* [2001] 2 IR 545). However, it is possible to separate the definition of equality from the potential remedy and to recognise that unequal distributions of wealth are "inequalities" without necessarily finding that the courts have any role to play in resolving them.

[28] Fredman, *Discrimination Law* (n 23) 28.

[29] Fredman, *Discrimination Law* (n 23) 30.

[30] Fredman, *Discrimination Law* (n 23) 31.

which would be measured in light of the state of inequality existing under the four dimensions.

1.4. Case law consistent with relative levels of disadvantage as the guiding principle of equality

In *DX v Buttimer*,[31] the neutral application of in camera rules in family court hearings was held to be unconstitutional discrimination on the ground of disability. One of the litigants struggled with oral communication following a laryngectomy. The rules excluded his friend, who helped him communicate. Hogan J. held:

> In practical terms, ["held equal before the law"] means that the courts must see to it that, where this is practical and desirable in the circumstances, litigants suffering from a physical disability (such as Mr X) are not placed at a disadvantage compared with their able-bodied opponents by reason of that disability, so that all litigants are truly held equal before the law in the real sense which the Constitution enjoins.[32]

The guiding principle in this passage is clearly relative levels of disadvantage, rather than neutral treatment.[33] Whyte notes that this case concerned court rules, with which the courts are naturally comfortable, and cautions that "it remains to be seen whether the potential for applying the guarantee of equality for the benefit of people with disabilities may be realised in a wider context".[34] Hogan J. adopted a similar approach, also in the context of legal proceedings, in the slightly earlier case of *BG v Murphy*.[35]

Subsequently, the Divisional High Court in *Fleming v Ireland*[36] quoted the reference to ensuring that all "are truly held equal before the law in the real sense which the Constitution enjoins".[37] The Court upheld the ban on assisted suicide

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[31] *DX v Buttimer* [2012] IEHC 175.
[32] *DX v Buttimer* [2012] IEHC 175, [14].
[33] Hogan J gave this further *obiter* support, and to ensuring that all "are truly held equal before the law in the real sense which the Constitution enjoins", in *DF v Garda Commissioner* [2013] IEHC 312, [36].
[34] Gerry Whyte, 'Constitutional Litigation and Disability Rights' (2012) Irish Jurist 303, 321.
[35] *BG v Murphy* [2011] 3 IR 748, [47]–[48].
[36] *Fleming v Ireland* [2013] 2 ILRM 9 (HC).
[37] *Fleming v Ireland* [2013] 2 ILRM 9 (HC), [121].

as justifiable indirect discrimination, but it stated, "the precept of equality in Article 40.1 is here engaged".[38] The Divisional High Court's judgment is an example of a workable application of equality defined by relative levels of disadvantage, rather than neutral treatment.

In light of these cases, in which Hogan J (along with Kearns P and Carney J in *Fleming*) showed an ability to define equality according to disadvantage, an interesting recent judgment is that of Birmingham J in the High Court case of *XY v HSE*.[39] Birmingham J did not cite these cases, but his judgment demonstrates that he understood equality to be defined by relative levels of disadvantage rather than treatment. In *XY*, a mentally disabled child was challenging the forced treatment to which she was subject. She argued that she was a victim of age discrimination because the safeguards in place for the forced treatment of children are different from those for forced treatment of an adult (she also claimed they were inferior). Birmingham J held that, although the safeguards were different, they were equal in the level of protection they afforded.[40] This holding demonstrates that equality is not contingent on neutral treatment, but rather on being neutral in the imposition of advantages and disadvantages.[41]

Neutral rules that disadvantage socio-economically disadvantaged people were held unconstitutional by the High Court in *Redmond v Minister for the Environment*.[42] In that case, electoral rules required candidates to pay significant deposits in order to run for election, which were refunded only if a certain number of votes was obtained. Herbert J undoubtedly understood equality to mean the absence of relative levels of disadvantage:

> 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,

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[38] *Fleming v Ireland* [2013] 2 ILRM 9 (HC), [122].
[39] *XY v HSE* [2013] IEHC 490.
[40] *XY v HSE* [2013] IEHC 490, [29].
[41] Despite inconsistencies in the jurisprudence, there are also older precedents supporting a definition of equality based on disadvantage: see *O'Brien v Keogh* [1972] IR 144, [157].
[42] *Redmond v Minister for the Environment* [2001] 4 IR 61.

> 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 of the Constitution were providing.[43]

Though the Supreme Court, in *King v Minister for the Environment (No 2)*,[44] overruled Herbert J's conclusion from *Redmond*, the Court did not reject (or even address) his approach to Article 40.1.[45]

These cases can easily be reconciled with the four dimensions of substantive equality of condition. The litigation context cases (*BG v District Judge Murphy*, *DX v Buttimer* and *DF v Garda Commissioner*) all concerned disadvantage in the fourth (participative) dimension of equality; the rules of the courts were operating in such a way as to impose a disadvantage on the ability of disabled people to participate equally in the court process. *Fleming* concerned equality in the second (recognition) dimension and third (transformative) dimension; the legal freedom granted to able-bodied people was unavailable to certain disabled people and this (Ms Fleming claimed) disadvantaged her by restricting her autonomy and denying her dignity by not recognising her distinct needs. The remedy, had she been successful, would have required the transformation of the legal rules to accommodate end of life decisions of certain disabled people. In *XY* the rules were held to be consistent with equality; the different safeguards for mentally disabled children and adults were not unequally disadvantaging because they were tailored to the distinct needs and circumstances of each group, thus accommodating diverse needs under the third (transformative) dimension. *Redmond* concerned the first (redistribution), second (recognition) and fourth (participation) dimensions. The indirect discrimination at stake prevented those living in poverty from participating in democracy by standing for election, integral to the fourth (participative) dimension, and Herbert J was clearly concerned with the systemic harm of poverty, something that is fundamentally problematic according to the first (redistribution) dimension of equality, and also

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[43] *Redmond v Minister for the Environment* [2001] 4 IR 61, [80].
[44] *King v Minister for the Environment (No 2)* [2007] 1 IR 296.
[45] See ch 7.

with the dignity harms caused by poverty, which concern the second (recognition) dimension.

The second (recognition) dimension has also received considerable attention in the cases concerning the variable standard of review and the presumptively proscribed grounds of discrimination. These cases, building on dicta of Walsh J in *Quinn's Supermarket v Attorney General*[46] and the Supreme Court in *Re Article 26 and the Employment Equality Bill 1996*,[47] have explicitly stated that certain grounds of discrimination warrant stricter review because they violate the dignity of the individual in a particularly harmful way. There are some inconsistencies and ambiguities in the list of grounds but it certainly includes race, ethnicity, religion,[48] and pedigree,[49] with greater uncertainty about marital status, political affiliation,[50] sex or gender,[51] disability,[52] poverty,[53] and nationality.[54] The Supreme Court in *Murphy v Ireland* recently gave *obiter* confirmation that these grounds receive particular protection because they are essential features of identity and dignity or are immutable characteristics and thus ensure equality "as human persons".[55] This developing concept demonstrates that equality claims based on dignity violations are of particular concern to Article 40.1. Thus, the second (recognition) dimension is very strongly protected by the Constitution. For

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[46] *Quinn's Supermarket v AG* [1972] IR 1.
[47] *Re Article 26 and the Employment Equality Bill 1996* [1997] 2 IR 321.
[48] Sex, race, language and religious or political opinion were listed by the Supreme Court in *Re Article 26 and the Employment Equality Bill* [1997] 2 IR 321, 347.
[49] *An Blascaod Mór Teoranta v Commissioner of Public Works* [2000] 1 IR 6.
[50] *Murphy v Ireland* [2014] 1 IR 198, [34].
[51] Sex/gender discrimination was thought to be a paradigm of presumptively proscribed discrimination following *Re Article 26 and the Employment Equality Bill* [1997] 2 IR 321, but the Supreme Court upheld direct sex discrimination without any reference to a stricter standard of review in *MD v Ireland* [2012] 2 ILRM 305.
[52]The Supreme Court in *Fleming v Ireland* [2013] 2 ILRM 73 (SC), [130], hinted that disability could be included: "Classification by reference to age or disability may be suspect or may be easily explained. Benefits granted by reference to age or disability may be easy to justify."
[53] *Redmond v Minister for the Environment* [2001] 4 IR 61 at 80; Herbert J's dicta quoted above (n 43) demonstrates that poverty would fulfil the considerations of dignity necessary to warrant a stricter standard of review; O'Malley J expressed similar sentiments in *HSE v OA* [2013] IEHC 172.
[54] Nationality was listed by the Supreme Court in *Fleming v Ireland* [2013] 2 ILRM 73 (SC), [130], but the High Court (Kearns P) in *Dokie v DPP* [2010] IEHC 110 did not impose a higher standard of review for direct discrimination based on nationality.
[55] *Murphy v Ireland* [2014] 1 IR 198, [34].

discussion of the presumptively proscribed grounds of discrimination, see chapter 4.

1.5. Communitarian features of the Constitution: harmonious interpretation of Article 40.1

The neutral treatment principle is a manifestation of a liberal philosophy; its inherent appeal and intuitive justice is in the idea that everyone should be treated the same. As a consequence, anti-discrimination laws that are based on the neutral treatment principle (such as prohibitions of direct discrimination) can be (but do not have to be) justified as serving a liberal-autonomy rationale, rather than an equality rationale.[56]

The Constitution as a whole, however, is not a liberal document but rather involves a series of compromises and amalgamations between a liberal-democratic philosophy and a communitarian philosophy based on Christian traditions.[57] Some articles are strongly influenced by one philosophy while others display influences of both,[58] and the two schools of thought heavily influenced the Drafting Committee of the Constitution.[59] Whyte highlights several explicit features of communitarian philosophy evident in the Constitution: Article 45, Directive Principles of Social Policy; Article 42.4, right to free primary education; and Article 41.2.2, commitment by the State to endeavour to protect mothers from economic hardship.[60] To this we can add the new Article 42A protection for children. In addition, Whyte interprets a commitment to social solidarity from the Preamble and the evident Christian values throughout the Constitution.[61] In order

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[56] Oran Doyle, 'Direct Discrimination, Indirect Discrimination and Autonomy' (2007) 27(3) OJLS 537; Hellman, 'Equality and Unconstitutional Discrimination' (n 20) 55–57; John Gardner, 'On the Ground of Her Sex(uality)' (1998) OJLS 167; Sophie Moreau, 'What is Discrimination?' (2010) 38(2) Philosophy & Public Affairs 143, 155-157; Re'em Segev, 'Making Sense of Discrimination' (2014) 27(1) MLR 47.

[57] Gerry Whyte, *Social Inclusion and the Legal System: Public Interest Law in Ireland* (2nd edn, IPA 2015) 54-56, 95-96.

[58] Rachel Walsh, 'Property Rights in the Drafting of the Irish Constitution: A Communitarian Compromise' (2011) 1 DULJ 86.

[59] Gerard Hogan, *Origins of the Irish Constitution, 1928-1941* (RIA 2012) 210-213, 215-216.

[60] Whyte, *Social Inclusion and the Legal System* (n 57) 94-96.

[61] Whyte, *Social Inclusion and the Legal System* (n 57) 97; see also, Walsh, 'Property Rights in the Drafting of the Irish Constitution" (n 58); Rory O'Connell, 'From Equal Before the Law to the Equal Benefit of the Law' in Oran Doyle and Eoin Carolan (eds), *The Irish Constitution: Governance and Values* (Thomson Round Hall 2008) 328–330.

to adopt a harmonious interpretation of other Articles, the courts have made use of the fact that both these philosophies are at play in the Constitution; for example, Walsh cites several cases where the courts have forged a compromise between these competing philosophies when dealing with the right to private property.[62]

The strength of the neutral treatment principle in some of the constitutional equality jurisprudence underlies the dominance of the liberal-autonomy philosophy, to the exclusion of the communitarian philosophy. A communitarian philosophy is essentially concerned with the place of the individual in the community; a definition of equality based on relative levels of disadvantage can be reconciled with this philosophy as it concerns issues of hierarchy, social exclusion and material inequality. This definition would also retain elements of the liberal-autonomy philosophy, because the core obligation of process equality, to be neutral between citizens, remains, and this ensures that the obligation to treat individuals as individuals (rather than treating them the same) has been retained. Thus a definition of equality based on relative levels of disadvantage offers a more harmonious interpretation of Article 40.1 than one based on neutral treatment.

The case law demonstrates that Article 40.1 can protect against many aspects of the four dimensions of substantive equality of condition.[63] In the remainder of this section I argue that protection of these dimensions is consistent with Article 40.1 when it is interpreted harmoniously with the rest of the Constitution.

To begin with, Daly has demonstrated that the courts have adopted a substantive conception of religious equality when applying Article 44's prohibition on discrimination.[64] In that context at least, a substantive rather than neutral treatment-based approach exists and the courts define equality according to disadvantage. This at least demonstrates that a substantive conception of equality is constitutionally workable. Additionally, a substantive

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[62] Walsh, 'Property Rights in the Drafting of the Irish Constitution' (n 58).
[63] See subsection 1.4 above.
[64] Daly, 'The Constitution and the Protestant Schools Cuts Controversy' (n 17) 94-95; but see a slightly different view in Eoin Daly, *Religion, Law and the Irish State* (Clarus Press 2012) 266-268.

conception of equality is more consistent with the communitarian values in the Constitution than the formalistic equal treatment approach to Article 40.1.

More specifically, each of the four dimensions of substantive equality of condition is consistent with values that are prevalent throughout the text of the Constitution. First, the *redistributive dimension* is concerned with material inequality of resources. This reflects values evident in Article 43.2 and Article 45. Article 43.2 explains the extent of private property rights protection:

> 1° The State recognises, however, that the exercise of the rights mentioned in the foregoing provisions of this article ought, in civil society, to be regulated by the principles of social justice.
>
> 2° The State, accordingly, may as occasion requires delimit by law the exercise of the said rights with a view to reconciling their exercise with the exigencies of the common good.

The strong assertion that social justice is of greater importance than personal property rights is an important precondition to the redistribution of wealth. Similar values are evident in Article 45. In particular:

> 2. The State shall, in particular, direct its policy towards securing:–
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> ...
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> ii. That the ownership and control of the material resources of the community may be so distributed amongst private individuals and the various classes as best to subserve the common good.
>
> iii that, especially, the operation of free competition shall not be allowed so to develop as to result in the concentration of the ownership or control of essential commodities in a few individuals to the common detriment.
>
> ...
>
> 4. 1° The State pledges itself to safeguard with especial care the economic interests of the weaker sections of the community, and, where

necessary, to contribute to the support of the infirm, the widow, the orphan, and the aged.

The justiciability of Article 45 is contested but, as I address in chapter 4, Whyte has argued persuasively that the Article can be used to recognise implied rights or as part of a harmonious interpretation to give meaning to other provisions of the Constitution.[65] A harmonious interpretation of Article 40.1, accounting for Articles 43.2 and Article 45, would allow a court to recognise the redistribution dimension of equality.

Secondly, the *recognition dimension* concerns the dignity and value or status of people as a matter of social standing. Dignity has widespread recognition across the Constitution, with the courts recognising a fundamental right to dignity as well as using it as a value to influence the interpretation of other rights and of statutes.[66] O'Dowd goes so far as to argue that dignity is the dominant value in the Irish Constitution.[67] An interesting textual protection of equal dignity is the prohibition on titles of nobility in Article 40.2. The Preamble also asserts the objective of assuring the "dignity and freedom of the individual". It would thus be easy for a court to protect the recognition dimension of substantive equality of

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[65] See ch 4, subsection 3.4; Whyte, *Social Inclusion and the Legal System* (n 57) 54; Gerard Hogan and Gerry Whyte, *JM Kelly: The Irish Constitution* (4th edn, LexisNexis Butterworths 2003) 2080-2085; *Murtagh Properties v* Cleary [1972] IR 330.

[66] A general right to dignity appears in some case law eg, *Re A Ward of Court (No 2)* [1996] 2 IR 79; *Foy v Register of Births, Deaths and Marriages* [2002] IEHC 116; Hederman J used the value of dignity to influence to influence the interpretation of other rights in *McKinley v Minister for Defence* [1992] 2 IR 333; see also, *O'T v B* [1998] 2 IR 321; *Quinn's Supermarket v Attorney General* [1972] IR 1; *G v An Bord Uchtála* [1980] IR 32; *State (Healy) v Donoghue* [1976] IR 325; *Murray v Ireland* [1991] ILRM 465; *McGee v Attorney General* [1974] IR 284; *Liang Li v Governor of Clover Hill Prison* [2012] IEHC 493; *MEO v Minister for Justice* [2011] IEHC 545; *DPP v Murray* [2012] IECCA 60; dignity has also been used to influence the interpretation of statutes, for example in *XY v Clinical Director of St Patrick's University Hospital* [2012] IEHC 224; For academic commentary on dignity in the context of the Irish Constitution see, William Binchy, 'Dignity as a Constitutional Concept' in Oran Doyle and Eoin Carolan (eds), *The Irish Constitution: Governance and Values* (Thomson Round Hall, 2008) 317-322; Conor O'Mahony, 'There is No Such Thing as a Right to Dignity' (2012) 10(2) Int J of Constitutional Law 551; Conor O'Mahony, 'There is No Such Thing as a Right to Dignity: A Rejoinder to Emily Kidd White' (2012) 10(2) Int J of Constitutional Law 585.

[67] John O'Dowd, 'Dignity and Personhood in Irish Constitutional Law' in Gerard Quinn, Attracta Ingram and Stephen Livingstone (eds), *Justice and Legal Theory in Ireland* (Oak Tree Press 1995) 165-166.

condition under Article 40.1.[68] Indeed, as I demonstrate in chapter 4, the value of dignity underlies the development of the presumptively proscribed grounds of discrimination in Irish constitutional equality law.

Thirdly, the *transformative dimension* finds expression in the Preamble to the Constitution, and thus is part of the fundamental constitutional project to which the People committed themselves in 1937 and which subsequent generations have sustained (by engaging with, amending and not replacing the Constitution). The Preamble lists some of the ambitions of the State:

> ... And seeking to promote the common good, with due observance of Prudence, Justice and Charity, so that the dignity and freedom of the individual may be assured, true social order attained ...

Beyond the Preamble, there is little textual reference to the transformative dimension; disability rights receive no explicit recognition in the text for example. However, the courts have used constitutional rights to seek transformative change for disadvantaged people. Famous examples included *O'Donoghue v Minister for Health*,[69] in which O'Hanlon J used the right to education to force the State to provide basic training and education for children with profound learning difficulties, and *McGee v Attorney General*,[70] in which the Supreme Court used the right to bodily integrity to change the regulation of contraceptives and in so doing achieve a transformative change in an important women's rights issue.

Fourth and finally, equality in the participative dimension appears at several points in the Constitution; for example in Article 16.1 guaranteeing the right to vote and stand for election "without distinction of sex", Article 45.2.i referencing the equal right of men and women to earn a livelihood, and the protection in Article 40.6.1.iii of the right to form trade unions. A harmonious approach to Article 40.1 thus demonstrates that the courts could protect all of the dimensions of substantive equality of condition.

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[68] Ó'Cinnéide reaches a similar conclusion; Ó'Cinnéide, 'Aspirations Unfulfilled' (n 22) 53-54.
[69] *O'Donoghue v Minister for Health* [1996] 2 IR 20.
[70] *McGee v Attorney General* [1974] IR 284.

2. Doctrinal Limitations to Comprehensive Equality Protection

In light of the above arguments that equality in Article 40.1 should be defined according to relative levels of disadvantage, there ought to be a number of constitutional equality obligations on the State. First, it must not discriminate directly if to do so would impose disadvantage on a disadvantaged group. Second, it must anticipate and avoid unequal disadvantaging effects of neutral treatment. Third, when it offers public goods and facilitates private bodies offering public goods, the State ought to compensate for the existing disadvantage suffered by groups that prevent them from accessing those goods.[71] This third obligation is the most controversial, but it is a logical extension of the obligation to be neutral between citizens, once neutrality and equality are defined according to relative levels of disadvantage rather than treatment; failing to compensate for existing disadvantage allows an unequal situation to be perpetuated in which the State is complicit, because it is largely through the structures of a state-supported society that dominant groups maintain their advantage. This positive obligation on the State is thus a logical corollary of protecting against indirect discrimination.

These three obligations are not radical in scope. They are limited by the inherent input focus of the process conception so that a violation of Article 40.1 is not found simply whenever State action happens to create unequal disadvantage. Instead, a breach occurs only when the State has been unreasonable in responding to that disadvantage (for example, unreasonably failing to anticipate and avoid the inequality). Furthermore, while these three obligations are the equality obligations placed on the State, they are obviously not the only constitutional obligations under which it operates. Thus, an unequally disadvantaging law could be upheld, either because it was not unreasonable, or

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[71] As an objection to this argument, there is a temptation to raise the (supposed) non-justiciability of Article 45. The argument is that, since Article 45 touches on these issues, it would be inappropriate for Article 40.1 to be interpreted in a manner that makes these issues justiciable. For an argument along these lines, see Michael Forde, 'Equality and the Constitution' (1982) 2 Irish Jurist 295; Gerard Hogan, 'Unenumerated Personal Rights: Ryan's Case Re-evaluated' (1990) 25 Irish Jurist 95; David Gwynn Morgan, *A Judgment Too Far? Judicial Activism and the Constitution* (Cork University Press 2001) 69-70; Gerard Hogan, 'Directive Principles, Socio-Economic Rights and the Constitution' (2001) 36 Irish Jurist 174. I respond to this argument in ch 4, subsection 3.4.

because it was justified by another consideration (this, for example, is what the Divisional High Court held in *Fleming*).

This is a vision of a process conception that is as comprehensive in its protection of equality as possible. There are no conceptual barriers to such protection. There are, however, some doctrinal limitations to be overcome. The most significant of these is the idea that, while it would be consistent with equality for the Oireachtas to account for disadvantage in order to treat people differently, Article 40.1 could never introduce an *obligation* on the State to treat people differently. This is described by Doyle as Ireland's "Aristotelian-lite" conception of equality,[72] and is encompassed in the Supreme Court's holding in *Fleming*:

> While it may be open to the Oireachtas to consider making some distinction between persons, it cannot be said that any such distinction is required in this case by the Article 40.1 rights of the appellant.[73]

There are two functions of relevant differences under full Aristotelian equality: first, non-neutral treatment by the State is justified when it is based on relevant differences, and second, neutral treatment by the State is challengeable when it fails to account for relevant differences. It is a peculiarity of Irish constitutional equality law that this second use of relevant differences, in challenging indirect discrimination, is underdeveloped. This limitation on Article 40.1 is not justified for several reasons.

First, it is not conceptually justified because the courts regularly do, and ought to continue to, define equality by reference to relative levels of disadvantage. Once this is the case, there is no conceptual difference between unfairness created by direct discrimination (non-neutral treatment) and unfairness created by indirect discrimination (neutral treatment). [74] Both kinds of unfairness are similarly

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[72] Doyle, *Constitutional Equality Law* (n 2) 71–73.
[73] *Fleming v Ireland* [2013] 2 ILRM 73 (SC) [136]; See also, *Draper v Attorney General* [1984] IR 277.
[74] Oran Doyle, 'Direct Discrimination, Indirect Discrimination and Autonomy' (2007) 27(3) OJLS 537, 550-551; Fredman, *Discrimination Law* (n 23) 212–214; this is reflected in the judgment of McLachlan J in the Canadian Supreme Court case *British Columbia (PSERC) v BCGSEU* [1999] 3 SCR 3 (*Meiorin*); for a defence of the direct and indirect distinction see John Gardner, 'On the Ground of Her Sex(uality)' (1998) OJLS 167.

unequal,[75] and so the "Aristotelian-lite" distinction is indefensible from an equality perspective. Kelly, for example, writing in 1983, extrapolated from the assertions of justifications for unequal treatment that there must also be an obligation to treat people differently in certain situations, thus arguing that full Aristotelian equality is protected in Article 40.1.[76] Direct and indirect discrimination are both problematic to Aristotelian equality because they fail to make use of a relevant difference in the way the principle commands; direct discrimination arises when a distinction is made that is based on an irrelevant difference and indirect discrimination arises when a distinction is not, but ought to have been, made on the basis of a relevant difference. An analysis of either direct or indirect discrimination will require the court to assess the effect of the law. Both assessments require the courts to ask whether the difference being used (in the case of direct discrimination) or ignored (in the case of indirect discrimination) is relevant to the objective of the law. Indirect discrimination is clearly an effect-based concept because it asks whether the law unequally burdens one group relative to another. Direct discrimination, however, is not immune from effect-based analysis because the courts uphold such discrimination only when it passes a justification requirement (be that a legitimate legislative purpose test[77] or a proportionality test[78]). This requirement necessitates an effect-based analysis because it questions how closely tailored (or rationally connected) the measure is to the objective. This assessment cannot be carried out purely on the face of the law.

In light of this, it is problematic that there are Supreme Court *dicta* rejecting effect-based analysis of laws challenged under the equality guarantee. In *Fleming v Ireland*, the Supreme Court upheld the ban on assisted suicide in s.2 of the Criminal Law (Suicide) Act 1993, holding *inter alia* that it was not discriminatory on the grounds of disability in breach of Article 40.1. The two

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[75] Fredman, *Discrimination Law* (n 23) 212–213; Mark Bell, *Racism and Equality in the European Union* (OUP 2008) ch 2.

[76] John Kelly, 'Equality Before the Law in Three European Jurisdictions' (n 22); from an even earlier position, Heuston also argues that non-neutral treatment is necessary in order to achieve the conception of equality protected by Article 40.1: see Robert Heuston, 'Personal Rights Under the Irish Constitution' (1976) 2 Irish Jurist 205; see also the judgment of Walsh J in *State (Nicolau) v An Bord Uchtála* [1966] IR 567, 639; Conor O'Mahony, *Educational Rights in Irish Law* (Thomson Round Hall 2006) 41.

[77] *Brennan v Attorney General* [1983] ILRM 449.

[78] *Dokie v DPP* [2010] IEHC 110.

bases on which the Supreme Court rejected the indirect discrimination claim were, first, a pre-eminence for the principle of neutral treatment, and second, a rejection of what was described as effect-based equality analysis:

> It is difficult to succeed in an equality challenge to a law which applies to everyone without distinction, and which is based on the fundamental equal value of each human life. It is often the case that neutral laws will affect individuals in different ways: in the absence of impact on a fundamental right that does not normally give rise to any unconstitutionality.[79] ...
>
> Consequently, the appellant's argument requires further refinement... It is that the legislature treats her unequally before the law by failing to include a distinction in a facially neutral statutory provision addressed to those other persons, which, she claims, indirectly affects her. The court is invited to follow the Canadian example by interpreting Article 40.1 as requiring the courts to engage in an effects-based analysis of laws passed by the Oireachtas.
>
> The court does not consider that the constitutional principle of equal treatment before the law, as interpreted and applied in its judgments, extends to categorise as unequal the differential indirect effects on a person of an objectively neutral law addressed to persons other than that person.[80]

Notable, therefore, is the subsequent case of *Gilligan*, in which through a series of *obiter* statements the Supreme Court appeared open to an effect-based analysis under Article 40.1:

> The provision does not have any discriminatory effect under the heading where objection might legitimately be raised. (See also Barrington J.'s

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[79] *Fleming v Ireland* [2013] 2 ILRM 73 (SC) [133].

[80] *Fleming v Ireland* [2013] 2 ILRM 73 (SC), [135]–[136]; It is important not to overstate the extent of the Supreme Court's rejection of effect-based analysis. This rejection (and thus the rejection of indirect discrimination) was qualified by the reference to the law being "addressed to persons other than that person". It remains the case, however, that the Supreme Court expressed a clear preference for a neutrality-based definition of equality. For analysis of these aspects of the judgment, see Ben Mitchell, 'Constitutional Equality Law after *Fleming v Ireland*' (2014) 37 DULJ 252, 257–258.

> statement of principle in *Brennan v Attorney General* [1994] I.L.R.M. 355; approved by this Court in the *Employment Equality Bill 1996* [1997] 2 I.R. 321.)
>
> The litmus test is whether this classification made by the Oireachtas is for a legitimate legislative purpose, is relevant to its purpose, and treats members of each class fairly. The fact of classification always involves a degree of exclusion or inclusion; whether that inclusion is legitimate can be measured by relevance to its purpose, fairness and the category of classification."[81]

Both of these paragraphs give reason to question the strength of the Supreme Court's opposition to "effect-based" analysis of equality stated in *Fleming*.

The second reason to question the restrictive Aristotelian-lite approach is that it is not textually justified by the language of Article 40.1. Doyle, suggesting that it is textually justified, has argued that the Aristotelian-lite interpretation

> coheres better with the text of Article 40.1 than does the full 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 in recognition of difference, but imposes no obligation to do so.[82]

The use of the double negative complicates the interpretation but there are two ways to challenge this. The first is that the sentence could be read to impose an obligation to differentiate because of the second use of the word "shall" rather than a permissive "may". The word "shall" is usually associated with the imposition of a duty, whereas the word "may" tends to grant a power. With this in mind, the second sentence uses a double negative to say that the State is under a duty to have regard to differences. The second sentence thus clarifies that the first sentence will not change the fact that differences will be accounted for; leaving the conclusion that regard shall be had to differences. The second

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[81] *Gilligan v Ireland* [2013] 2 IR 745, [48]–[49].
[82] Doyle, *Constitutional Equality Law* (n 2) 73–74.

way to challenge this interpretation is to point out that all the second sentence does is explicitly permit non-neutral treatment. It does not explicitly say that there is not also an obligation to account for differences. Thus, if the "equal before the law" language of the first sentence (and therefore Article 40.1 as a whole, under *MD v Ireland*) endorses a conception of equality based on disadvantage rather than on neutral treatment, it is perfectly consistent with the text that an obligation to have regard to differences could arise.

Doyle's argument would be reinforced by an originalist interpretation, because Article 40.1 was intentionally amended during the drafting process so that the second sentence uses what the drafters saw as non-mandatory language of "This shall not be held to mean that the State shall not...".[83] Debate on the appropriateness of originalism remains and, without engaging with the merits of such an approach here,[84] it is worth noting that the original intentions on other aspects of Article 40.1 have not been determinative. For example, the phrase "as human persons" was intended as a restriction on the right to equality,[85] but it is instead being used to bolster the right; the Supreme Court in the recent cases of *Gilligan v Ireland*[86] and *Fleming* stated that the phrase refers to personal characteristics that are essential to identity, which have previously been stated to be presumptively unconstitutional grounds of discrimination.[87] This view was repeated in 2014 in an *obiter* statement of O'Donnell J. in *Murphy v Ireland*,[88] and

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[83] Hogan, *Origins of the Irish Constitution, 1928-1941* (n 59) 399, 528; Doyle, *Constitutional Equality Law* (n 2) 61.

[84] Hogan and Whyte (n 65) 18–30; O'Mahony (n 76) 31-35; Gerard Hogan, 'Interpreting the Constitution' in Litton (ed), *The Constitution of Ireland 1937-1987* (IPA 1988); Richard Humphreys, 'Constitutional Interpretation' (1993) 15 DULJ 57; Gerry Whyte, 'Discerning the Philosophical Premises of the Report of the Constitution Review Group: An Analysis of the Recommendations on Fundamental Rights' (1998) 2 Contemporary Issues in Irish Law and Politics 216, 228; Gerry Whyte, 'Education and the Constitution: Convergence of Paradigm and Praxis' (1990–2) 25–27 Irish Jurist 69; Oran Doyle, 'The Duration of Primary Education: Judicial Constraint in Constitutional Interpretation' (2002) 10 ISLR 222.

[85] Doyle, *Constitutional Equality Law*, (n 2) 60; Hogan, *Origins of the Irish Constitution, 1928-1941* (n 59) 310–318.

[86] *Gilligan v Ireland* [2013] 2 IR 745, [47]–[48].

[87] *Quinn's Supermarket v Attorney General* [1972] IR 1, 13–14; *Re Article 26 and the Employment Equality Bill 1996* [1997] 2 IR 321, 347; *Fleming v Ireland* [2013] 2 ILRM 73 (SC), [130].

[88] *Murphy v Ireland* [2014] 1 IR 198, [34].

has received support in several High Court judgments.[89] An originalist interpretation of the Constitution has not been dominant generally in Irish law and it seems particularly unlikely to find favour in the context of Article 40.1.[90] As a result, I disagree with Doyle's position that the Aristotelian-lite conception receives textual support from Article 40.1.

Thirdly, the value of judicial deference does not justify such an extreme restriction on the right to equality. Deference is an important value and the Supreme Court has emphasised that deference will apply when legislation deals with social controversies.[91] However, in the context of fundamental rights, deference ought to be a value that judges take into account to influence the strength of equality review, rather than to make such claims non-justiciable.[92] Under the Aristotelian-lite conception, deference excludes all claims of indirect discrimination by defining such inequalities out of Article 40.1. Under a full Aristotelian conception, deference would instead be relevant at the subsequent justification stage. This would be a more progressive equality guarantee because, even when justified, it would recognise the existence of inequality and place the theoretical burden on the justification requirement rather than on the definition of equality.[93] This would lead to clearer tools with which to critique the reasoning of judges and to analyse the constitutional merits of legislation. Deference could also more appropriately be used to balance equality with other constitutional values, rather than using deference when defining equality in the first place. The courts have occasionally resorted to a narrow interpretation of Article 40.1 that places it lower in the hierarchy than other constitutional values.[94] Though not conducive to a strong right to equality, this use of deference is more transparent than the one that occasionally operates so as to limit equality to neutral treatment.

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[89] *Quigley v Minister for Justice* [2012] IEHC 414; *Unite v Minister for Finance* [2010] IEHC 354; *J & J Haire v Minister for Health* [2009] IEHC 562.

[90] There are, however, some examples of references to originalist interpretations of Article 40.1, eg *Re Philip Clarke* [1950] IR 235.

[91] The Supreme Court held that deference will be due when the Oireachtas has legislated in an area of social controversy in *MD v Ireland* [2012] 2 ILRM 305, [50].

[92] Oran Doyle, 'Judicial Scrutiny of Legislative Classifications' (2012) 47 Irish Jurist 175, 175.

[93] Fredman, *Discrimination Law* (n 23) 183.

[94] *Dillane v Ireland* [1980] ILRM 167 (SC); *O'Brien v Stoutt* [1984] IR 316 (SC).

Finally, notwithstanding the Supreme Court's *dicta* in *Fleming* and holding in *Draper v Attorney General*,[95] the courts have occasionally applied full Aristotelian equality. First, in *DX v Buttimer*, mentioned above, Hogan J held that neutral *in camera* rules were discriminatory.[96] Hogan J quoted from the Supreme Court's judgment in *MD* that:

> applying the same treatment to all human persons is not always desirable because it could lead to indirect inequality because of the different circumstances in which people find themselves.[97]

It is significant that Hogan J used this quote to find an obligation to treat people differently and avoid indirect discrimination, while the Supreme Court in *MD* used it to justify direct discrimination, thus illustrating that direct and indirect discrimination raise identical equality concerns.[98] Secondly, the Divisional High Court in *Fleming* acknowledged that an obligation to treat people differently can arise under Article 40.1.[99] Thirdly, in *Redmond v Minister for the Environment*[100] a neutral electoral deposit requirement was an unconstitutional wealth-based discrimination. Furthermore, in *MD v Ireland* and *de Burca v Attorney General*,[101] Supreme Court statements supported full Aristotelian equality.

3. Precedent

In this chapter I reference several different types of cases that use Article 40.1. In this section I distinguish "true equality" cases on the one hand from those that involve claims for consistency on the other; it is only in the true equality cases that the definition of equality based on disadvantage is applicable. In essence, these different cases are not referring to the same right. The only uniting factor is that they all use the language of "equality", but while some cases are enforcing the right to equality, others are enforcing entirely different rights and simply using Article 40.1 as a platform.

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[95] *Draper v Attorney General* [1984] IR 277.
[96] *DX v Buttimer* [2012] IEHC 175, [14].
[97] *DX v Buttimer* [2012] IEHC 175, [14]; quoting Denham CJ in *MD v Ireland* [2012] 2 ILRM 305, [42].
[98] Oran Doyle, 'Direct Discrimination, Indirect Discrimination and Autonomy' (n 74) 10–15.
[99] *Fleming v Ireland* [2013] 2 ILRM 9 (HC), [122].
[100] *Redmond v Minister for the Environment* [2001] 4 IR 61.
[101] *de Burca v Attorney General* [1976] IR 38; Hogan and Whyte (n 65) 1365.

In the recent jurisprudence, there are at least four categories of cases that reference Article 40.1. First, several cases deal with the democratic process. Second, there are cases seeking generally consistent treatment under public law principles of consistency, legality, reasonableness and the rule of law. Third, there are cases dealing with equality of arms in litigation. Fourth, there are cases based on and concerning equality and inequality, paradigmatically those developing the idea of presumptively unconstitutional grounds of discrimination.

This final category involves claims that are inherently tied to the notion of relative levels of disadvantage; the claims are explicable as challenges to wrongful systemic inequality under the dimensions of substantive equality of condition. The presumptively proscribed grounds of discrimination demonstrate this; the purpose of protecting these grounds is that certain groups defined by them are at risk of suffering discrimination and being disadvantaged.[102] In addition to the presumptively proscribed grounds of discrimination, this category includes other claims where the concern is with relative levels of disadvantage and unequal standings in society. These cases involve some of the features necessary to justify the ground's inclusion on the list of presumptively unconstitutional grounds, such as violations of dignity or exclusions from opportunities.

The other three categories do not involve this fundamental concern for systemic wrongful inequality within the dimensions of substantive equality of condition. The first category of cases dealing with the democratic process is the clearest example of this.[103] They arise, not because of systemic unequal status, but because of a breach of a fundamental principle of democracy that each person's vote is of equal value. Carolan, for example, describes this as the republican principle of equality of input into the political system.[104] In *Doherty v Referendum*

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[102] This list is flux and is discussed above (n 48–54); I examine these cases in further detail in ch 4, arguing that the courts could recognise poverty, social class or socio-economic status as a presumptively proscribed ground of discrimination.
[103] *McKenna v An Taoiseach (No2)* [1995] 2 IR 10; *Coughlan v Broadcasting Complaints Commission* [2000] 3 IR 1; *Kelly v Minister for the Environment* [2002] 4 IR 191.
[104] Eoin Carolan, 'Recovering the Republic? Democratic Representation and the Theory of Mixed Government' (2012) 48(2) Irish Jurist 173, 194.

Commission,[105] Hogan J lists the "three core principles" relevant to the referendum process, the third being equality:

> Article 40.1 thus reflects a deeply moral premise of strict equality of citizens. In the referendum context, the value of all votes and each vote and the opinion of all citizens from the most humble to the most exalted are valued equally.[106]

Though equality in the sense of one person, one vote is guaranteed by Article 40.1, this does not mean that *Doherty* is a true equality case. Rather, it is a referendum case in which the Court used Article 40.1 to guarantee an aspect of democratic legitimacy. This guarantee could also be found implicit in Article 47. For example, in *O'Donovan v Attorney General*,[107] a case from 1961, Budd J in the High Court held that the impugned Dáil constituency boundaries created "grave inequalities of parliamentary representation" by departing from the proper ratio of member to population.[108] Budd J was acknowledging that equality is an important value in democracy cases, but based his decision on the right to vote in Article 16. He said the provisions governing the democratic process must be read in the context of the Constitution as a whole and then referred to equality in Article 40.1 as one of the values that must be taken into account.[109] In doing so, he was holding that a harmonious interpretation of the Constitution means Article 16 includes a value of equality, but he did not extrapolate from this that the case before him was an equality case; rather, he understood it to be a case about the democratic process.

The second category involves claims that non-neutral treatment has violated Article 40.1. These cases could be conceived of as examples of direct discrimination under the definition of equality based on relative levels of disadvantage. However, that is an inaccurate description; the litigants in these cases are not challenging an inequality of status, or systemic wrongful inequality, but instead are challenging the non-neutrality of treatment itself. They are thus

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[105] *Doherty v Referendum Commission* [2012] IEHC 211, [23]–[25].
[106] *Doherty v Referendum Commission* [2012] IEHC 211, [25].
[107] *O'Donovan v Attorney General* [1961] IR 114; Beytagh, 'Equality under the Irish and American Constitutions' (n 22).
[108] *O'Donovan v Attorney General* [1961] IR 114, 142, 150.
[109] *O'Donovan v Attorney General* [1961] IR 114, 137.

seeking to enforce the general obligations of consistency, legality and reasonableness that make up the rule of law. These challenges to legislation are analogous to administrative law challenges to executive action under judicial review for irrationality. It is notable that the courts have applied a similarly deferential approach to this second category of cases as they have applied to rationality challenges.[110] These rule of law obligations can plausibly be drawn from Article 40.1, but this just show that the Article can have more than one function and not that equality has to be defined as neutral treatment in all cases. These cases are not, as the fourth category of true equality cases are, based on a claim that an unequal situation exists that implicates the State. What distinguishes the second from the fourth category of cases is that the non-neutral treatment on the part of the State does not involve any hint of violations of dignity, creation of social hierarchies or other infringements of equality in dimensions of substantive equality of condition.

There are several recent examples of cases in this second category. For example, in *Douglas v DPP*[111] and *McInerney v DPP*[112] Hogan J held that a vaguely worded criminal law would lead to inconsistent applications that would breach Article 40.1. In *Webster v Dun Laoghaire Rathdown County Council*,[113] Hedigan J held that different treatment of different groups under different legislative schemes was consistent with Article 40.1 because it was not "arbitrary, unreasonable or unjust discrimination".[114] There are numerous other examples of Article 40.1 being applied in this manner.[115] These cases initially appear inconsistent with the disadvantaged-based approach adopted in the true

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[110] *State (Keegan) v Stardust Compensation Tribunal* [1986] IR 642.
[111] *Douglas v DPP* [2013] IEHC 343.
[112] *McInerney v DPP* [2014] IEHC 181.
[113] *Webster v Dun Laoghaire/Rathdown County Council* [2014] IEHC 181.
[114] *Webster v Dun Laoghaire/Rathdown County Council* [2014] IEHC 181, [7.3].
[115] *Minister for Justice, Equality and Law Reform v Tobin* [2012] 4 IR 147 (different treatment in extradition matters under different legislative schemes); *Canty v Ireland* [2011] IESC 27 (different appeal routes to the Supreme Court under different legislative schemes); *O'Sullivan v Chief Executive of the Irish Prison Service* [2010] 4 IR 562 (different appeal mechanisms for different deportation decisions); *State (Hartley) v Governor of Mountjoy Prison* (SC, 21 December 1967) (upholding a different extradition scheme to the UK compared to other countries); see also *Brehuta v DPP* [2012] IEHC 498; *Quinn v IBRC* [2013] 1 IR 393; *Gilligan v Ireland* [2013] 2 IR 745; *Murphy v Ireland* [2014] 1 IR 198.

equality cases. However, this can be explained by distinguishing them into the second and fourth categories respectively.

The Canadian experience under Section 15 of the Charter of Fundamental Rights and Freedoms is a useful analogy here. For a while, as well as applying Section 15 as an equality guarantee, the courts applied it as a general rule requiring consistency from the legislature. In order to avoid being too interventionist, the courts applied a deferential rationality standard to these cases. Eventually, the Canadian courts abandoned this approach and held that Section 15 operates exclusively as an equality guarantee and applied only to the listed and analogous grounds. Significantly, one of the reasons for this change was a (justifiable) fear that the courts would take a similarly deferential approach to all challenges relying on Section 15.[116] Ireland's experience with the second category cases is comparable to this. The courts entertain equality challenges on every conceivable basis and, in order to avoid being too interventionist, the courts only require the State to justify an inconsistency or distinction on the basis of rationality. Analogous to the fear expressed in the Canadian context, we often see a deferential approach from the courts when applying Article 40.1 as an equality guarantee. Canada resolved this difficulty by abandoning the general consistency line of cases. In Ireland, this is not possible because so much of administrative law is based on Article 40.1. Instead, adopting explicitly the structured approach to the four categories of Article 40.1 cases will enable the courts to provide better equality protection without leading to a more interventionist approach in every case.

Finally, the third category concerns equality of arms in litigation. These cases require procedural fairness. For example, in *Brohoon v Ireland*[117] Kearns P held that there is no presumption of identical treatment in the criminal process and rather that there is a requirement that the treatment not be arbitrary, capricious or unreasonable.[118] There is older authority for this category as well.[119] A fairness

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[116] Robert Sharpe and Kent Roach, *The Charter of Rights and Freedoms* (3rd edn, Irwin Law) 280-281; Peter Hogg, *Constitutional Law of Canada, Volume 2* (5th edn, Thomson Carswell 2007); Lynn Smith and William Black, 'The Equality Rights' in Errol Mendes and Stéphane Beaulac (eds), *Canadian Charter of Rights and Freedoms* (5th edn, LexisNexis 2013) 956-957.

[117] *Brohoon v Ireland* [2011] IEHC 74.

[118] See also, *DF v Garda Commissioner* [2013] IEHC 312.

criterion could be analysed through the concern for relative levels of disadvantage in the fourth category but, again, the distinguishing feature is the absence of the kinds of equality concerns that arise under dimensions of substantive equality of condition. Though these cases make reference to the equality guarantee, they could also be disposed of through principles implicit in the right of access to court and the right to a fair trial.

4. Educational Inequality and Article 40.1

In this chapter I explore a number of on-going developments in the equality jurisprudence under Article 40.1. If the courts confirmed all of these, and took them to their logical conclusions, could the courts find that the State has failed to guarantee equality in how it manages the education system? The types of inequality at issue are those on the basis of poverty, social class and socio-economic status, which I outline in chapter 5. I consider in chapter 4 whether poverty, social class or socio-economic status could be a presumptively proscribed ground of discrimination under Article 40.1.

The kinds of inequalities at stake are indirect; the State's policy position allowing schools to discriminate on the basis of poverty (directly, by charging fees, and indirectly, though voluntary contributions) and social class (indirectly, for example by adopting a curriculum favouring middle class values) constitute neutral rules that place people disadvantaged by poverty and class in a worse position relative to others. They also constitute a failure by the State to meet positive duties to ensure that people can access valuable public services like education on an equal basis. The State, however, is not directly discriminating on the basis of poverty, social class and socio-economic status.

The prospects for successfully challenging these inequalities are not particularly strong. As a preliminary, the courts would first have to confirm the developments in equality jurisprudence upon which the arguments would rely, which may take time. There is also the risk of courts reversing these developments when faced with controversial applications. Furthermore, positive duties are difficult to enforce in the courts; the best approach to enforcement is to use a

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[119] *State (Hartley) v Governor of Mountjoy Prison* (SC, 21 December 1967).

reasonableness approach.[120] Despite these significant obstacles, the challenges to educational inequality are arguably based on both precedent and principle. A particular example of judicial authority on this topic is the concurring judgment of Denham J in *Sinnott v Minister for Education*,[121] in which she suggested that the failure to provide education for the disabled applicant was a failure by the State to hold him equal before the law:

> There is no question but that the treatment of the first plaintiff by the State would not be as an able bodied child. However, he was entitled to be held equal - to be provided with free primary education.[122]

This is interesting because the failure to provide particular education for Mr Sinnott was indirect discrimination, because the free education system was formally available to him. Denham J also held, dissenting on this issue, that the failure was a breach of his mother's right to equality; because she had to pay for her son's education herself, the State had left her in a disadvantaged position relative to other parents.[123]

Thus, the arguments that the persistence of educational inequality is unconstitutional are not speculative; they are consistent with developments in the case law that have evolved over several years and with large amounts of judicial *dicta*. Given the difficulties using Article 40.1 as the basis of a challenge, however, it might be more advantageous to use a conjoined application of the right to equality in Article 40.1 and the right to education in Article 42. I consider this possibility in chapter 7.

Conclusion

Article 40.1 is put to multiple uses by the courts; it guarantees neutrality in the democratic process, it ensures consistency on the part of the State, it requires equality of arms before the courts, and it guarantees a right to equality. The numerous seemingly conflicting uses of Article 40.1 may partially explain the

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[120] Murray Wesson, 'Disagreement and the Constitutionalisation of Social Rights' (2012) 12(2) Human Rights Law Review 221; Whyte, *Social Inclusion and the Legal System* (n 57) 84-93.
[121] *Sinnott v Minister for Education* [2001] 2 IR 545.
[122] *Sinnott v Minister for Education* [2001] 2 IR 545, 660.
[123] *Sinnott v Minister for Education* [2001] 2 IR 545, 660-661.

traditional weakness of the right to equality. However, there is a fundamental difference between the first three categories and the fourth because the true equality cases are concerned with systemic wrongful inequality, identified by the dimensions of substantive equality of condition, while the others are not.

Distinguishing the four categories can hopefully prevent the transfer of ideas from the first three categories, which have little to do with the right to equality, into the true equality cases. This is not a fanciful risk or even a trivial problem. In *MD*, the Supreme Court adopted language of "strict equality". This is an idea perfectly suited to cases dealing with the democratic process, as demonstrated by *Doherty v Referendum Commission*, but is wholly inappropriate in true equality cases. The reasoning of the Supreme Court, rather than necessarily the result, in *Fleming v Ireland* is an example of the approach that can arise when neutral treatment takes hold as the guiding principle in a true equality case. In true equality cases, the courts have sometimes applied a guiding principle of relative levels of disadvantage. These cases are welcome and the courts ought to adopt this principle explicitly.

When dealing with true equality cases, the courts have often defined equality according to disadvantage. This is consistent with Article 40.1 providing a guarantee of equality. The courts can use that definition of equality when applying the Aristotelian equality command, which is to treat equals equally and unequals unequally. This would mean that when someone is disadvantaged relative to someone else, this is a relevant difference to which the State should have regard and should then act in a way that reduces, rather than increases, that inequality. Applying this reasoning to educational inequality makes it arguable that the State is in breach of Article 40.1 by failing to ensure equality in the education system.

Ch 4: Poverty or Social Class as a Presumptively Proscribed Ground of Discrimination

Sections

1. Presumptively Proscribed Grounds of Discrimination
    1.1 Development of the Presumptively Proscribed Grounds
    1.2 Presumption of Constitutionality and Shifting the Burden of Proof
2. Criteria for Identifying Grounds: The Human Personality Doctrine
    2.1 Background to the Human Personality Doctrine
    2.2 Human Personality Doctrine and using Dignity to choose the Presumptively Proscribed Grounds
3. Poverty, Socio-economic Status or Social Class as a Presumptively Proscribed Ground of Discrimination
    3.1 Constitutional Equality Cases Dealing With Poverty
    3.2 Theoretical Arguments in an Irish Context
    3.3 Economic Inequality and the Separation of Powers
        3.3.1 Democratic Objection
        3.3.2 Constitutional Separation of Powers Objection
        3.3.3 Competence Objection
        3.3.4 Poverty Under a Rigid Separation of Powers
    3.4 Article 45 Directive Principles of Social Policy

Introduction

In this chapter I apply the arguments for the recognition of poverty as a ground of equality law in Ireland. I advance the theoretical arguments in chapter 2, so these two chapters should be read in conjunction. At the root of the argument is the claim that poverty, socio-economic status or social class as a ground would be just the same as any other ground of equality law. The great challenge with sustaining that claim is that poverty is inherently tied to economic inequality, which means there is a nexus with economic policy. That instantly raises questions of the legitimacy and competence of the courts but, as argued in section 3 below, I do not think these concerns are insurmountable.

In section 1 I outline the grounds of inequality and discrimination that the courts have identified as particularly problematic under Article 40.1. This is an important development in Irish constitutional equality law, which Doyle describes as the

presumptively proscribed grounds of discrimination.[1] In Section 2 I seek to identify the theory (or theories) that the courts use to identify these grounds. This is still unclear, because the courts have not spoken at length on this issue, but dignity appears to be the preeminent value. As in chapter 2, I argue that the courts should not constrain themselves to a single value and instead should seek to prohibit wrongful systemic inequality under any of the dimensions of inequality. Consequently, in Section 3 I argue that the courts could add poverty, socio-economic status or social class to the list of protected grounds. I make the positive case for this recognition and then rebut a number of objections, such as those based on the separation of powers, the competence of the courts, and the non-justiciability of Article 45.

1. Presumptively Proscribed Grounds of Discrimination

Article 40.1 of the Constitution is, for many writers, a frustrating provision that is notable for its limited doctrines and missed opportunities. One clear exception, however, is the idea that there are certain grounds on which equality is protected to a greater degree. Article 40.1 applies to any possible distinction, which means that the courts can only prevent the Article from destroying all government activity by applying a deferential standard of review. The developing idea of presumptively proscribed grounds of discrimination would add another layer to equality law, in which discrimination on certain grounds would receive more intensive review and be subject to a shift in the evidential burden of proof. To call this area of the jurisprudence much more than an idea would be misleading, however; in face of the of the narrow case law more generally, commentators have seized on a few statements by the courts that offer a vision of a more progressive Article 40.1. The danger is that this enthusiasm overstates the developments and, by writing into the vacuum left between the courts' statements, misleads the reader into thinking this doctrine has properly taken hold in Ireland. On the contrary, it remains an uncomfortable fact for this chapter, and this thesis, that the courts have yet to apply the presumptively proscribed grounds of discrimination explicitly in any case where it would form part of the *ratio decidendi*. With that caveat in mind, there remains reason for optimism because of the frequency with which the courts have spoken on this issue. These

[1] Oran Doyle, *Constitutional Equality Law* (Round Hall 2005) chs 6 and 9.

cases can be analysed to chart the scope of what is probably more accurately called a potential doctrine, rather than a doctrine, of Irish constitutional equality law.

Article 40.1 on a textual level provides a bald guarantee of equality because it does not set out explicitly any grounds on which equality is guaranteed:

> 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.

Kelly suggests an explanation for this by noting, first that some specific grounds are explicitly covered elsewhere in the Constitution (such as religion in Article 44.2.3°, sex in Article 16.1, and political, religious and class identity in Article 40.6.2°) and secondly, that it was not the general trend to list these grounds in constitution-drafting until after the Second World War.[2] The Irish Constitution is part of an older order of constitutions and came into effect in 1937, predating this modern trend. One of the great strengths of this entirely open-textured approach, if certain grounds are to receive additional protection, is that it allows the judiciary to identify new grounds of discrimination (and abandon old ones) as society develops.[3]

1.1 Development of the Presumptively Proscribed Grounds

In standard Article 40.1 cases, the ground in question is not particularly important because the Article applies to every type of distinction. The presumptively proscribed grounds of discrimination are beginning to change this. There are some inconsistencies and ambiguities in the list of grounds stated by the courts but it certainly includes race, ethnicity, religion,[4] and lineage or "pedigree",[5] with greater uncertainty about marital status, political affiliation,[6] sex

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[2] John Kelly, 'Equality Before the Law in Three European Jurisdictions' (1983) 2 Irish Jurist 259, 261-262.
[3] Sandra Fredman, *Discrimination Law* (2nd edn, OUP 2011) 118.
[4] *Re Art 26 and the Employment Equality Bill 1996* [1997] 2 IR 321, 347.
[5] *An Blascaod Mór Teoranta v Commissioner of Public Works* [2000] 1 IR 6.
[6] *Murphy v Ireland* [2014] 1 IR 198, [34].

or gender,[7] disability,[8] and nationality.[9] This list has its roots in the famous judgment of Walsh J in *Quinn's Supermarket v Attorney General*[10] where he said:

> ... this provision 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. This list does not pretend to be complete...[11]

This statement could be read in a broad or narrow way. On the broad reading it says that the noted grounds are particular problematic to Article 40.1 equality and so any distinctions on these bases are prohibited entirely (whether or not the distinction at issue itself implicates dignity). A narrower reading is that only the distinctions that are motivated by prejudice will be proscribed. The difference is whether dignity identifies the ground, on which all distinctions are then prohibited, or whether there must also be a dignity violation specific to each impugned distinction before Article 40.1 can arise. The Supreme Court of Canada followed this latter, narrower approach for a period of years, before reverting to the broader approach. The Irish Supreme Court, in *Re Art 26 and the Employment Equality Bill 1996*, gave consideration to this issue again and, in more deliberate language that supports the broader interpretation, said that

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[7] Sex/gender discrimination was thought to be a paradigm of presumptively proscribed discrimination following *Re Article 26 and the Employment Equality Bill* [1997] 2 IR 321, but the Supreme Court upheld direct sex discrimination without any reference to a stricter standard of review in *MD v Ireland* [2012] IESC 10.

[8] *Fleming v Ireland* [2013] 2 ILRM 73, [130] (SC) the Supreme Court hinted that disability could be included: "Classification by reference to age or disability may be suspect or may be easily explained. Benefits granted by reference to age or disability may be easy to justify."

[9] Nationality was listed by the Supreme Court in *Fleming* [2013] 2 ILRM 73 [130] and approved in *Gilligan v Ireland* [2013] 2 IR 745, but O'Donnell J did not include it in *Murphy v Ireland* [2014] 1 IR 198, [34] and in *Dokie v DPP* [2010] IEHC 110 the High Court (Kearns P) did not impose a higher standard of review for direct discrimination based on nationality.

[10] *Quinn's Supermarket v Attorney General* [1972] IR 1.

[11] *Quinn's Supermarket v Attorney General* [1972] IR 1, 13-14.

certain grounds are protected to the extent that discrimination on those grounds would be presumptively 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.[12]

Doyle notes that this statement, though consolidating the idea that certain grounds receive particular equality protection, also weakens the strength of that guarantee because discriminations on these grounds are merely presumptively invalid, rather than being absolutely proscribed as implied by Walsh J in *Quinn's Supermarket*.[13] The idea that these grounds should receive fortified equality protection is bolstered by the holding of the Court that "age" is not one of the presumptively proscribed grounds of discrimination, and that, therefore, age discrimination would be justified if "the differentiation is related to a legitimate objective and is not arbitrary or irrational".[14] Thus, without setting out the test for the more intensive standard of review, the Court implied that a variable standard of review applies. In addition, as Doyle explains, the notion of being presumptively proscribed requires, at a minimum, that the burden of justification at least partially lie on the State.[15]

In *An Blascaod Mór Teoranta v Commissioner of Public Works*,[16] the Supreme Court held a classification based on lineage, or "pedigree", to be unconstitutional. In doing so, the Supreme Court referred to ideas from United States jurisprudence of suspect classifications and constitutional blindness.[17] The Court did not refer to the notion of presumptively proscribed grounds of discrimination directly and it applied an ordinary legitimate legislative purpose test. However, it treated the ground of discrimination, "pedigree", as it would

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[12] *Re Article 26 and the Employment Equality Bill* [1997] 2 IR 321, 347.
[13] Doyle, *Constitutional Equality Law* (n 1) 138.
[14] *Re Article 26 and the Employment Equality Bill* [1997] 2 IR 321, 347-348; *D v Residential Institutions Redress Review Committee* [2010] 1 IR 262.
[15] Oran Doyle, 'Judicial Scrutiny of Legislative Classifications' [2012] 47 Irish Jurist 175, 176.
[16] *An Blascaod Mór Teoranta v Commissioner of Public Works* [2000] 1 IR 6.
[17] *An Blascaod Mór Teoranta v Commissioner of Public Works* [2000] 1 IR 6, 19; Doyle, *Constitutional Equality Law* (n 1) 140-141.

have been expected to treat a presumptively proscribed ground of discrimination such as race:

> It is hard to see what legitimate legislative purpose [the legislation in question] 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.[18]

After a period of silence on this issue, the Supreme Court appeared to reject the potential doctrine in one of the most high-profile equality cases of recent years, *MD v Ireland*.[19] The Court upheld direct sex discrimination in a criminal law context and made no mention of the idea of presumptively proscribed grounds of discrimination. On the contrary, the Court emphasised that the impugned law dealt with a controversial social issue and therefore warranted extra deference, rather than the higher standard of review appropriate to a presumptively proscribed ground of discrimination.[20] This holding reflected precedent, to the extent that deference has traditionally been shown to legislation in the social sphere,[21] but it cannot be reconciled with the precedents developing a doctrine of presumptively proscribed grounds of discrimination.[22]

Following *MD*, however, in three separate judgments the Supreme Court has given *obiter* endorsements to the idea of reigniting the presumptively proscribed grounds of discrimination. First, in *Fleming v Ireland*,[23] the Supreme Court said:

> [A] law will be closely scrutinised if it classifies people by reference to such classes as race, religion, gender or nationality. These are categories, where as a matter of history, it is possible to detect the operation of conscious or unconscious prejudice.[24]

The Court then went on to say:

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[18] *An Blascaod Mór Teoranta v Commissioner of Public Works* [2000] 1 IR 6, 19.
[19] *MD v Ireland* [2012] IESC 10.
[20] *MD v Ireland* [2012] IESC 10, [50].
[21] Doyle, *Constitutional Equality Law* (n 1) 158-160.
[22] Doyle, 'Judicial Scrutiny of Legislative Classifications' (n 15) 183-184.
[23] *Fleming v Ireland* [2013] 2 ILRM 73 (SC).
[24] *Fleming v Ireland* [2013] 2 ILRM 73 (SC), [130].

> Classification by reference to age or disability may be suspect or may be easily explained. Benefits granted by reference to age or disability may be easy to justify.[25]

Also significant is the Court's statement that in cases of direct discrimination, "it may be necessary, depending on its context, to inquire into its justification".[26] These dicta support a more intensive standard of review for certain grounds and a shift in the burden of proof. The first indented quote also supports the broader approach to identifying grounds, in which dignity is used as the means to identify the protected ground but does not limit the extent of its protection. As discussed above and in chapter 2, this means that certain grounds can be protected because discrimination on those grounds threatens dignity, but that any discrimination on such grounds is then protected against, whether or not that individual discrimination violates dignity itself.

Secondly, in *Gilligan v Ireland*,[27] the Court cited and repeated these statements from *Fleming*.[28] In that case, the Court held that there was no prejudicial intent in the impugned law and also, importantly, that there was no discriminatory effect on such classes as race, religion, gender or nationality, which meant that the appropriate standard of review to be applied was the legitimate legislative purpose test.[29] This implies that discriminatory *intent* on any ground is problematic, while discriminatory *effect* is also problematic but only on certain grounds. This focus on intent in the first instance is unhelpful. Article 40.1 potentially applies to any ground, which means that any line drawn by the State is potentially reviewable. Whether or not the State intended to draw that line is not determinative of its wrongfulness: the State *intends* to provide primary schooling to children under 12 and secondary schooling to older children; the State *intends* to detain certain people convicted of crimes but not other people; the State *intends* to provide free nursing care only to those who need it and cannot otherwise afford it. The fact that it intends these discriminations is not a basis for challenging them. If they are wrongful, it is a matter of effect rather than

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[25] *Fleming v Ireland* [2013] 2 ILRM 73 (SC), [130].
[26] *Fleming v Ireland* [2013] 2 ILRM 73 (SC), [129].
[27] *Gilligan v Ireland* [2013] 2 IR 745.
[28] *Gilligan v Ireland* [2013] 2 IR 745, [47].
[29] *Gilligan v Ireland* [2013] 2 IR 745, [48]-[49].

intent. Despite that use of intention, it is clear that the Court was endorsing a more intensive standard of review for certain grounds. Again, however, it did not articulate the content of that standard.

Thirdly, in *Murphy v Ireland*,[30] O'Donnell J in the Supreme Court gave an important overview of Article 40.1. He quoted Walsh J's statement in *Quinn's Supermarket* that equality protects grounds based on dignity and said:

> ... the guarantee of equality before the law is expressed in terms of such equality "as human persons". That phrase was problematic in the early period of constitutional interpretation... It is however, increasingly understood that it is intended to refer to those immutable characteristics of human beings, or choices made in relation to their status, which are central to their identity and sense of self and which on occasions have given rise, whether in Ireland or elsewhere, to prejudice, discrimination or stereotyping... Matters such as gender, race, religion, marital status and political affiliation, while not all immutable characteristics, can nevertheless be said to be intrinsic to human beings' sense of themselves. Differentiation on any of these grounds, while not prohibited, must be demonstrated to comply with the principles of equality. This is the sense in which the principle of equality is most commonly employed in constitutions and international instruments.[31]

This vision of Article 40.1 would see discriminations based on certain grounds treated carefully by the courts, and the fact that they "must be demonstrated" to comply with equality implies that the burden of justification may be shifted in certain instances. The existence of a variable standard of review is further indicated by O'Donnell J's discussion of how Article 40.1 applies when there are none of the listed grounds (gender, race, etc) at issue, as was the case in *Murphy*. In those instances, O'Donnell J said that Article 40.1 would still have a role to play but he said

[30] *Murphy v Ireland* [2014] 1 IR 198.
[31] *Murphy v Ireland* [2014] 1 IR 198, [34].

> It is unnecessary here to seek to determine the level of scrutiny the Constitution would require to be applied to any particular differentiation in the absence of one of the factors identified above.[32]

This clearly states that a more intensive standard of review is appropriate when the identified factors (the presumptively proscribed grounds) are at stake.

Several features of this case law are worth highlighting. First, the Supreme Court has taken three recent opportunities to endorse the notion of a more intensive standard of review for certain grounds. This reignites the potential for this development in Irish constitutional equality law after the Court had earlier appeared unwilling to engage with it.[33] Secondly, this appears to include a variable standard of review. Thirdly, the statements from the Court suggest that a shift in the burden of justification is possible. Fourthly, the grounds that make up this list of potentially presumptively proscribed grounds are inconsistent and still developing,[34] but when the courts have provided examples they have always stated it to be an open-ended list, by referring to grounds "such as" race, gender, etc. This allows scope for the argument that poverty, socio-economic status or social class should be included as a presumptively proscribed ground.

1.2 Presumption of Constitutionality and Shifting the Burden of Proof

Before examining how the courts identify the protected grounds it is important to reconcile the shift in the burden of proof with the presumption of constitutionality. The Supreme Court in *Lowth v Minister for Social Welfare*[35] dismissed the Article 40.1 challenge by applying the presumption of constitutionality, though it did not explicitly deal with the question of whether the burden of proof could shift in some instance. This shift in burden could be merely functional or evidential, so that the normative presumption of constitutionality, that the law is still valid, remains.[36] The ordinary burden is on the plaintiff to demonstrate that there is a State measure that distinguishes between people (direct discrimination) or fails to account for relevant differences between them

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[32] *Murphy v Ireland* [2014] 1 IR 198, [35].
[33] Doyle 'Judicial Scrutiny of Legislative Classifications' (n 15).
[34] See n 48-54 above.
[35] *Lowth v Minister for Social Welfare* [1998] 4 IR 321.
[36] Doyle, *Constitutional Equality Law* (n 1) 138-141.

(indirect discrimination). This raises a *prima facie* case of discrimination, which the State rebuts by demonstrating that the inequality is justified.

This approach is not unique to constitutional equality law and arises in other areas of constitutional law and in statutory and EU equality law. In *BUPA Ireland Ltd v Health Insurance Authority*,[37] which dealt with various personal and family rights in the Constitution, McKechnie J held that when a plaintiff establishes that a right is restricted, the burden shifts to the State to justify it.[38] The Supreme Court in *King v Minister for the Environment (No 2)*[39] discussed *prima facie* violations of Article 16 and said that this would be unconstitutional "unless the State can establish there are objective reasons why this is necessary."[40] *BUPA Ireland* and *King* each suggest a sensible approach to the presumption of constitutionality, which is established in other legal systems. However, as Foley demonstrates, the courts do not uniformly apply this approach to the presumption of constitutionality.[41]

In statutory law, the respondent (for example an employer) carries the full burden of demonstrating that the inequality is justified. In constitutional law, a lesser burden could be used, so that the State merely has to identify its purported justification and the burden then returns to the plaintiff to rebut the presumption of justification. A degree of burden shifting is essential because without it the right to equality, and any other constitutional right, becomes impossible to implement. If the plaintiff has the entire burden of proof, including the duty to identify and rebut the potential justification for the inequality, the result is that the plaintiff has to identify every possible justification and discount it.[42] This is, as Doyle criticises it, tantamount to proving a negative.[43] A minimal degree of burden shifting is consistent with the concept of justifying a restriction on a right; the plaintiff shows that a right protected by the Constitution has been affected by

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[37] *BUPA Ireland Ltd v Health Insurance Authority* [2006] IEHC 431.
[38] *BUPA Ireland Ltd v Health Insurance Authority* [2006] IEHC 431, [6]; Brian Foley, *Deference and the Presumption of Constitutionality* (IPA 2008), 163-164.
[39] *King v Minister for the Environment (No 2)* [2007] 1 IR 296.
[40] *King v Minister for the Environment (No 2)* [2007] 1 IR 296, 324; Foley (n 38) 163-164.
[41] Foley (n 38).
[42] The Supreme Court took this approach in *D v Residential Institutions Redress Review Committee* [2010] 1 IR 262, which did not deal with one of the presumptively proscribed grounds of discrimination.
[43] Doyle 'Judicial Scrutiny of Legislative Classifications' (n 15).

an action of the State, and the State then explains why that apparent infringement is acceptable.

The presumption of constitutionality has two functions:[44] it is a default of rule that allows the system to take legislation at face value and implement it,[45] and it is an evidential (or adjudicative) rule in judicial review of legislation.[46] The former function does not prevent the proposed shift in burden of proof because the fact that a plaintiff has identified a potential infringement of a right is enough to question whether what is merely a *presumption* of constitutionality is in fact correct. The secondary function is designed to ensure the proper conduct of constitutional litigation,[47] so is not an absolute rule. Indeed, Hogan and Whyte note that the intensity of the presumption of constitutionality can vary depending on the context and nature of the legislation in question.[48] The courts should be able to interpret the presumption as sufficiently adaptable to allow a minimal shift in burden to prevent equality cases being unarguable.

2. Criteria for Identifying Grounds: The Human Personality Doctrine

In chapter 2, I outline the theory of how courts can identify protected grounds in equality law. In many jurisdictions grounds are only identified if the groups defined by them implicate a particularly important value, such as dignity, autonomy or democracy. I argue that in choosing grounds the courts should aim to tackle systemic wrongful inequality. Since inequality can be wrongful for a whole range of moral reasons, I argue that it is better not to confine the tools for the identification grounds to a single principle.

Whether unified by a single principle (of dignity, autonomy or democracy) or not, constitutional courts in the common law tradition across the world regularly rely

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[44] Foley (n 38) 137.
[45] *Buckley v Attorney General* [1950] IR 67, 80; *Goodman International v Hamilton* [1992] 2 IR 542, 586.
[46] *Pigs Marketing Board v Donnelly* [1939] IR 413, 417; *Re Article 26 and the Offences Against the State (Amendment) Bill 1940* [1940] IR 470, 478; see Gerard Hogan and Gerry Whyte, *Kelly: The Irish Constitution* (4th edn, LexisNexis Butterworths 2003) 832-833, 840-843; Brian Foley, 'Presuming the Legislature Acts Constitutionally: Legislative Process and Constitutional Decision-Making' (2007) 29 DULJ 141.
[47] The State can prevail in judicial review proceedings, despite not presenting evidence, for example, *Norris v Attorney General* [1984] 1 IR 36; Michael Forde and David Leonard, *Constitutional Law of Ireland* (Bloomsbury 2013) 41.
[48] Hogan and Whyte (n 46) 840.

on a combination of criteria in identifying grounds. These include: the immutability of the characteristic in question or its nature as a fundamentally personal choice; whether a group defined by the ground is excluded from the political process, or constitutes a discrete and insular minority; whether discrimination on the basis of the ground would violate dignity by treating individuals as less valuable members of society; and whether there is a history of disadvantage and discrimination associated with groups defined by the ground.[49]

In a changing society, the grounds of discrimination that merit protection are subject to change, and so the judiciary need the ability to identify new grounds to be protected.[50] For example, if Irish society developed a stigmatisation of people with freckles in the future, which led to systemic inequality, the courts should be able to adjust the list of presumptively proscribed grounds of discrimination to include this ground.

In Ireland, the courts have used the human personality doctrine as the means of identifying protected grounds under Article 40.1. In the remainder of this section, I examine briefly the history of this doctrine, before analysing the recent use of the doctrine as a means of identifying protected grounds.

2.1 Background to the Human Personality Doctrine

Article 40.1 guarantees equality "as human persons". This phrase is the source of the human personality doctrine, which has a long and troubled history of both narrow and inconsistent decisions.[51] In what is known as the "context of discrimination" approach, the courts have occasionally held that unconstitutional discrimination would only arise if the law distinguished people in the context of their essential human attributes, something that it almost impossible to imagine in practice.[52] The more expansive version of the doctrine, the "basis of discrimination" approach, would strike down a discrimination that is based on an

[49] Fredman, *Discrimination Law* (n 3) 130-139.
[50] Fredman, *Discrimination Law* (n 3) 110-139.
[51] Hogan and Whyte (n 46) 1342-1348; Kelly (n 2); Doyle, *Constitutional Equality Law* (n 1) 127-132; Forde and Leonard (n 47) 409-437.
[52] *Quinn's Supermarket* [1972] IR 1 per Kenny J; *Murtagh Properties v Cleary* [1972] IR 330; *Madigan v Attorney General* [1986] ILRM 136; *McMenamin v Ireland* [1996] 2 IR 100; *O'Q v Buttimer* [2009] IEHC 25; see Gerry Whyte, 'A Comment on the Constitution Review Group's Proposals on Equality' in Rosemary Byrne and William Duncan (eds), *Developments in Discrimination Law in Ireland and Europe* (ICEL 1997).

essential human attribute, no matter the context in which it arises.[53] In the most recent twist in the doctrine's development, the basis of discrimination approach has been consolidated and it has become the source of the presumptively proscribed grounds of discrimination.

In recent years, the basis of discrimination approach has dominated.[54] The extracts from the Supreme Court judgments in *Fleming v Ireland*, *Gilligan v Ireland* and *Murphy v Ireland*, discussed above, displayed a preference for the basis of discrimination approach. In *Fleming*, the Supreme Court said that Article 40.1 equality is applicable to economic activities.[55] This is significant because the most notable application of the context of discrimination approach, in *Murtagh Properties v Cleary*,[56] dealt with economic activity. In that case, Kenny J held that the article was inapplicable to trading activities and conditions of employment.[57] Additionally, In *Unite v Minister for Finance*,[58] the State directly argued for a context of discrimination approach under *Murtagh Properties v Cleary*, but Kearns P rejected this argument without comment and applied the basis of discrimination approach. More explicitly, Laffoy J in *Quigley v Minister for Education*[59] rejected a context of discrimination argument based on *Murtagh Properties* and said that the phrase "as human persons" means that certain grounds are presumptively proscribed. In *Quigley*, Laffoy J upheld discrimination against part-time workers relative to full-time workers, because she found that the condition of full or part time work has nothing to do with human attributes:

> I do not think it is open to this Court to merely assess the difference of treatment simpliciter without considering whether such difference is

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[53] *Quinn's Supermarket v Attorney General* [1972] IR 1 per Walsh J; *East Donegal Co-Op v Attorney General* [1970] IR 317; *Brennan v AG* [1983] ILRM 449; *Re Article 26 and the Employment Equality Bill* [1997] 2 IR 321; Doyle, *Constitutional Equality Law* (n 1) 128-129.

[54] Elaine Dewhurst, 'The Development of the Irish Equality Guarantee by the Superior Courts in 2013' (2014) Bar Review 18, 24.

[55] *Fleming v Ireland* [2013] 2 ILRM 73 (SC), [129].

[56] *Murtagh Properties v Cleary* [1972] IR 330.

[57] *Murtagh Properties v Cleary* [1972] IR 330, 335.

[58] *Unite v Minister for Finance* [2010] IEHC 354.

[59] *Quigley v Minister for Education* [2012] IEHC 414.

based on the forms of discrimination which have been identified by the Supreme Court as being proscribed by Article 40.1. [60]

An unusual feature of Laffoy J's judgment is the holding to the effect that Article 40.1 inequalities does not arise at all outside the context of these presumptively proscribed grounds; when the discrimination has nothing to do with human attributes, there can be no unconstitutional discrimination. Canadian jurisprudence on Section 15 of the Charter appears to have been referenced throughout the submissions and features at an earlier point of the judgment.[61] Canadian equality law is limited in its protection only to listed and analogous grounds. It is worth emphasising, however, that this cannot be the correct position in Irish law. As I have argued in chapter 3, Article 40.1 applies in at least four categories of cases and while it operates differently in the context of true equality cases (such as when the presumptively proscribed grounds of discrimination arise), it is not exclusively applicable in those cases because the Article also places a general obligation of consistency on the State. In true equality cases (such as *Fleming*), Article 40.1 can be applied analogously to Section 15 of the Canadian Charter, but in other cases where it is just a consistency obligation that applies (such as *Quigley*), it is inappropriate to compare Article 40.1 to Section 15. The comparative use of the Canadian Section 15 in *Quigley* thus seems to have distorted the Court's reasoning. The possibility that Article 40.1 would become constrained in this way was highlighted and cautioned against by Doyle when the Supreme Court in *D v Residential Institutions Redress Review Committee*[62] came to a similar result.[63] The correctness of the claim that Article 40.1 applies to any type of distinction, but that it applies differently in different categories of cases, is affirmed by O'Donnell J in *Murphy v Ireland*, as discussed above, where he said that Article 40.1 is concerned with certain grounds of discrimination in particular but that it also is a more general guarantee of consistency.

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[60] *Quigley v Minister for Education* [2012] IEHC 414, [7.2].
[61] *Quigley v Minister for Education* [2012] IEHC 414, [3.18]
[62] *D v Residential Institutions Redress Review Committee* [2010] 1 IR 262.
[63] Doyle, 'Judicial Scrutiny of Legislative Classifications' (n 15) 178.

In a final note of caution, occasionally the context of discrimination approach does reappear successfully. In *Prendergast v Higher Education Authority*,[64] Charlton J rejected a challenge to the system of reserving places in medical school for international students, who had lower entry criteria than EU students. Charlton J quoted from judgments applying the context of discrimination approach[65] and held that the government policy that admission to subsidised education at primary degree level by EU citizens should be unrelated to ability to pay economic fees had nothing to do with Article 40.1 equality based on the nature of human personality.[66] Clouding this reasoning slightly is the fact that before and after stating the context of discrimination approach, Charlton J engaged with the justification for the unequal treatment and discussed the difference in social function between an EU and an international student, which would make the entry scheme consistent with Article 40.1.[67] This style of reasoning is more consistent with the basis of discrimination approach, because a question of justification could only arise if there were a potential inequality at stake, which Charlton J implied was not the case under the context of discrimination approach. Subsequently, in *O'Q v Buttimer*,[68] Edwards J purported to apply a context of discrimination approach, though his conclusion is also defensible from a basis of discrimination approach. Both of these cases are ambiguous, containing elements of both the context and basis of discrimination approaches. However, they do show that it may be premature to state categorically that the context of discrimination approach has demised. Indeed, in chapter 7, I propose an alternative function for the context of discrimination approach, based on the idea of an application of equality in the context of a fundamental right. Consequently, while the courts should avoid the traditional context of discrimination approach, there are good arguments for retaining sensitivity to context in the Article 40.1 analysis.

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[64] *Prendergast v Higher Education Authority* [2008] IEHC 257.
[65] *Prendergast v Higher Education Authority* [2008] IEHC 257, [69]-[70].
[66] *Prendergast v Higher Education Authority* [2008] IEHC 257, [68].
[67] *Prendergast v Higher Education Authority* [2008] IEHC 257, [64]-[67], [71]-[74].
[68] *O'Q v Buttimer* [2009] IEHC 25.

2.2 Human Personality Doctrine and using Dignity to choose the Presumptively Proscribed Grounds

A significant feature of the recent application of the human personality doctrine is its use to explain the existence of the presumptively proscribed grounds of discrimination. Doyle had previously described the basis of discrimination approach as the unspoken justification for the identification of these grounds.[69] Binchy also demonstrates the clear link between human dignity and the protection of these grounds.[70] Since Doyle's analysis, the Supreme Court has explicitly used the human personality doctrine in this way. In *Gilligan*, the Court cited its statements from *Fleming* (which in turn cited Walsh J's basis of discrimination approach in *Quinn's Supermarket*) to the effect that equality "as human persons" means equality is guaranteed in relation to dignity, such that Article 40.1 particularly protects against inequalities based on the assumption that individuals or groups are inferior.[71] From this it concluded that grounds that have a history of prejudice, such as race, religion, gender or nationality, deserve a more intensive standard of review than other classifications.[72] Similarly, O'Donnell J in *Murphy* said that the reason for the presumptively proscribed grounds needing extra protection is that these grounds implicate people "as human persons".[73]

In wielding the doctrine, the Supreme Court seems to treat it as a platform for the introduction of dignity as a criterion in the identification of grounds.[74] I considered the role of dignity in equality law theory in chapter 1. Each of the judgments in *Fleming*, *Gilligan* and *Murphy* refer to equality "as human persons" and then immediately focus on the kinds of discriminations that are based on prejudice (which is a paradigm of dignity-violating discrimination). Certainly, from an egalitarian perspective, the identification (on any basis) of presumptively

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[69] Doyle, *Constitutional Equality Law* (n 1) 139.
[70] William Binchy, 'Dignity as a Constitutional Concept' in Oran Doyle and Eoin Carolan (eds), *The Irish Constitution: Governance and Values* (Thomson Round Hall, 2008) 317-322.
[71] *Gilligan v Ireland* [2013] 2 IR 745, [47]; *Fleming v Ireland* [2013] 2 ILRM 73, [128]; *Quinn's Supermarket v Attorney General* [1972] IR 1, 13-14.
[72] *Gilligan v Ireland* [2013] 2 IR 745, [47]; *Fleming v Ireland* [2013] 2 ILRM 73, [129];
[73] *Murphy v Ireland* [2014] 1 IR 198 [34].
[74] The courts have established dignity as an important constitutional value; see ch 4, subsection 1.5; Binchy (n 70) 309-317.

proscribed grounds is welcome. However, there is a worrying potential in the language adopted by the Supreme Court that dignity-violations become, not merely a tool for the identification of presumptively proscribed grounds, but also the sole criterion with which to measure discrimination itself, such that the courts would only find unconstitutional discrimination to have occurred when there is either direct or indirect discrimination *and* a violation of dignity. This is not a fanciful concern; the Canadian Supreme Court construes Section 15 equality as based on dignity but in *Laws v Canada*,[75] the Canadian Supreme Court evolved the *Andrews*[76] test for discrimination to add an extra limb,[77] so that a violation of dignity had to exist for discrimination to be in violation of the Charter. It took a subsequent Canadian Supreme Court judgment in *R v Kapp*[78] to reverse this development.

The Canadian experience demonstrates the danger of collapsing equality into a single value and, given the Irish courts' traditional preference for restrictive interpretations of Article 40.1, it is necessary to caution against an excessive reliance on dignity when developing the presumptively proscribed grounds of discrimination. Of course, prejudice, stereotyping and violations of dignity more generally are examples of inequalities, but they are not the only ones. Measures that favour full-time over part-time workers may indirectly discriminate against women in employment but can be free from dignity violations and rely instead on entirely legitimate business interests. Under the four dimensions of substantive equality of condition, dignity violations would fall under the recognition dimension, but equality will also be concerned with harms under the redistribution, participation and transformative dimensions. As a result, equality protection can be enhanced if judges have authority to identify any wrongful systemic inequality under Article 40.1.

While dignity has been the principle most obviously relied on by the Irish courts when identifying the presumptively proscribed grounds, there are some dicta

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[75] *Law v Canada* [1999] 1 SCR 497.
[76] *Andrews v Law Society of British Columbia* [1989] 1 SCR 143.
[77] i) a distinction on an enumerated or analogous ground, ii) that creates disadvantage, and iii) violates the dignity of the plaintiff.
[78] *R v Kapp* [2008] SCC 41.

relying on other principles, such as a history of discrimination.[79] In order to protect the four dimensions of equality as comprehensively as possible, as wide a range of identifying criteria as possible ought to be used. This will allow for protection against the types of inequities that fall into only one discrete dimension (such as the participation dimension) without having an overlap with the recognition dimension (dignity). It would be of great concern, however, analogous with the restrictive use of dignity temporarily adopted by the Canadian Supreme Court, if the Irish courts began to use the various criteria not as alternatives but rather as individual essential elements for the identification of a presumptively proscribed ground. The statements of O'Donnell J quoted at length above,[80] potentially lead in this restrictive approach. One interpretation of his examination of the presumptively proscribed grounds is that equality issues arise when there are both dignity concerns at stake *and* a history of discrimination in Ireland on that ground.

At this stage in its development, there are several uncertainties in the doctrine of the presumptively proscribed grounds of discrimination. If these can be resolved in favour of a strong right to equality it has the potential to salvage Article 40.1 from being the "constitutional backwater" that Doyle described.[81]

3. Poverty, Socio-economic Status or Social Class as a Presumptively Proscribed Ground of Discrimination

Arguments that poverty, socio-economic status or social class should be treated as a protected ground of discrimination are at the fringes of equality theory. Unlike race, which has been the paradigm in the US, or sex, which has been at the forefront of EU equality law, or even caste, which has specific mention in the Indian Constitution, poverty has not typically been seen as a matter for equality law. As discussed in chapter 2, it has traditionally been treated as a political matter, beyond the reach of the courts. Given that apparent international consensus, it is unsurprising that Forde, Hogan, Whyte and others have suggested that it is unlikely that the courts would, or even could, apply Article 40.1 to poverty. In 1982, Forde suggested three particular reasons for this. First,

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[79] *Fleming v Ireland* [2013] 2 ILRM 73, [130]; *Murphy v Ireland* [2014] 1 IR 198.
[80] See footnote 31.
[81] Doyle, *Constitutional Equality Law* (n 1) viii.

the drafters did not intend the Article to apply to poverty.[82] Doyle, however, demonstrates that there are numerous features of Article 40.1 jurisprudence that are inconsistent with the original intent of the drafters.[83] Originalism as an interpretive method has not dominated Irish constitutional law in general,[84] undermining the strength of this objection. Secondly, Forde raised the concern that dealing with poverty would require the courts to stipulate how to carry out redistribution measures, to which they are manifestly unsuitable.[85] Whyte has subsequently engaged with this argument in detail, arguing first that the capacity of the courts could be improved through expert evidence and training,[86] and later that this problem could be overcome by making a judicial remedy less prescriptive and adjusting the standard of review.[87] I discuss this potential development in the standard of review below. More fundamentally, even if this objection stopped the courts from dealing with the redistributive dimension of inequality, it would not stop them addressing other dimensions. In particular, the inequalities associated with poverty in the recognition dimension could be analysed by the courts. I discuss this below, and in chapter 2. Thirdly, Forde suggested that the equality guarantee should be unconcerned with poverty because the Article 45 directive principles of social policy recognise poverty as an issue, thus making it non-cognisable by the courts.[88] Forde and Leonard repeat this objection.[89] Hogan also supports this objection.[90] I will deal with these second and third objections in the remainder of this section.

In 1987, Whyte raised six concerns, leading to doubt about the direct applicability of Article 40.1 to issues of poverty.[91] First, he noted that it is unclear whether Article 40.1 applies horizontally between citizens. This does not affect

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[82] Michael Forde, 'Equality and the Constitution' (1982) 2 Irish Jurist 295, 308.
[83] Doyle, *Constitutional Equality Law* (n 1) ch 3.
[84] Hogan and Whyte (n 46) 28-30.
[85] Forde (n 82) 308.
[86] Gerry Whyte, *Social Inclusion and the Legal System: Public Interest Law in Ireland* (1st edn, IPA 2002) ch 1.
[87] Gerry Whyte, *Social Inclusion and the Legal System: Public Interest Law in Ireland* (2nd edn, IPA 2015) 72-83; Gerry Whyte, 'Judicial Capacity to Enforce Socio-Economic Rights' (2014) 37 DULJ 203, 207.
[88] Forde (n 82) 308.
[89] Forde and Leonard (n 47) 821-822.
[90] Gerard Hogan, 'Unenumerated Personal Rights: Ryan's Case Re-evaluated' (1990) 25 Irish Jurist 95, 108.
[91] Gerry Whyte, 'Law and Poverty in Ireland' in William Duncan (ed), *Law and Social Policy: Some Current Problems in Irish Law* (DULJ 1987) 91.

the principled question of whether poverty is recognisable under Article 40.1, and it should not be fatal to the proposals in this thesis, which are based on a vertical application of the Article. Second, Whyte cautioned that the courts have been unwilling to address constitutional lacunae. As discussed in chapter 7, a number of recent cases suggest the courts are overcoming this issue, known as the *Somjee* problem. This development is incomplete, so the concern about lacunae remains valid, but there is at least reason to hope that this problem is resolvable. Third, Whyte noted that the courts have used Article 40.1 in a formalistic way and not as a general guarantee of equality. As discussed in section 1 of this chapter and in chapter 1 on defining equality according to disadvantage rather than treatment, subsequent cases indicate a growing engagement with equality ideas by the courts, particularly with the idea of presumptively proscribed grounds of discrimination. Whyte's fourth and fifth concerns were the same as Forde's arguments and are addressed below, while the sixth concern was the continued dominance of the context of discrimination approach, which, as I discuss in section 2 above, the courts are now abandoning in favour of the more progressive basis of discrimination approach.

3.1 Constitutional Equality Cases Dealing With Poverty

Given the domestic and international resistance to judicialising poverty, it is important that the Irish courts have dealt with poverty as a matter of Article 40.1 inequality on numerous occasions.

An early indication of the potential use of Article 40.1 over matters of socio-economic inequality came in Walsh J's famous judgment in *Quinn's Supermarket*. The courts often take this judgment as the source of the presumptively proscribed grounds of discrimination. An interesting feature of Walsh J's list that has been dropped in more recent versions is the inclusion of "social background".[92] It would not have been difficult to interpret this ground to include social class, income levels or other matters that indirectly correlate with poverty, such as where someone lives or was raised. Interestingly, both O'Dowd and Hogan and Whyte note the possibility that *Quinn's Supermarket* could be

[92] *Quinn's Supermarket v Attorney General* [1972] IR 1, 14.

interpreted this way.[93] In *de Burca v Attorney General*,[94] another seminal equality law case, the Supreme Court held unconstitutional direct wealth discrimination in the formation of juries. The Juries Act 1927 prevented citizens without a minimum rating qualification in land from sitting on juries. O'Higgins CJ and Walsh J both held that the rate payer requirement was unconstitutional discrimination, while the rest of the majority decided the case on other grounds. Whyte cautions against overreading *de Burca* on the basis that the case addressed legal proceedings, during which the courts are more comfortable applying equality, and the protection of this ground may not stretch to other areas.[95] The significance of this is that it suggests judicial reluctance, or conservatism, is the real barrier to the application of Article 40.1 to wider poverty issues rather than a principled restriction on the scope of this ground.

Another interesting case is *MhicMhathuna v Ireland*,[96] in which the Supreme Court upheld benefits given to single parents, thus favouring them, in this context, over married parents, because of their differences in social function. The Supreme Court referred to Article 40.1 to suggest that the measure supported equality by tackling the financial disadvantage of one group, and on this basis upheld the law against a challenge that it was an attack on the institution of marriage.[97] As well as judicialising poverty, this demonstrates an asymmetrical approach to poverty and wealth inequality; measures designed to help the poor serve equality and do not constitute discrimination against the wealthy. As Fredman points out, this asymmetrical understanding of poverty inequality is essential if an equality guarantee is to have any meaningful role.[98] Mullally has expressed concern that a symmetrical approach to poverty-based inequality under Article 40.1 would be harmful because it could lead to challenges to social distributive justice programmes.[99] This use of equality by the Supreme Court in *MhicMhathuna* is interesting but should not be overstated. The reference

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[93] John O'Dowd, 'The Principle of Equality in Irish Constitutional and Administrative Law' (1999) 11 European Review of Public Law 769, 817; Hogan and Whyte (n 46) 1350.
[94] *De Burca v Attorney General* [1976] IR 38.
[95] Whyte, 'Law and Poverty in Ireland' (n 91) 92.
[96] *MhicMhathuna v Ireland* [1995] 1 IR 484.
[97] *MhicMhathuna v Ireland* [1995] 1 IR 484, 498-499.
[98] Sandra Fredman, 'Positive Duties and Socio-Economic Disadvantage: Bringing Disadvantage on the Equality Agenda' (2010) 3 EHRLR 290, 294.
[99] Siobhán Mullally, 'Substantive Equality and Positive Duties in Ireland' (2007) 23 S Afr J on HR 291, 309-310.

appears to have been an additional supporting argument, which complements the Court's primary reasoning which is that deference ought to be applied to the legislation because it dealt with a political issue.[100]

Barron J held in *K v W (No 2)*,[101] that direct discrimination on the basis of socio-economic status would breach Article 40.1. This involved a custody dispute between a natural father and putative adoptive parents. Barron J held that Article 40.1 meant that he could not take account of the socio-economic and wealth differences between the parties. Instead, Barron J decided the case based on the level of attachment to the putative adoptive parents that the child had developed.[102] Holding that the child should stay with the putative adoptive parents, he said:

> I have heard no evidence to cause me to alter my view as to the differences in the upbringing of a child between the two competing homes. These differences spring solely from socio-economic causes and in my view should not be taken into consideration, certainly where one of the claimants is a natural parent. To do otherwise would be to favour the affluent as against the less well-off which does not accord with the constitutional obligation to hold all citizens as human persons equal before the law.[103]

In this paragraph, Barron J suggests that law should be blind to socio-economic differences between people, but his underlying reason is that it is unequal to favour the rich over the poor; the breach of 40.1 would be the favouritism of one group, rather than simply the fact of recognising class factors. The Constitution should not be interpreted as a class-blind document. Article 40.6.2° states:

> Laws regulating the manner in which the right of forming associations and unions and the right of free assembly may be exercised shall contain no political, religious or class discrimination.

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[100] Whyte, *Social Inclusion and the Legal System* (n 87) 14.
[101] *K v W (No 2)* [1990] ILRM 791.
[102] *K v W (No 2)* [1990] ILRM 791, 800-801.
[103] *K v W (No 2)* [1990] ILRM 791, 799.

Far from being blind to poverty, socio-economic status or social class, the Constitution can be interpreted as sensitive to each of these kinds of inequalities.

Another significant case is *The State (McIlhagga) v Governor of Portlaoise Prison*.[104] A criminal defendant was imprisoned for obtaining money on false pretenses, with his sentence to be lifted when he repaid the money. Mr McIlhagga argued that this discriminated between those who had money and those who did not. Although the Supreme Court rejected the claim, saying it was just restitution of what was wrongfully taken, the Court implied that discrimination on the ground of "rich" and "poor" would breach the Constitution:

> The payment in question is not the imposition of a fine. Nor have we here a case – if such is to be supposed – where a court in sentencing two persons of equal obloquy, one rich and the other poor, sends the poor man to prison but lets the rich man go free on payment of a fine well within his means ... [In this case] neither in purpose nor in effect is there discrimination as between rich and poor. A condition requiring monies which have been fraudulently obtained to be restored to the injured parties far from being discriminatory is, on the contrary, eminently just.[105]

Both O'Malley and the Law Reform Commission have interpreted this case as persuasive authority for the proposition that wealth-based discrimination breaches Article 40.1.[106]

Much more explicit is the holding of Herbert J in *Redmond v Minister for the Environment*,[107] where he held unconstitutional a requirement to pay an electoral deposit before standing for election on the basis that it was a wealth based discrimination contrary to Article 40.1. Herbert J dealt with the redistributive inequality of poverty, thus indicating that the courts can have the capacity to engage with distributive inequalities, without having to dictate economic policy. Rather than taking a narrow holding, such as saying the discrimination was only

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[104] *The State (McIlhagga) v Governor of Portlaoise Prison* (SC, 29 July 1971); Hogan and Whyte (n 46) 1381.
[105] *State (McIlhagga) v Governor of Portlaoise Prison* (SC, 29 July 1971).
[106] Thomas O'Malley, *Sentencing Law and Practice* (2nd edn, Thomson Round Hall 2006) 110; Law Reform Commission, *Consultation Paper on the Court Poor Box* (LRC CP 31–2004) [2.57].
[107] *Redmond v Minister for the Environment* [2001] 4 IR 61.

problematic because of its political participation context, Herbert J embraced the notion of poverty as a ground of inequality more generally. He also emphasised the dignity harms and recognition inequalities that accompany poverty, thus acknowledging the numerous other inequalities associated with being poor beyond mere material deprivations. The emphasis on these recognition inequalities highlights the similarities between poverty and the presumptively proscribed grounds of discrimination, such as race and religion. Herbert J's reasoning consequently sets out a strong case for poverty to be included as a presumptively proscribed ground under Article 40.1:

> 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 of the Constitution were providing.[108]

The Supreme Court subsequently disagreed with *Redmond* on this point in *King v Minister for the Environment (No 2)*.[109] Significant reliance should not, therefore, be placed on *Redmond*, but it remains relevant because the Supreme Court's rejection of its *ratio* was not on the application of Article 40.1. The Supreme Court in *King*, per Murray CJ, overruled *Redmond* on the question of the power of the Oireachtas under Article 16 to regulate the right to stand for election to the Dáil.[110] In an *obiter* statement the Court also said that requiring a deposit is a proportionate way of preventing abuse of the electoral system.[111] The Court did not, however, overrule or even consider Herbert J's use of Article 40.1. Given that the Court did not reject the principle that Article 40.1 applies to poverty, *King* is not a barrier to the use of Article 40.1 in this way.

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[108] *Redmond v Minister for the Environment* [2001] 4 IR 61 80.
[109] *King v Minister for the Environment (No 2)* [2007] 1 IR 296.
[110] *King v Minister for the Environment (No 2)* [2007] 1 IR 296, 321.
[111] *King v Minister for the Environment (No 2)* [2007] 1 IR 296, 316.

In several cases, judges have used other articles of the Constitution to protect against poverty-based inequality. These cases could just as sensibly have been decided on the basis of Article 40.1. *G v An Bord Uchtala*,[112] dealt with a natural mother forfeiting her parental rights over her child and Walsh J held that such right could only be lost through consent. He said:

> In my view, a consent motivated by fear, stress or anxiety, or a consent or conduct which is dictated by poverty or other deprivations does not constitute a valid consent.[113]

The important thing about consent being invalid when motivated by poverty is that this protected against indirect discrimination on the grounds of poverty in the context of custody of children. Walsh J's reasoning did not rely on Article 40.1, nor was he explicitly articulating an equality justification for this principle, but it is an example of courts using the Constitution to protect against the unequal effects of poverty. This is significant because it shows that equality protection on the ground of poverty does not require the courts to exercise revolutionary or new powers.

Similarly, in *Dillon v DPP*,[114] de Valera J held unconstitutional the criminalisation of begging in s.3 of the Vagrancy (Ireland) Act 1847. The Westminster Parliament imposed this Act during The Great Famine and it prohibited begging in any public place, in all circumstances.[115] The impact this had on a subsection of disadvantaged people, a huge group when it was enacted, and a smaller one when the DPP sought to enforce it in 2003, is obvious. The applicant challenged the law's constitutionality on several grounds, one of which was that it breached Article 40.1 for discriminating between rich and poor.[116] De Valera J passed no comment on this ground, instead striking down the law on basis, first that it was vague (violating Articles 34.1, 40.4.1°, 40.1 and 40.3),[117] and second that it infringed the right to freedom of expression under Articles 40.3 and 40.6.1°.[118]

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[112] *G v An Bord Uchtala* [1980] IR 32.
[113] *G v An Bord Uchtala* [1980] IR 32, 74.
[114] *Dillon v DPP* [2008] 1 IR 383.
[115] *Dillon v DPP* [2008] 1 IR 383, 386.
[116] *Dillon v DPP* [2008] 1 IR 383, 387.
[117] *Dillon v DPP* [2008] 1 IR 383, 389; see also *King v Attorney General* [1981] 1 IR 233.
[118] *Dillon v DPP* [2008] 1 IR 383, 389.

Despite using Article 40.1 to find vagueness in criminal law to be constitutionally problematic, de Valera J did not treat this as an equality case.[119] Criminalisation of begging, however, is indirect discrimination against the poor in the recognition dimension, the inequality of which is captured in Anatole France's famous sarcastic words:

> ... to labour in the face of the majestic equality of the law, which forbids the rich as well as the poor to sleep under bridges, to beg in the streets, and to steal bread.[120]

In a similar earlier case, *King v Attorney General*,[121] the Supreme Court struck down the criminalisation of loitering by a "suspected person or reputed thief".[122] The Court used Article 38 and a concept of human dignity, but O'Dowd has argued that the case make more sense as an example of the courts treating poverty as a presumptively proscribed ground of discrimination and striking it down as unequal.[123] It is difficult to argue that *King* is precedent for poverty as a protected ground, given that the Court did not discuss equality protection under Article 40.1, but it does demonstrate that protection against recognition inequalities on this ground does not require inappropriate expansion in the judicial power, given that these kinds of cases already arise.

O'Malley J recently engaged with poverty-based discrimination in *HSE v OA*.[124] In that case, a mother was seeking the costs of her legal representation at interim care order proceedings relating to her child. The HSE objected on the basis that, since the mother would have qualified for legal aid but waived her entitlement, she should not then be able to obtain a costs order, as this was tantamount to establishing a private legal aid system. O'Malley J rejected this on the basis that, if the HSE's argument was correct, it would exclude those of low socio-economic means from obtaining cost orders to which they would otherwise be

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[119] Hogan J reached similar conclusions in *Douglas v DPP* [2013] IEHC 343; *McInerney v DPP* [2014] IEHC 181.
[120] Anatole France, *Le Lys rouge* (Calmann-Lévy 1927) 106; quoted in Fredman, *Discrimination Law* (n 3) 1.
[121] *King v Attorney General* [1981] IR 233.
[122] Vagrancy Act 1824, s.4.
[123] John O'Dowd, 'The Principle of Equality in Irish Constitutional and Administrative Law' (1999) 11 European Review of Public Law 769, 817; Hogan and Whyte (n 46) 1350.
[124] *HSE v OA* [2013] IEHC 172.

entitled. O'Malley J did not cite the jurisprudence on presumptively unconstitutional grounds of discrimination, and did not say that poverty is a protected ground under Article 40.1. Instead, O'Malley J applied an equality principle inherent in legal aid, seemingly drawn from Article 40.1,[125] which gave an entitlement to:

> an individual litigant who is not on legal aid and has not applied for legal aid to be treated in the same way as any other litigant who is not on legal aid – without arbitrary, capricious or invidious discrimination[126]

However, her judgment does demonstrate that discrimination on the basis of poverty can be of particular concern to the courts. Whyte's comments about *de Burca* apply similarly to *HSE v OA*, which is that the courts appear to be more comfortable dealing with poverty-based inequalities in legal proceedings than in wider areas of social life. The distinction between these categories of cases, however, is not based on principle but rather it is just a matter of judicial conservatism.

There have not been any clear rejections of the possibility that poverty could be a presumptively proscribed ground of inequality under Article 40.1, along the lines of *San Antonio Independent School District v Rodriguez*[127] in the USA. However, Charlton J's judgment in *Prendergast*, discussed above in section 2, could be interpreted as a rejection because he held that an ability to pay economic fees had nothing to do with Article 40.1 equality based on the nature of human personality.[128] However, as discussed above, the precedential weight of this case is doubtable, because Charlton J appeared to rely on the context of discrimination approach, and in light of the numerous cases cited here that are consistent with poverty becoming a presumptively proscribed ground of discrimination.

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[125] *HSE v OA* [2013] IEHC 172, [40]-[41].
[126] *HSE v OA* [2013] IEHC 172, [65].
[127] *San Antonio Independent School District v Rodriguez* (1973) 411 US 959.
[128] *Prendergast v Higher Education Authority* [2008] IEHC 257, [68].

3.2 Theoretical Arguments in an Irish Context

Supporting these cases, the theoretical arguments in chapter 2 on the recognition of poverty as a protected ground apply in Ireland. There are four core arguments. First, there is significant overlap between the groups defined by poverty and the groups defined by more traditional grounds, such as ethnicity, gender or sexual orientation. Chapter 5 considers some of the sociological research on inequality in the education system in detail, but for now it is sufficient to note that there is strong and persistent evidence that economic poverty is a phenomenon for disproportionate numbers of individuals in many groups defined by traditional status grounds, such as women,[129] Travellers and other ethnic minorities[130] and homosexual individuals.[131]

Secondly, to see the condition of poverty as simply material disadvantage is naïve and inaccurate, given the dignity harms associated with poverty. As I detail in section 1 above, the Irish courts have focused on the recognition harms associated with violations of dignity when developing the presumptively proscribed grounds of discrimination. Thirdly, the poor in Ireland are excluded from participation in public life, particularly from the political process.[132] Thus, the third theoretical argument applies in Ireland. Fourthly, there are obviously many material disadvantages and inequalities associated with poverty in Ireland. Material disadvantage is not simply a reference to money; evidence exists that

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[129] In Ireland, this overlap is strongest amongst young women; Central Statistics Office, *Men and Women in Ireland* (Stationary Office, Dublin 2012) [3.5]-[3.7] <http://www.cso.ie/en/media/csoie/releasespublications/documents/otherreleases/2011/Women%20and%20Men%20in%20Ireland%202011.pdf> accessed 17 November 2014.

[130] Brian Harvey, *Working for Change: A Guide to Influencing Policy in Ireland* (Combat Poverty Agency 2008) <http://www.combatpoverty.ie/publications/WorkingForChange_2008.pdf> accessed 17 November 2014.

[131] Gay and Lesbian Equality Network, *Poverty: Lesbians and Gay Men* (Combat Poverty Agency 1995) <http://www.combatpoverty.ie/publications/PovertyLesbiansAndGayMen_1995.pdf> accessed 17 November 2014; for a more recent analysis of how inequality on the ground of LGBT status can convert into income inequality, see Ernesto Vasquez del Aguila and Sara Cantillon, *The labour market and LGBT discrimination in Ireland* (2010) 10(5) UCD Social Justice Series 88, 91-92.

[132] Eoin Carolan, 'Recovering the Republic? Democratic Representation and the Theory of Mixed Government' (2012) 48(2) Irish Jurist 173.

universal services and policy decisions favour affluent areas over working class communities.[133]

In light of the cases cited dealing with economic inequality and the theoretical arguments in favour of protecting poverty under an equality guarantee, there is a strong case for including poverty, socio-economic status or social class as a presumptively proscribed ground under Article 40.1. In the remainder of this section I outline how poverty as a ground would function identically to other presumptively proscribed grounds, such as race, religion or gender, and how it would be consistent with the major Article 40.1 precedents. I then consider a potential separation of powers objection, which has been put strongly by the Supreme Court in the recent past. Finally, I conclude by responding to Forde's third objection to the use of Article 40.1 over poverty issues, which is that they should be non-cognisably by the courts because of Article 45. Along with the arguments advanced elsewhere in this thesis, on the best methods of constitutional interpretation, on the recognition of substantive equality under Article 40.1, and on the *Somjee* problem, these arguments overcome the three objections raised by Forde and the six doubts noted by Whyte to the recognition of poverty under Article 40.1.

3.3 Economic Inequality and the Separation of Powers

The crucial factor to emphasise in this debate is that poverty, socio-economic status or social class as a presumptively proscribed ground would function just like any other ground. It would mean that distinctions that discriminate on the ground would be subject to a higher standard of review and a functional burden of proof at the justification stage would be on the State. An apparent problem with this conclusion is that it that the court may have a new role in reviewing economic policy. Recently, in *MacDonncha v Minister for Education*,[134] Hogan J argued that the Irish courts would be both incapable of such a review and straying into illegitimate territory if it tried:

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[133] For example, Walsh notes that compulsory acquisitions of property are more likely in be made in less affluent areas than in wealthy areas; Rachel Walsh, '"The Principles of Social Justice" The Compulsory Acquisition of Private Property for Redevelopment in the United State and Ireland' (2010) 32(1) DULJ 1.

[134] *MacDonncha v Minister for Education* [2013] IEHC 226.

> [E]ven if the judicial branch possessed – which it does not – the skill and understanding of a Keynes or a von Hayek or a Friedman or a Krugman in matters of general macroeconomic theory, this would not alter matters in the slightest. This is because questions of the wisdom, efficacy and general fairness of these policies are committed exclusively to the democratic process. Article 5 of the Constitution proclaims the State to be a democracy and this means that questions of general economic policy of this nature are committed to the two branches of government which are ultimately answerable to the People in the electoral process.[135]

There are two objections contained in this statement, both of which are well rehearsed in Irish constitutional law, articulated by the Constitution Review Group and others.[136] As noted in chapter 2 these objections are popular with courts all around the world. Whyte describes the first, the alleged illegitimacy of judicial engagement with an exclusively political issue, as the democratic objection.[137] Whyte describes the second as the capacity objection, which is the claim that courts are incapable of comprehending the issues at stake. Whyte also describes a third objection, called the constitutional objection. This is similar to the democratic objection but based on the perceived strength of the doctrine of the separation of powers in Article 6 of the Constitution.

3.3.1 Democratic Objection

The first objection, based on democratic legitimacy, is surprisingly simplistic for an argument that receives such widespread support. A majority of the Constitution Review Group supported this objection:

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[135] *MacDonncha v Minister for Education* [2013] IEHC 226, [3]; see similar sentiments in Gerard Hogan, 'Directive Principles, Socio-Economic Rights and the Constitution' (2001) 36 Irish Jurist 174.

[136] The All-Party Oireachtas Committee on the Constitution, *Report of the Constitution Review Group* (Stationary Office 1996) [12]; Gerard Hogan, 'Unenumerated Personal Rights: Ryan's Case Re-evaluated' (n 90) 108; Adrian Hardiman, 'The Role of the Supreme Court in Our Democracy' in Joe Mulholland (ed), *Political Choice and Democratic Freedom in Ireland: 40 Leading Irish Thinkers* (MacGill Summer School 2004); *O'Reilly v Limerick Corporation* [1989] ILRM 181; *Sinnott v Minister for Education* [2001] 2 IR 545; *TD v Minister for Education* [2001] 4 IR 259.

[137] Whyte, *Social Inclusion and the Legal System* (n 46) 12-13.

> The main reason, however, why the Constitution should not confer personal rights to freedom from poverty, or to other specific economic or social entitlements, is that these 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[138]

For the same reason, the Constitution Review Group rejected an explicit guarantee of equality in education.[139] As Whyte reposts:

> The reasoning that such a step "would remove the necessary discretion of Government and Oireachtas in policy matters" seems to carry the unwelcome implication that the Review Group believes that it may sometimes be necessary for the State to perpetuate inequality in education.[140]

The claim made by the democratic objection is circular; in the quote from *MacDonncha*, Hogan J presupposes a particular conception of democracy (in which economic policy is exclusively for the majoritarian political process), and then says that since Article 5 of the Constitution commits the State to democracy, it must be a commitment to this conception of democracy and these questions are therefore exclusively for the political process. Similarly, the majority of the Constitution Review Group presumed that poverty is exclusively a

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[138] *Report of the Constitution Review Group* (n 136) [12]; Lynch and Connolly disagreed with this recommendation; Kathleen Lynch and Alpha Connelly, 'Equality Before the Law', *Report of the Constitution Review Group* (n 136) (Appendix 18); see also, Gerry Whyte, 'Discerning the Philosophical Premises of the Report of the Constitution Review Group: An Analysis of the Recommendations on Fundamental Rights' (1998) 2 Contemporary Issues in Irish Law and Politics 216; Tim Murphy, 'Economic Inequality and the Constitution' in Tim Murphy and Patrick Twomey (eds), *Ireland's Evolving Constitution 1937–1997: Collected Essays* (Oxford, 1998).

[139] *Report of the Constitution Review Group* (n 136) 354; Kathleen Lynch, 'Equality and Education: argument for a special provision in the Constitution promoting equality of access to, and participation in, education' in *Report of the Constitution Review Group* (Stationary Office, Dublin 1996) 635-636.

[140] Whyte, 'Discerning the Philosophical Premises of the Report of the Constitution Review Group' (n 138) 217-218; see also, Irish Commission for Justice and Peace, *Re-Righting the Constitution: The Case for New Social and Economic Rights: Housing, Health, Nutrition, Adequate Standard of Living* (Genprint 1998) 17.

political matter, while implicitly saying that, for example, race or gender inequality is not exclusively political and can be addressed by the courts. One substantive problem with this, as Murphy points out, is that it is difficult in a constitutional setting to distinguish clearly between law and politics, especially when rights are at stake.[141] The procedural flaw with the reasoning is the failure to explain the division between constitutional law and politics by reference to the Constitution itself; instead, the majority of the Constitution Review Group just asserted that its understanding of what is exclusively political is in fact the case.[142] Curiously, the majority of the Constitution Review Group abandoned its claim that poverty is an exclusively political matter when it argued that the rights to life and bodily integrity already provide a minimum degree of protection from destitution. It is impossible to reconcile this claim with the majority's premise for rejecting a right to freedom from poverty because it demonstrates that their absolutist claim that poverty is "committed exclusively to the democratic process", is false in the Irish Constitution.[143]

Article 5 of the Constitution uses the word "democratic", but it does not define its meaning. It simply says:

> Ireland is a sovereign, independent, democratic state.

Hogan J's position in *MacDonncha* ultimately rests on the view that the judiciary should have little or no role in these social issues. Writing academically prior to appointment to the bench, Hogan argued:

> There is no doubt but that excessive judicial review probably saps at the sinews of the democratic order, especially where the judiciary uses this powerful instrument as a mechanism for imposing its own social mores and economic beliefs on the population at large. This, after all, was the sobering lesson which the US Supreme Court learnt painfully during the 1930s and this lesson would quickly have to be learnt again if any modern

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[141] Murphy (n 138) 169-170.
[142] Whyte, 'Discerning the Philosophical Premises of the Report of the Constitution Review Group' (n 138).
[143] *Report of the Constitution Review Group* (n 136) [12].

> courts sought to impose their own version of social democracy via the constitutional protection of socio-economic rights.[144]

This is contestable on two fronts. First, Hogan J in judicial and academic writing, and Hardiman and Murray JJ in cases such as *Sinnott* and *TD*, argue against a straw-man when they raise the spectre of judicial power dominating and dictating social policy. No proponent of substantive equality or socio-economic rights advocates a dominant judicial power; on the contrary, it is a fundamental premise that judicially enforceable rights and equality guarantees are only arise when the political system has overlooked the rights and needs of politically weak and isolated groups.[145] Furthermore, since litigation in isolation cannot achieve lasting social change, the purpose of judicial enforcement of equality and socio-economic rights is not to see the judges solve the problem, but to provoke the political system into respecting the interests of neglected groups. [146] Consequently, the anti-democratic horror against which proponents of the rigid separation of powers appear to be defending is simply non-existent.

Second, the arguments for judicial deference on issues of equality and economic and social policy are presented as though they are both respectful of the democratic process and dictated by the Constitution. In *MacDonncha*, Hogan J did not base his interpretation of democracy on any values drawn from the Constitution. Instead, he simply used his subjective understanding of the word and applied it to Article 5. The resolution of this issue was not essential in *MacDonncha*, which perhaps explains the brevity of reasoning. This unreasoned approach, however, is typical of many cases in which the issues of the courts' democratic legitimacy arise.[147]

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[144] Hogan, 'Directive Principles, Socio-Economic Rights and the Constitution' (n 135) 197.
[145] Whyte, 'Discerning the Philosophical Premises of the Report of the Constitution Review Group' (n 138) 227; Whyte, *Social Inclusion and the Legal System* (n 46); Sandra Fredman, 'Providing Equality: Substantive Equality and the Positive Duty to Provide' (2005) 21 S Afr J on HR 163, 176; Martha Jackman, 'Charter Equality at Twenty: Reflections of a Card-Carrying Member of the Court Party' (2006) 20 National Journal of Constitutional Law 115, 125.
[146] Whyte, *Social Inclusion and the Legal System* (n 46) 201, 443-444; for example, see Michael Farrell, 'Lydia Foy and the Struggle for Gender Recognition' (2012) 1 Socio-Legal Studies Review 153.
[147] Judges often take typical features of democracy and assert that they are incorporated in the Constitution through Article 5. These features are often uncontroversial, but the

Implicit in the democratic objection is the idea that the Oireachtas has greater legitimacy in this field than the courts. However, Carolan argues that the republican nature of the Constitution requires that we do not view the Dáil as preeminent, because this conflates popular sovereignty (upon which the Constitution is based) with electoral primacy, or democratic majoritarianism.[148] Using the principle of popular sovereignty, Carolan argues that the courts draw legitimacy from the will of the people through society's on-going endorsement of the Constitution.[149] According to the Constitution, the courts are an organ of government created by the people and not an inherently anti-democratic check on the majority.

In addition Whyte notes many articles of the Constitution that are compatible with a communitarian conception of democracy, and incompatible with a majoritarian conception that restricts judicial review on distributive inequalities. For example, in the Article 45 Directive Principles of Social Policy, the Article 42.4 right to free primary education, the Article 42.5 State power to protect children at risk of neglect, and the Article 41.2.2° commitment to protect mothers from economic hardship.[150]

One argument, which I describe in chapter 2 as the fundamental objection, is that the State, whether through the political system or the courts, has no authority to engage in redistribution. This argument is unrelated to the democratic objection, but some proponents of the democratic objection appear implicitly to believe in the fundamental objection as well. The fundamental objection conceives of the state as a parasitic entity that is imposed on society; consequently, there are aspects of society, such as "naturally" created

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reasoning would be improved by linking the features specifically to values in the Constitution; *Ryan v Attorney General* [1965] IR 294, 310; *de Burca v Attorney General* [1976] IR 38, 47; *McKenna v An Taoiseach (No 2)* [1995] 2 IR 10; A better example of linking the meaning to the text of the Constitution is the judgment of Budd J in *O'Donovan v Attorney General* [1961] IR 114, 137.

[148] Carolan (n 132) 174-175.

[149] Carolan (n 132) 199-200.

[150] Whyte, *Social Inclusion and the Legal System* (n 46) 54-56, 95-96; see also Rachel Walsh, 'Property Rights in the Drafting of the Irish Constitution: A Communitarian Compromise' (2011) 34 DULJ 86; Rory O'Connell, 'From Equal Before the Law to the Equal Benefit of the Law' in Oran Doyle and Eoin Carolan (eds), *The Irish Constitution: Governance and Values* (Thomson Round Hall, 2008) 328–330.

inequality, with which the state cannot interfere.[151] Judges are, of course, entitled to hold that moral or philosophical view of the state as a personal view, but it is difficult to reconcile that theory with the State envisaged in the Constitution. The text of the Constitution does not claim that the State is an entity imposed on society. Instead, it describes the State as an emanation of society (of the people) itself. This is evident in multiple provisions.[152] The Preamble declares that the people:

> Do hereby adopt, enact, and give to ourselves this Constitution.

Article 6.1 describes the people (society) as the sovereign in the Irish constitutional order:

> All powers of government, legislative, executive and judicial, derive, under God, from the people...

Article 27 envisages the people, rather than the Oireachtas, exercising that power directly in some instances by providing for plebiscites on legislative proposals when:

> [a] Bill contains a proposal of such national importance that the will of the people thereon ought to be ascertained.[153]

Writing in an American context, Cookson argues for a conception of the state along similar lines, so that State "interference" to remove and reduce inequalities in education is legitimate:

> In my construction, society precedes the state, and the state is always the servant of society. This means that principle of social organization stem from the needs of the group as defined by themselves and that authority is always accountable to the collective. [154]

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[151] Robert Nisbet, *The Sociological Tradition* (8th edn, Transaction Publishers 2007) 53.
[152] Binchy argues that the natural law philosophy underlying many provisions means the State, according to the Constitution, is an emanation of society; Binchy (n 70) 311.
[153] See, Hogan and Whyte (n 46) 416-417.
[154] Peter Cookson, 'First Person Plural: Education as Public Property' in Bruce Biddle (ed), *Social Class, Poverty, and Education: Policy and Practice* (RoutledgeFalmer 2001) 40.

I have argued that a judge should interpret the constitutional meaning of democracy in the light of the hints given in the text. As laid out above, I think the best holistic interpretation of the Constitution is one that conceives of democracy in a communitarian way with checks against majoritarian neglect of the disadvantaged through judicial review on distributive issues as a matter of final resort. However, it is inescapable that these values are vague. It may well be that the judges feel these references to communitarian values and the idea that the state emanates from society are outweighed by other commitments to majoritarian democracy in the Constitution. As the assigned decision-maker, the judge has authority to make these decisions. Consequently, my criticism is primarily the lack of an attempt to justify the presupposed conception of democracy by reference to values evident in the Constitution.

3.3.2 Constitutional Separation of Powers Objection

This absence of clear reasoning in the democratic objection, using Article 5, is evident also in the separation of powers objection using Article 6, described by Whyte as the constitutional objection. Article 6 of the Constitution reads:

> 1. All powers of government, legislative, executive and judicial, derive, under God, from the people, whose right it is to designate the rulers of the State and, in final appeal, to decide all questions of national policy, according to the requirements of the common good.
>
> 2. These powers of government are exercisable only by or on the authority of the organs of State established by this Constitution.

Many judges assert that this provides a separation of powers and then jump from that premise to the conclusion that the doctrine of the separation of powers makes issues that affect social and economic policy virtually non-justiciable. The courts have declared a strong separation of powers in a series of cases.[155] The leading judgments are those of Hardiman and Murray JJ in *TD v Minister for Education*.[156] Whyte,[157] Doyle,[158] Langwallner[159] and Murphy[160] show the fallacy in

[155] *O'Reilly v Limerick Corporation* [1989] ILRM 181; *Sinnott v Minister for Education* [2001] 2 IR 545; *TD v Minister for Education* [2001] 4 IR 259.
[156] *TD v Minister for Education* [2001] 4 IR 259.

this argument, which simply assumes a certain conception of the separation of powers (that held by the judge deciding the case) is that provided by Article 6. Article 6, is a bald reference to the separation of powers, just like Article 5 makes a bald reference to democracy, and the way it ought to be interpreted is an open question. As Whyte demonstrates, the answer to that question is not self-evident and when judges and commentators assert a particular conception of the doctrine as mandated by the Constitution, they are instead incorporating their own moral views into the Constitution.[161] Fredman makes a similar point in a comparative context.[162]

As I discuss in chapter 2 and above, society has appointed judges as decision-makers so, in constitutional questions, their moral views are inevitably and appropriately relevant to their decisions. Clarke similarly argues that it is impossible for fundamental rights provisions of the Constitution to avoid abstract, normative concepts and that these need to be resolved by assigning a decision-maker:

> Once assigned to a court, however, as has been done by the Constitution, the very nature of the task requires the court to make normative judgments about justice, democracy, and the common good, which inevitably requires the articulation of principles that are often only implicit in the text of the Constitution. ... In performing that function, the

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[157] Whyte, *Social Inclusion and the Legal System* (n 46) 30, 54-56, 68, 95-96; Gerry Whyte, 'The Role of the Supreme Court in Our Democracy: A Response to Mr Justice Hardiman' (2006) 28 DULJ 1; Gerry Whyte, 'Public Interest Litigation in Ireland: The Emergence of the Affirmative Decree?' (1998) DULJ 198; Gerry Whyte, 'Socio-Economic Rights in Ireland: Judicial and Non-Judicial Enforcement' (2006) 11(2) Bar Review 27, 29; Eoin O'Dell and Gerry Whyte, 'Is this a Country for Old Men and Old Women? – *In Re Article 26 and the Health (Amendment) (No 2) Bill 2004*' (2005) 27 DULJ 368, 369-372; Oran Doyle and Gerry Whyte, 'The Separation of Powers and Constitutional Egalitarianism' in Eoin O'Dell, *Older People in Modern Ireland: Essays on Law and Policy* (First Law 2006).

[158] Doyle, *Constitutional Equality Law* (n 1) 45; Oran Doyle, *Constitutional Law: Text, Cases and Materials* (Clarus Press, 2008) 376-378.

[159] David Langwallner, 'Separation of Powers, Judicial Deference and the Failure to Protect the Rights of the Individual' in Eoin Carolan and Oran Doyle (eds), *The Irish Constitution: Governance and Values* (Thompson Round Hall 2008).

[160] Murphy (n 141).

[161] Whyte, 'Discerning the Philosophical Premises of the Report of the Constitution Review Group' (n 138) 226-227.

[162] Sandra Fredman, 'Providing Equality: Substantive Equality and the Positive Duty to Provide' (n 145).

> courts might try to conceal the normative character of their work by a veneer of legal positivism, claiming that the meaning of a constitution is decided exclusively by reference to texts that were approved by relevant legislative bodies.[163]

A judge's personal opinions are inevitably influential in that normative assessment. However, a good faith exercise of the judicial power requires humility in the use of those opinions and an attempt to follow the text of the Constitution. The use of morality by judges is constrained. First, they cannot ignore the text of the Constitution. Second, their individual moral views are a secondary opinion on morality, which is appropriately used when the Constitution does not steer the decision towards a particular moral answer. This is because the Constitution is meant to represent the collective morality of the citizenry, which cannot be prescribed exhaustively. The judge's own opinions are, therefore, a proxy for the citizenry's collective morality. As a result, rather than having a completely free choice on the moral question, the judge should seek to decide the question consistent with other assertions of morality present in the Constitution.

Foley captures this feature of constitutional interpretation:

> A judge striking down legislation may say "it's not me, it's the Constitution". Such passing of the judicial buck, is, however, quite illusory. The Constitution needs interpretation and interpretation is, at its root, informed by the interpreter.[164]

Foley explains that this does not mean the judges can use her or his own views completely unrestrained (such a constitution would be "radically indeterminate"). Instead, he argues that the Constitution is "under-determinate". The result is that judges have guidance from the text but need to reach decisions themselves:

> Under-determinacy, however, still leaves a role for the application of judgment in choosing between different readings of the under-

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[163] Desmond Clarke, 'Interpreting the Constitution: Essentially Contested Concepts' in Eoin Carolan and Oran Doyle (eds), *The Irish Constitution: Governance and Values* (Thomson Round Hall 2008) 112-113.
[164] Foley (n 38) 25.

> determinate (but not radically indeterminate) Constitution and, of course, there are reasonable concerns about the criteria which judges use in making such judgments.[165]

This requires an analysis of the entire document, to see whether the three organs of power are rigidly separated from one another, or whether the nature of the enforceable fundamental rights and other provisions suggests a different understanding. In addition, the nature of the rights guaranteed by the Constitution are also indicative of whether the people are committed to a majoritarian of a more communitarian conception of democracy. If the Constitution simply provided a framework for government, with no fundamental rights, no Preamble nor Directive Principles declaring certain values to be important, and no assertions to the common good and social justice, it would be inescapable that the appointed decision-maker (the judge) would have a free choice on the question of what conception of democracy Article 6 provides. Given that the text does provide all of these things, however, it is startling that judges can assert a rigid separation of powers and an exclusively majoritarian conception of democracy with regard to social issues without seeking to account for their existence in the Constitution. Remarkable too is the thinly veiled accusation that their opponents, who argue for a more interventionist judiciary on equality and social issues, are anti-democratic and are disregarding the Constitution.

3.3.3 Competence Objection

The second objection to judicial engagement with issues of poverty contained in Hogan J's quote from *MacDonncha*, and repeated often in debates in Irish constitutional law,[166] is based on the competence of the court. This reference to "competence" is to the technical capacity, skill, or ability of judges and adversarial courts procedures to assess these issues and enforce decisions, rather than power or authority. I also address this objection in chapter 2.

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[165] Foley (n 38) 25 (internal footnotes omitted); see also, Colm Ó'Cinnéide, 'Aspirations Unfulfilled: The Equality Right in Irish Law' in Donncha O'Connell (ed), *Irish Human Rights Law Review 2010* (Clarus Press 2010) 53.

[166] Hogan, 'Directive Principles, Socio-Economic Rights and the Constitution' (n 135) 195; Whyte, *Social Inclusion and the Legal System* (n 46) 68.

Considering this objection in a Canadian context, Wiseman accepts that the competence concerns are genuine, but argues that they are not unique to poverty and suggests they are no more pronounced in this context than in other areas of constitutional law.[167] The important thing is how the courts respond to the competence concerns. The courts in Ireland occasionally say that issues of social policy and poverty as nearly non-justiciable.[168] Wiseman suggests it is preferable for courts to deal with the issues but keep the review to a high level, setting out the crucial requirements and letting the government determine the specifics.[169]

Whyte suggests a similar response in the Irish context. Previously, Whyte considered whether the courts could have enhanced competence, analogous to the superior courts in India, by liberalising standing and procedural rules, and using novel fact-finding methods.[170] Subsequently, in anticipation of judicial reluctance with what is effectively a parallel system of political decision-making,[171] Whyte proposes review of these issues using a reasonableness standard of review.[172] This approach would see the courts asking whether the impugned State action is reasonable in the extent to which it protected and vindicated rights. Whyte suggests it would incorporate proportionality, with the more intensive standard of review usually associated with proportionality, but that the strength of the standard of review could vary depending on the nature of the right, the vulnerability of the group, and the impact on public finances.[173]

The reasonableness approach is a useful component in the analysis but it is not a complete answer to the competence concerns. This is because it is impossible for the courts to avoid defining the content of the right. Under Article 40.1 the courts would have to use some definition of equality in order to apply the right, whether or not they also used a reasonableness approach. As I demonstrate in chapter 3, the courts would have no difficulty giving content to the right to

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[167] David Wiseman, 'Competence Concerns in Charter Adjudication; Countering the Anti-Poverty Incompetence Argument' (2005-2006) 51(3) McGill LJ 503, 507.
[168] *MhicMhathuna v Ireland* [1995] 1 IR 484.
[169] Wiseman (n 167) 516.
[170] Whyte, *Social Inclusion and the Legal System* (n 46) 69-71.
[171] Whyte, *Social Inclusion and the Legal System* (n 46) 71.
[172] Whyte, *Social Inclusion and the Legal System* (n 46) 72.
[173] Whyte, *Social Inclusion and the Legal System* (n 46) 86.

equality by reference to disadvantage, by using the dimensions of equality outlined by Fredman. The competence concerns are not as pronounced with the right to equality as they are with socio-economic rights, such as a right to housing or water.

Rights-based judicial review, using any constitutional right, is a three-stage analysis. The court must ask, first, whether the right has been restricted or whether the State has failed to vindicate it, second, whether that restriction or non-vindication is justified by other considerations of policy and public interest, and third what remedies the court has available. The reasonableness approach is a standard of review; it is relevant to the second question of justification. It is not, however, relevant to the first question of whether a right has been restricted (the *prima facie* unconstitutionality). That question is *rights-focused*, whereas the second question is *action-focused*. Whether the right has been restricted depends on the content of the right; for example, as in *Sinnott*, whether the right to education has *prima facie* been breached depends whether the kind of instruction sought by the plaintiff constitutes "education". The answer to that question depends on the nature of education and is independent of how reasonable the State was in meeting the plaintiff's needs. That reasonableness is relevant to the second question. The reasonableness approach cannot avoid the need to define the content of the right,[174] for example under a minimum core approach or another theory.

In a bid to overcome the *action-* rather than *rights-focus* of the reasonableness approach, Liebenberg calls for "substantive interpretation of reasonableness" by making sure the courts analyse the impact on disadvantaged groups of the measure as part of whether it was reasonable.[175] As Liebenberg and Goldblatt summarise:

> Reasonableness review entails an assessment of whether government has adopted and properly implemented a coherent, comprehensive and

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[174] David Bilchitz, *Poverty and Fundamental Rights: The Justification and Enforcement of Socio-Economic Rights* (OUP 2007) 176.

[175] Sandra Liebenberg, 'Judicially Enforceable Socio-Economic Rights in South Africa: Between Light and Shadow' (2014) 37 DULJ 137, 148-153; Whyte, *Social Inclusion and the Legal System* (n 46) 85.

transparent programme that is capable of facilitating the realisation of the relevant rights.[176]

This purports to leave it to the government to define the content of the right, with the court just asking whether that decision was reasonable. This "context-sensitive standard",[177] however, cannot avoid the need to engage with the content of the right. Bilchitz, Young and others demonstrate that, whether a measure is reasonable has to be assessed in relation to something, that something being the right.[178] In Liebenberg and Goldblatt's model, the reasonableness depends on whether the measure is "capable of facilitating the realisation of the relevant rights". That necessarily depends on what those rights would look like when they are realised. Far from avoiding the need for courts to define the content of the right, attempting to apply the reasonableness approach in isolation simply disguises this part of the court's reasoning. In response to this problem with the reasonableness approach, Wesson argues that a court can give some content, against which to assess reasonableness, but that it should decline "to give exact content to the right" and should regard "its jurisdiction as supervisory".[179]

The problem with this argument is that it essentially requires the court to leave its reasoning vague. The reasonableness approach does not exempt the court from a rights-focused approach in the first question. By seeking to give some (but not detailed) content to a right, the court will just be assessing reasonableness against the judge's subjective views on the right, rather than against principles developed through proper constitutional law processes. Rather than disguising the reasoning like this, courts need to own the analysis.[180] In the first stage, the court defines the content of the right. That may be vague and the outcome contestable, but the content of the right is a question of constitutional fact.

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[176] Sandra Liebenberg and Beth Goldblatt, 'The Interrelationship Between Equality and SE Rights under South Africa's Transformative Constitution' (2007) 23(2) S Afr J on HR S Afr J on HR 335, 353.
[177] Liebenberg and Goldblatt (n 176) 354.
[178] Bilchitz (n 174)143; Katharine Young, 'The Minimum Core of Economic and Social Rights: A Concept in Search of Content' (2008) 33 Yale J of Int Law 113, 116.
[179] Wesson seeks to outline a version of the reasonableness approach that avoids content setting, Murray Wesson, 'Disagreement and the Constitutionalisation of Social Rights' (2012) 12(2) Human Rights Law Review 221, 240.
[180] For example, see Audrey Chapman, '"A Violations Approach" for monitoring the International Covenant of SEC rights' (1996) 18 Human Rights Quarterly 23.

Reasonableness can be used in the second stage, as the standard of review. Wesson's argument is a call for deference, which is appropriate, but he seeks to apply deference to the first (rights-focused) stage of the analysis, rather than to the second and third stages. Instead, as Bilchitz argues, considerations of deference arise in the second and third stages.[181]

Competence concerns, however, can arise in all three stages. For example, we can question whether courts have the ability to analyse the content of a right, such as a right to health, whether they can adequately weigh competing consideration against that right, and whether courts can devise a remedy to enforce it. The problem with trying to turn these competence concerns into an objection to applying the right to equality to poverty is that these concerns are no more pronounced in this context than for any other ground and they are even less pronounced than for some other constitutional rights. The right to property, for example, is notoriously vague but the courts are able to go through each stage of the analysis without being paralysed by competence concerns. In the first stage, defining the content of the right, the courts have declared confidently that planning permission is protected property but milk quotas and taxi or hackney licences are not.[182] In the second stage, dealing with justification and the standard of review, the courts have been comfortable dictating that the Oireachtas must provide compensation in some, but not all, instances in order to justify restrictions on rights.[183] In the third stage, the courts have fashioned remedies requiring the State to spend significant sums of money repaying improperly seized property.[184] The kinds of competency concerns that are allegedly fatal to the application of equality to poverty are no more difficult that those the courts overcome when dealing with the right to property.

The competence concerns are genuine, but they are not particularly applicable to the right to equality and its application to poverty, socio-economic status or

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[181] Bilchitz (n 174) 143.
[182] *Hempenstall v Minister for the Environment* [1994] 2 IR 20; *Re Article 26 and Part V of the Planning and Development Bill 1999* [2000] 2 IR 321; *Maher v Minister for Agriculture, Food and Rural Development* [2001] 2 IR 139.
[183] *Central Dublin Development Association v Attorney* General (1975) 109 ILTR 69; *O'Callaghan v Commissioner of Public Works* [1985] ILRM 364.
[184] *Daly v Revenue Commissioners* [1995] 3 IR 1; *Re Article 26 and the Health (Amendment) (No 2) Bill 2004* [2005] IESC 7.

social class. The concerns are rather applicable to the general power of Irish courts to review and strike-down legislation and acts of the executive. Seeking to apply the competence concerns as an objection to poverty as an equality ground, but not as an objection to other examples of judicial power, is problematic and unpersuasive. The selective use of the competence objection seems just to be another way of making the legitimacy objection. As Whyte argues, it demonstrates more about the underlying ideological biases of the people raising the objections than it does about the limited competences of the judiciary to deal with these issues.[185]

3.3.4 Poverty Under a Rigid Separation of Powers

In the foregoing sections, I have relied on procedural arguments over substantive claims. I argued that the biggest flaws with the democratic and separation of powers arguments are that their proponents utilise them without adequately justifying them as interpretations of the Constitution. If a judge concluded, having engaged with the constitutional text that, on balance, a non-communitarian majoritarian conception of democracy was in her view the best interpretation of Articles 5 and 6, that would be a legitimate conclusion. Based on the judge's position as the assigned decision-maker, this conclusion would have to be accepted as the constitutional conception of democracy. A rigid separation of powers, however, does not prevent judges from engaging with issues of poverty, socio-economic status and social class. Even though economic policies and redistributive inequalities could not be tackled directly by the courts, the extent of inequality and discrimination suffered by the poor is not limited to that economic inequality. Using Fredman's four dimensions of equality, there are obviously material disadvantages under the redistribution dimension, but there are also dignity harms such as prejudice and stereotyping under the recognition dimension and exclusionary barriers to partaking in the political process and accessing public goods, such as education, under the participation dimension.

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[185] Gerry Whyte, 'A Tale of Two Cases – Divergent Approaches of the Irish Supreme Court to Distributive Justice' (2010) 32 DULJ 365; Oran Doyle and Gerry Whyte, 'The Separation of Powers and Constitutional Egalitarianism after the *Health (Amendment) (No 2) Bill Reference*' in Eoin O'Dell (ed), *Older People in Modern Ireland: Essays on Law and Policy* (First Law 2006).

Consequently, there is ample scope for Article 40.1 equality to apply to poverty without pushing the courts into problematic reviews of economic policy.

Poverty as one of the presumptively proscribed grounds would be no different to any other ground. There are significant economic inequalities associated with many of the presumptively proscribed grounds, such as ethnicity, nationality or gender. The courts are able to operate equality review on these grounds by focusing on the other dimensions of equality and there is no reason for this not to be possible with poverty as well. For example, in *de Burca*, the Supreme Court struck down an inequality on the basis of poverty in the participation dimension. Non-landowners were excluded from jury service, which indirectly discriminated on the basis of poverty. Two judges, O'Higgins CJ and Walsh J, held this to be unconstitutional. Similarly, in *Dillon v DPP* de Valera J held the criminalisation of begging to be unconstitutional. This law indirectly discriminates against the poor, indeed, the ground of "beggers" overlaps so closely with the very poor or homelessness that the law arguably also discriminated directly on the grounds of poverty and socio-economic status. On an equality analysis, the law violated the recognition dimension, by criminalising and stigmatising an act of desperation by a disadvantaged group. De Valera J struck down the law as a violation of the right to freedom of expression, but the case could easily have been decided on the basis of Article 40.1.

Similarly, many other areas of law involve significant recognition inequalities on the basis of poverty, socio-economic status and social class. The most obvious example of this is in substantive criminal law where theft is criminalised, whereas tax avoidance is lawful. Each act is motivated by a similar desire for material wealth, but only the latter, which is disproportionately practiced by the wealth, is lawful even though it is arguably just as harmful to society. Similarly prosecution and sentencing practices are disproportionately harsher on defendants from deprived backgrounds compared to those from wealthy backgrounds.[186]

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[186] Irish Penal Reform Trust, *The Vicious Circle of Social Exclusion and Crime: Ireland's Disproportionate Punishment of the Poor* (IPRT Position Paper, January 2012); Caroline Austin, 'Inconsistent Sentencing Practice in Ireland: Is There a Way Forward?' (2005) 13 Irish Student Law Review 146; Niamh Maguire, 'Consistency in Sentencing' (2010) 2 Judicial Studies Institute Journal 14; Ivana Bacik and Michael O'Connell, *Crime and Poverty in Ireland* (RoundHall Sweet & Maxwell 1998).

These cases demonstrate that a rigid separation of powers does not prevent the courts dealing with recognition inequalities on the ground of poverty. Additionally, when there is an independent constitutional obligation to spend money, as in providing for free primary education, the separation of powers should not prevent courts analysing whether that money is spent equally. Articles of the Constitution do not exist in isolation and often have to function in conjunction with each other. Article 42 guaranteeing a right to free primary education is an explicit, judicially enforceable socio-economic right in the Constitution and it is now well settled that the right includes an obligation on the State to spend resources in order to provide for universal free primary education.[187] Even with a rigid separation of powers, the courts are required to assess measures implemented by the political organs in order to meet this constitutional obligation, even if only to a standard of requiring "appropriate" education.[188] Consequently, a right to equality applied in conjunction with the right to free primary education would require the measures to be analysed to ensure that the way the State is spending money does not discriminate directly or indirectly on the basis of poverty (or ethnicity or gender, etc) and also to ensure that it furthers the egalitarian purpose of Article 40.1 by working to reduce inequality on the basis of poverty. Once the law in question involves spending money in furtherance of a constitutional obligation, the court is faced with a choice of either analysing that law for compliance with constitutional rights and obligations, or abdicating the right-protecting function of the courts in preference for the non-justiciability of economic policy.

In most of the cases pronouncing a rigid separation of powers, the courts faced the potential of mandatory orders against the executive. The recognition of poverty as a presumptively proscribed ground does not require mandatory orders to be issued, but instead could benefit from the more conservative declaratory remedies. It is significant that the courts in these cases were open to declaratory remedies being legitimate, which suggests that the separation of powers was only strict in preventing the courts formulating policy, but not strict

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[187] *Crowley v Ireland* [1980] IR 102; *O'Donoghue v Minister for Health* [1996] 2 IR 20; *O'Shiel v Minister for Education* [1999] 2 IR 321.

[188] *O'Carolan v Minister for Education* [2005] IEHC 296; *Ó C v Minister for Education* [2007] IEHC 170; *McD v Minister for Education* [2008] IEHC 265.

with regard to the courts reviewing and assessing policy for constitutional compliance.[189]

3.4 Article 45 Directive Principles of Social Policy

The final objection raised by Forde,[190] and also by Hogan,[191] and Morgan[192] to the courts dealing with issues of poverty is that Article 45 could be read as an indication that economic deprivation is not to be used as a ground for judicial review of legislation. Murphy J seemed to hint at this argument in *TD v Minister for Education*,[193] though he did not go so far as to say anything covered by Article 45 is therefore excluded from other articles of the Constitution.[194]

This Article is prefaced with a statement about the limited applicability of the clauses:

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

It is certainly true that several of the provisions in Article 45 are concerned with socio-economic inequality and poverty:

> Article 45.1 The State shall strive to promote the welfare of the whole people by securing and protecting as effectively as it may a social order in which justice and charity shall inform all the institutions of the national life.
>
> Article 45.2 The State shall, in particular, direct its policy towards securing:

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[189] *TD v Minister for Education* [2001] 4 IR 259, 335; Hogan and Whyte (n 46) 120.
[190] Forde (n 82); Forde and Leonard (n 47) 821-822.
[191] Hogan, 'Unenumerated Personal Rights: Ryan's Case Re-evaluated' (n 90); for debate, see, Richard Humphreys, 'Interpreting Natural Rights' (1993-1995) 28-30 Irish Jurist 221; Murphy (n 160).
[192] David Gwynn Morgan, *A Judgment Too Far? Judicial Activism and the Constitution* (Cork University Press 2001) 69-70.
[193] *TD v Minister for Education* [2001] 4 IR 259.
[194] *TD v Minister for Education* [2001] 4 IR 259, 317-318; Whyte, *Social Inclusion and the Legal System* (n 46) 54.

> i 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.
>
> ii That the ownership and control of the material resources of the community may be so distributed amongst private individuals and the various classes as best to subserve the common good.
>
> iii That, especially, the operation of free competition shall not be allowed so to develop as to result in the concentration of the ownership or control of essential commodities in a few individuals to the common detriment.
>
> iv That in what pertains to the control of credit the constant and predominant aim shall be the welfare of the people as a whole.
>
> ...
>
> Article 45.4.1° The State pledges itself to safeguard with especial care the economic interests of the weaker sections of the community, and, where necessary, to contribute to the support of the infirm, the widow, the orphan, and the aged.

As Hogan and Whyte note, the traditional view on these sentences has been that the entire Article is "completely outside the range of judicial consideration."[195] In several of the cases that have presented this orthodox view, the courts have used the non-justiciability of Article 45 to affirm the contrasting strength of the other articles of the Constitution; for example in *Byrne v Ireland*,[196] Walsh J said:

> This express exclusion from cognisance by the courts of [Article 45] reinforces the view that the provisions of the Constitution obliging the

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[195] Hogan and Whyte (n 46) 2079; *Buckley v Attorney General* [1950] IR 67; *Byrne v Ireland* [1972] IR 241; *Comyn v Attorney General* [1950] IR 142; *O'Brien v Manufacturing Engineering Co* [1973] IR 334; Gerard Quinn, 'Rethinking the Nature of Economic, Social and Cultural Rights in the Irish Legal Order' in Costello (ed), *Fundamental Social Rights: Current European Legal Protection and the Challenge of the EU Charter on Fundamental Rights* (Irish Centre for European Law 2000) 37, 49.

[196] *Byrne v Ireland* [1972] IR 241.

State to act in a particular manner may be enforced in the courts against the State as such.[197]

This degree of non-justiciability may be contestable. For example, Whyte argues that the courts may use Article 45 as an interpretive tool when construing other articles.[198]

Even setting aside that argument, however, there is a significant difference between the traditional, non-cognisable view of Article 45 and the suggestion by Forde and Hogan that the Article would preclude the consideration of poverty under other articles. The implication of Forde's suggestion is that, not only is Article 45 non-cognisable by the courts, it also occupies the field with regard to any issues that arise implicitly under its terms. By this logic, anytime Article 45 overlaps with another constitutional article, the courts should disapply the other article to the extent of that overlap. This in fact contradicts the essence of the orthodox view, as Walsh J's quote from *Byrne v Ireland* indicates, because it would involve removing judicial enforcement of other articles of the Constitution.

Considering the example of gender equality can show the fallacy of this argument (or at least the extreme consequences that would follow). Article 45.2.i clearly makes reference to gender equality in the context of employment when it says "citizens (all of whom, men and women equally, have the right to an adequate means of livelihood)..." Does this mean that Article 40.1 cannot be used to tackle gender discriminations in legislation that affects the work environment? This is surely not the case.[199] Instead, Article 40.1 does apply to gender equality on its own terms, while simultaneously Article 45 states that gender equality in employment is a social policy that the Oireachtas should pursue.

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[197] *Byrne v Ireland* [1972] IR 241, 265.

[198] Whyte, *Social Inclusion and the Legal System* (n 46) 54; Hogan and Whyte (n 46) 2080-2085.

[199] In *Murtagh Properties v* Cleary [1972] IR 330, Kenny J held that gender discrimination in employment was outside the scope of Article 40.1. However, Kenny J's reasoning relied on the context of discrimination approach, since abandoned by the courts, and not on the influence of Article 45. This case does not support the claim that Article 45 restricts the scope of other articles of the Constitution.

To rebut Forde's rejection of poverty as a ground, I have argued that Article 40.1 on its own terms and in the courts' jurisprudence can sensibly be applied to poverty issues and there is no basis to the suggestion that Article 45 should change this. The directive principles do not occupy the entire constitutional field on this matter. Poverty is relevant to both Articles and it requires a particularly expansive view of the limitations on Article 45 to suggest that it is exclusively responsible for any issues addressed by it, to the point that it could remove the force of other constitutional articles.

However, even if Forde is correct that Article 45 occupies the field with regard to distributive inequality, this would not entirely remove poverty as a ground from the ambit of Article 40.1 because the directive principles only deal with the distributive dimension of socio-economic equality, leaving the participation and the recognition dimensions to be dealt with under the ordinary equality guarantee. At its very strongest, therefore, Forde's suggestion not only strains the orthodox understanding of Article 45 but can also only affirm that Article 40.1 equality is primarily about recognition equality and dignity harms, which means that the courts could still review legislation to prevent prejudice on the basis of poverty.

Conclusion

The potential doctrine of the presumptively proscribed grounds of discrimination is one of the most important developments in Irish constitutional equality law. This doctrine is developing at a glacial pace, but three recent judgments of the Supreme Court suggest that it is open to recognising certain grounds as worth of greater equality protection, in the form of a more intensive standard of review and a shift in the burden of proof related to justification of *prima facie* inequality. An important feature of these cases is the explicit use by the Court of the human personality doctrine and the "basis of discrimination" approach in order to explain the existence of the presumptively proscribed grounds of discrimination. This leads to the possibility that dignity is the more important criterion in the identification of presumptively proscribed grounds.

Based on the Court's discussion of the presumptively proscribed grounds, there is a strong case to include poverty, socio-economic status or social class in the

list of grounds. The kinds of inequalities experienced by people on this ground are closely analogous to those experienced by people on well-established grounds like ethnicity or religion. Similar to the debates over socio-economic rights, this ground faces several objections, such as the claim that it is illegitimate for courts to engage with economic inequality (the democratic and constitutional objections) and that they are unable to grapple with the issues at stake (the competence objection). A further, uniquely Irish, objection is that the non-justiciability of Article 45 precludes the courts from considering poverty issues under Article 40.1. In this chapter I seek to overcome each of these objections on their own terms. I also show that, even at their strongest, these objections could not prevent the courts from considering the non-distributive inequalities that exist on the ground of poverty, socio-economic status or social class, such as those in the recognition and participation dimensions. In conclusion, it is perhaps safest to say that there is a strong case for the recognition of poverty as a presumptively proscribed ground and that the objections are unpersuasive, but to acknowledge that the personal attitudes and political views of the judges themselves may remain as a barrier to the recognition of this ground.

Ch 5: Inequality in the Irish Education System

Sections

1. Inequality in the Education System on the basis of Poverty, Social Class and Socio-Economic Status
    - 1.1 Redistributive Dimension
    - 1.2 Recognition Dimension
    - 1.3 Participative and Transformative Dimensions
    - 1.4 Educational Performance in and Unequal System
2. Consequences of Inequality
    - 2.1 Consequences as a Societal Level
    - 2.2 Consequences at an Individual Level
    - 2.3 Consequences for the Transition to Third Level Education
3. Measures to Resolve Inequality
    - 3.1 Equality of Opportunity Remedies
    - 3.2 Substantive Equality of Condition Remedies
        - 3.2.1 The Principle of Inclusion
        - 3.2.2 Other Measures Based on Substantive Equality of Condition

Introduction

Inequality in the school system is a sensitive subject in Ireland. Religious segregation between schools is constitutionally mandated but politically controversial, while rates of single-sex schooling are among the highest in the EU. The subject of this chapter, segregation and inequality based on poverty, social class or socio-economic status, is deeply entrenched in the education system. It has harmful effects on a large number of children but, unlike the current focus on religious inequality, it generates a relatively small amount of political attention.

The importance of education to both the student and society at large is well accepted and a high-quality education system is a politically popular objective in Ireland. At the same time, parents inevitably (and justifiably) have a desire to provide what they see as best for their own children. At times, these two values can collide. These issues are part of the wider moral question of the extent to which society should allow parents/guardians to pursue their interpretation of the best interest of their children; should they be allowed to take steps to support their children's interests even if that has the consequence of supporting (or

increasing or creating) inequality? Do parents' duties for the education of their children override their responsibilities to the rest of society? Or does society have the right to impose a limit on the extent to which parents can pursue a child's best interests? Should society try to use the education system to dismantle inequality, or are the rights to education of individual children enough to trump wider egalitarian values?

These questions pose a moral debate between autonomy and equality. They do not, however, create a debate between quality and equality. Proponents of parental autonomy and private schools often argue that competition between schools, and the additional funding available from fees, raises standards and leads to a stronger education system. From this position, the argument runs, the only way to achieve equality is to reduce the quality of education for the privileged, thus levelling down. The problem for this argument is that overwhelming evidence demonstrates that standards can be raised faster through equality than through segregation. Wilkinson and Pickett show that when rich countries reach a certain level of development, as Ireland has, measures of wellbeing such as educational performance do not continue to improve simply with the creation of wealth. Instead, improvements in wellbeing come from decreasing inequality:

> Rich people tend, on average, to be healthier and happier than poor people in the same society. But comparing rich countries it makes no difference whether on average people in one society are almost twice as rich as people in another. ...
>
> Having come to the end of what higher material living standards can offer us, we are the first generation to have to find other ways of improving real quality of life. The evidence shows that reducing inequality is the best way of improving the quality of the social environment, and so the real quality of life, for all of us.[1]

Wilkinson and Pickett therefore reject the argument that equality can only be attained at the expense of quality, including for those at the top of the social

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[1] Richard Wilkinson and Kate Pickett, *The Spirit Level: Why Equality is Better for Everyone* (Penguin 2010) 13, 29.

spectrum. On the contrary, their evidence demonstrates that in more equal societies, in addition to overall better average performances, the best students tend to perform better than the best students in less equal societies, and the weakest also perform better than the weakest in less equal societies.[2] To borrow Wilkinson and Pickett's phrase, "equality is better for everyone"; the bottom sections of society obviously have the most to gain from greater equality, but the top sections of society also receive an absolute improvement in their welfare.[3]

In this chapter I provide an overview and analysis of the inequalities in the Irish education system based on poverty, social class and socio-economic status. The primary purpose of this chapter is to contextualise the constitutional arguments about inequality made in this thesis. The secondary purpose is to explore practical measure for tackling inequality in the education system. I address issues of the constitutionality or otherwise of such measures in chapters 6 and 7.

In Section 1 I outline the extent and causes of inequalities in the education system associated with poverty, social class and socio-economic status using the four dimensions of substantive equality of condition from chapter 1. In section 2 I outline the profound and wide-ranging consequences of these inequalities. For an individual, the ripple effect can be see in everything from access to (and quality of) higher education and job opportunities to more unexpected fields, such as health, reliance on State subsidies and social housing, and crime rates. At a societal level, inequalities in the education system contribute to the preservation of long-term social class-based inequalities. Finally, in section 3 I present a number of measures that could be used to try to resolve these inequalities. These can be broken into measures that serve equality of opportunity and measures that serve substantive equality of condition. The DEIS[4] system is based on the former approach and tackles "educational disadvantage". Measures based on substantive equality of condition involve working towards an inclusive education system.

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[2] Wilkinson and Pickett (n 1) 108-110.
[3] Wilkinson and Pickett (n 1) ch 13.
[4] Delivering Equality of Opportunity in Schools; See section 3.3.1 below.

1. Inequalities in the Education System on the basis of Poverty, Social Class and Socio-Economic Status

Ireland does not have an inclusive education system; segregation is widespread based on a number of grounds, most explicitly religion and gender. Schools can directly discriminate on these grounds. Despite having one of the most segregated systems in the EU on the ground of gender, Ireland is above average in terms of equality of performance for female and male students.[5] However, the school system also contains other segregations that do lead to educational inequality. Particular problems can be seen in relation to race or ethnicity, especially for children from migrant[6] or Traveller backgrounds.[7] In addition, segregation and inequality is common for students with disabilities.[8] Inequality and segregation on the basis of poverty, social class and socio-economic status is also ubiquitous, as a standalone inequality and in the way it intersects with other grounds.[9] The starkest example of this intersection is among Travellers.

Schools cannot decide admissions based on academic ability, for example based on past performance or through entrance examinations.[10] The Equal Status Act 2000 also prevents discrimination on the protected statutory grounds,[11] though s.7(3)-(4) subjects these to several exceptions. However, the Act does not include poverty, social class or socio-economic status. Statutory law thus does not address numerous types of direct and indirect discrimination on these grounds in the education system. One example, made notable by the

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[5] Stephen Gorard and Emma Smith, 'An international comparison of equity in education systems' (2004) 40(1) Comparative Education 15, 24.
[6] Merike Darmody, 'Power, Education and Migration into Ireland' (2011) 3(3) Power and Education 224; Merike Darmody, Delma Byrne and Frances McGinnity, 'Cumulative disadvantage? Educational careers of migrant students in Irish secondary schools' (2014) 17(1) Race, Ethnicity and Education 129.
[7] Brian Harvey, *Travelling with Austerity: Impact of Cuts on Travellers, Traveller Projects and Services* (Pavee Point 2013).
[8] Sean Griffin and Michael Shevlin, *Responding to Special Education Needs: An Irish Perspective* (Gill & Macmillan 2011).
[9] Prior to its effective abolition in 2009, the Combat Poverty Agency provided excellent oversight of this issue: *Educational Disadvantage in Ireland* (Summer 2003)
[10] Don Thornhill, Secretary, *Circular letter M51/93: Selection Procedure for the Enrolment of Pupils in Second-Level Schools* (Department of Education, 2 December 1993) [3]; Kathleen Lynch and Anne Lodge, *Equality and Power in Schools: redistribution, recognition and representation* (RoutledgeFalmer 2002) 68.
[11] Gender, civil status, family status, sexual orientation, religion, age, disability, race, and membership of the Traveller community.

unsuccessful challenge based on the Traveller community ground in *Stokes v CBS Clonmel*,[12] is the practice in some schools of reserving places for the children of past pupils. This policy favours children from privileged backgrounds and, by prioritising their entry into elite schools, helps those privileges to persist across generations.[13] Given the levels of educational disadvantage amongst Travellers, this has a particularly adverse effect on members of this community and on migrant communities.

We can conceive of these inequalities as problems from an equality of opportunity perspective, in which the problem is that some schools are advantaged relative to other schools.[14] The inequality under this conception is not the segregation itself, but the fact that it leads to different educational outcomes. Under substantive equality of condition, in contrast, equality cannot be achieved merely by improving the educational outcomes of the disadvantaged. The types of inequalities at stake also include the fact of segregation itself. The segregation cannot be resolved without adopting an inclusionary approach to education.[15] The choice of conception fundamentally changes the width of the definition of equality, making it controversial.[16] Some matters that are acceptable under equality of opportunity (eg segregation) are the core inequality at stake under substantive equality of condition.

The Irish education system is a product of Irish society. A significant cause of inequality within and between schools is the fact that Irish society is grossly unequal.[17] Ireland's rapid scramble towards wealth during the "Celtic Tiger" economic boom brought significant economic growth but left an unequal society in its wake. By 2007, Ireland was above the Organisation for Economic-

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[12] *Stokes v CBS Clonmel* [2015] IESC 13.
[13] Ben Mitchell, 'Irish Government Abandons Plans to Reduce Elitism in Schools' OxHRH Blog (14 December 2015) <http://ohrh.law.ox.ac.uk/irish-government-abandons-plans-to-reduce-elitism-in-schools/> accessed 16 May 2016.
[14] Emer Smyth and Selina McCoy, 'Investing in Education: Combating Educational Disadvantage' (Research Series Number 6, Barnardos and the Economic and Social Research Institute 2009).
[15] Kathleen Lynch and John Baker, 'Equality in Education: An equality of condition perspective' (2005) 3(2) Theory and Research in Education 131, 147.
[16] Richard Breen and Jan Jonsson, 'Inequality of Opportunity in Comparative Perspective: Recent Research on Educational Attainment and Social Mobility' (2005) 31 Annual Review of Sociology 223, 223-224.
[17] Colm Ó'Cinnéide, 'Aspirations Unfulfilled: The Equality Right in Irish Law' in Donncha O'Connell (ed), *Irish Human Rights Law Review 2010* (Clarus Press 2010) 50-53.

Cooperation and Development (OECD) average for overall poverty rate and for the child poverty rate,[18] despite a remarkably long period of sustained economic growth. During the subsequent economic recession, the austerity measures had a harsh impact on the poorest members of society, [19] and especially on Travellers.[20] On the Gini coefficient statistics for 2012, the most recent available, Ireland's pre-tax market income inequality is the worst in the OECD.[21] Significant redistribution measures make Ireland average for post-tax inequality,[22] but the need for these measures means less funding is available for public expenditure, for example on education. Societal inequality is a multifaceted problem, and not caused nor solved exclusively by the education system. The unequal school system contributes to this continuing societal inequality, however, because wealth and power affect the quality of education and type of opportunities available to students.

Using the dimensions of substantive equality of condition from the writings of Fredman[23] and of Lynch and Baker,[24] in the remainder of this section I outline the inequalities in the Irish education system.

1.1 Redistributive Dimension

Educational inequalities under the redistribution dimension are inherently tied to society-wide economic, political and cultural inequality.[25] While education is neither the single cause of nor the single solution to inequality, it is relevant to both. A wealth gap of some degree is an inevitable consequence of an economy

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[18] Sheelagh Drudy, 'Quality and equality at a time of austerity' (2011) 100(398) Studies: An Irish Quarterly Review 167, 176.
[19] Elish Kelly, Seamus McGuinness and John Walsh, *An Evaluation of the Back to Education Allowance* (ESRI Research Series No 47, October 2015) vii; Gonzalo Fanjul, *Children of the Recession: The Impact of the Economic Crisis on Child Well-Being in Rich Countries* (UNICEF 2014).
[20] Harvey (n 7).
[21] Organisation for Economic Co-Operation and Development, *Income Distribution and Poverty* (OECD 2012) <http://stats.oecd.org/Index.aspx?DataSetCode=IDD> accessed 20 May 2016.
[22] OECD (n 21).
[23] Sandra Fredman, *Discrimination Law* (2nd ed, OUP 2011) 25-33.
[24] Kathleen Lynch and John Baker, 'Equality in Education: An equality of condition perspective' (2005) 3(2) Theory and Research in Education 131, 132-134.
[25] Lynch and Baker (n 15) 132.

based on a competitive market.[26] However, the extent of the inequality can undermine capitalism itself.[27] The instrumental importance of education to the economy also means that capitalism actually benefits from educational equality because it allows more people to compete in the marketplace. More fundamentally, the moral premise of this thesis is that education is an intrinsic good that should be available to all equally, regardless of ability to pay.

The most obvious redistributive inequalities are those tied to the stratification of the primary and secondary school sectors. The fee-paying voluntary schools, which have the largest educational resources, are at one end of the spectrum, followed by the non-fee-paying voluntary sector.[28] Below these in term of resources (and educational prestige) are the community and comprehensive schools, followed by the vocational education sector. These schools tend to have the highest proportions of students from poor or unemployed family backgrounds and have lower scores in many of the factors used to measure educational success, such as transition to higher education.[29]

A fees requirement is an obvious distributive barrier. Several features of the private school industry are noteworthy. The first noteworthy aspect is its small size. Lynch and Moran report:

> With the exception of Dublin, the majority of counties have only one fee-paying school and these tend to be either schools for minority religions or single-sex Roman Catholic schools.[30]

More than half of these fee-paying schools are in Dublin.[31]From the 2015/2016 academic year, fifty-one secondary schools in Ireland,[32] around 8% of the total,

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[26] Michael Connolly, 'Social Mobility, Education and the European Convention on Human Rights' (2013) European Human Rights Law Review 152, 153.
[27] Thomas Piketty, *Capital in the Twenty-First Century* (Harvard University Press 2014) 27, 571; Rory Hearne and Cian McMahon, *Towards Cherishing all Equally 2016* (TASC 2016) 5.
[28] Drudy (n 18) 177.
[29] Drudy (n 18) 177.
[30] Kathleen Lynch and Marie Moran, 'Markets, Schools and the Convertibility of Economic Capital: The Complex Dynamics of Class Choice' (2006) 21 British Journal of Sociology of Education 221, 225.
[31] Lynch and Moran (n 30) 224.
[32] Katherine Donnelly, 'Enrolments on rise as country's fee-paying schools begin to enjoy the fruits of recovery' *Irish Independent* (Dublin, 2 January 2016) 4; Courtois offers

charge fees for admission. The fees range from €2,600 to €12,646 for day students and up to €22,350 for boarders.[33] The system of private schools in Ireland is not fully privatised, however:[34] there are 9 fully private secondary schools, including the for-profit tuition (or "grind") schools.[35] Only 2% of Irish students attend these schools, with the remainder in schools that receive at least some public funding.[36] In most fee-paying schools, the State funds a significant amount of the costs including most of the teachers' salaries.[37] The State pays for one teacher for every 19 students in the non-fee-paying sector and for every 23 students in fee-paying schools.[38] Schools that choose to charge fees receive less State funding than non-fee-paying schools, particularly in relation to building maintenance and day-to-day costs. Financial pressure during the recession led five schools to decide to move into the non-fee-paying sector.[39]

In the fee-paying sector, the additional revenue generated by fees is used to fund additional facilities, such as sporting, teaching and extra-curricular resources. In the non-fee-paying sector, many schools rely on "voluntary contributions" from parents as a supplement to State funding; 66% of parents with children in primary schools, and 79% of parents with children in secondary schools, were asked to pay a contribution in the 2015-2016 school year.[40] The level of contributions schools receive inevitably correlates to the wealth of the parents, thus leading to greater financial resources for schools catering to children from wealthier backgrounds. This incentivises schools to encourage students from middle class backgrounds to attend and discourage students from working-class

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different figures, saying that there were 56 fee-paying schools in Ireland in 2014, catering to 7% of the student population: Aline Courtois, ''Thousands waiting at our gates': moral character, legitimacy and social justice in Irish elite schools' (2015) 36(1) British Journal of Sociology of Education 53, 56.

[33] Donnelly (n 32) 4; Lynch and Lodge (n 10) 40-42.

[34] Dympna Glendenning, *The Irish Constitution: Education and Human Rights in Recognised Schools* (IHREC 2012) 8; Joe Humphreys, 'Fee-paying schools step up campaign against admissions bill' *The Irish Times* (24 November 2014).

[35] Peter McGuire, 'How to read the feeder school list and some of its peculiarities' *The Irish Times* (Dublin, 3 December 2015).

[36] Dympna Glendenning, Religion, Education and the Law: A Comparative Approach (Tottel 2008) 291.

[37] Lynch and Moran (n 30) 224.

[38] Donnelly (n 32) 4.

[39] Donnelly (n 32) 4.

[40] Barnardos, *School Costs Survey 2016: Briefing Paper* (3 August 2016) 13 <http://www.barnardos.ie/assets/files/Advocacy/2016SchoolCosts/BarnardosSchoolCostsSurveyBriefing2016.pdf> accessed 4 August 2016.

backgrounds, because middle class parents are more likely to make higher contributions.[41] While a fees requirement is an overt barrier, many schools have a culture in which the voluntary contribution is a *de facto* fee, which acts as a similar barrier. This practice of asking for significant voluntary contributions from parents can be controversial. In 2014, Rockwell College in Tipperary moved into the fee-paying sector because of efforts by the Department of Education to make the school reduce its charges, which included the level of voluntary contribution it required from parents as well as other costs such as for boarding services.[42] This is a cautionary tale for reform; as I discuss in chapter 8 the State's weak constitutional powers in education create the risk that schools will opt-out of the non-fee-paying sector entirely if the State subjects its funding to too many conditions.

These redistributive inequalities lead to differing access to and participation in education. They also lead to different educational outcomes, as schools with more resources can support a better learning environment.[43] These inequalities are part of what some sociologists describe as a "neo-liberal ideology of choice" in the education system. The ideology of choice is that parents should be free to choose from a range of types of schooling for their children and that there should be diversity between schools to facilitate this. Internationally, particularly since the 1990s, choice ideology has dominated educational policy.[44] In Ireland it is constitutionally enshrined in Article 42.

A system based on choice serves the value of autonomy and also provides for diversity. These are worthy objectives but it is important to highlight their costs to equality. The existence of a free choice leads to a marketplace in which schools have to compete with each other. On one view, this should drive up performance as schools seek to attract parents based on educational outcomes for their children. The evidence from the US indicates that a parental choice ideology is

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[41] Lynch and Lodge (n 10) 42.
[42] Donnelly (n 32) 4; Katherine Donnelly, 'Renowned School to be Fee-Paying from Autumn' *Irish Independent* (Dublin, 25 May 2013).
[43] Lynch and Baker (n 15) 135.
[44] Breen and Jonsson (n 16); Lynch and Moran (n 30) 222-223.

not an effective way of raising the quality of education.[45] Moreover, the worrying implication of such an argument is that poor educational provision in some schools is an acceptable consequence. Having a system based on a competitive market incentivises schools to structure themselves so as to attract certain types of parents and reject others.[46] The consequence is that certain schools, those that are elite and high performing, become inaccessible to members of certain groups, particularly the poor. Even without formal barriers to schools, the ideology of choice becomes a barrier because only those who have sufficient economic, cultural and social capital are able to avail of this choice.[47]

For example, a belief that a school expects a large voluntary contribution leads to some parents opting not to send their children to elite or popular schools out of a fear that their children will be disadvantaged within the school if they are not generous.[48] Similarly a fees requirement induces parents without high levels of wealth not to choose certain schools. These cause parents to select schools, not on their educational or religious credentials, but on their associated costs. These schools are often less academically successful, thus contributing to an educational inequality between schools.[49] It also leads to a concentration of children from middle class backgrounds in elite, expensive schools, and of children from working class background in less successful schools. Thus, while choice is formally available to all parents, in practice it is only available to wealthy or middle class parents.

Aside from inequality between schools, attendance at any school, whether fee-paying or not, is expensive. This makes education disproportionately burdensome for people from poor backgrounds. Barnardos estimates that, in 2016, the average cost of putting a child through a year of schooling is €340 for Senior Infants, €395 for Fourth Class, and €775 for the first year of secondary

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[45] Atila Abdulkadiroglu, Parag Pathak and Christopher Walters, 'School Vouchers and Student Achievement: Evidence from the Louisiana Scholarship Program' (December 2015) National Bureau of Economic Research Working Paper 21839.
[46] Peter Cookson, 'First Person Plural: Education as Public Property' in Bruce Biddle (ed), *Social Class, Poverty, and Education: Policy and Practice* (RoutledgeFalmer 2001).
[47] Lynch and Moran (n 30) 222-223; Drudy (n 18) 178; Lynch and Lodge (n 10) 39.
[48] Lynch and Lodge (n 10) 42.
[49] Lynch and Lodge (n 10) 42; Lynch and Moran (n 30) 227-228.

school.[50] Of these costs, some could easily be reduced, such as allowing for textbooks to be reused or resold, and supporting cheaper, generic school uniforms.[51]

Finally, cuts in state funding to the education system have been unequal and reflect societal inequality. Harvey, for example, reports that from 2008-2013 the government reduced overall educational spending by 4.3%.[52] In light of that, the scale of the cuts to programmes to support equality for Travellers are almost incomprehensible; the State cut education programmes for Travellers by 86.6%, and programmes to advance Traveller equality by 76.3%.[53] In the words of Pavee Point:

> These figures tell an egregious story of an extraordinary level of disinvestment by the Irish state in the Traveller community. One can think of no other section of the community which has suffered such a high level of withdrawal of funding and human resources, compounded by the failure of the state to spend even the limited resources that it has made available.[54]

1.2 Recognition Dimension

A purely distributive assessment of the education system cannot present the scale of inequality, however. Some of the most harmful inequalities arise in the recognition dimension of substantive equality of condition.

Recognition harms take many forms, including prejudice against (and stereotypes of) certain people based on their group membership, demonization

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[50] Barnardos, *School Costs Survey 2016: Briefing Paper* (n 40) 7; The Oireachtas Joint Committee on Education and Social Protection in 2013 found that the average cost for a student (excluding fees) was €338 per year for primary school and €781 per year for secondary school: Joint Committee on Education and Social Protection, *Report on Tackling Back to School Costs* (June 2013) 11

[51] Barnardos, *School Costs Survey 2016: Briefing Paper* (n 40) 22-26; Joint Committee (n 51) 20-21; Lynch and Lodge (n 10) 45-46.

[52] Harvey (n 7) 20.

[53] Harvey (n 7) 38; this shocking trend is evident outside the education context as well: Interagency activities -100%; Traveller accommodation -85%; National Traveller organisations -63.6%; FAS Special Initiative for Travellers -50%; National Traveller Partnership -32.1%; Traveller SPY youth projects -29.8%; Health -5.4%; compounding these cuts is that fact that some agencies then managed to underspend, thus providing even less services.

[54] Harvey (n 7) 2.

and penalisation of a community's culture or practices, or rejection of person's identity characteristics as either unimportant or non-existent.[55]

Lynch and others argue that schools are inherently middle-class institutions; they rely on mores, lifestyle and resources that middle class families are likely to have and expect children to have certain attributes that are more likely to be possessed by middle class rather than working class children.[56] In this context, schools are a microcosm of society where working-class traits are devalued and are the subject of recognition inequalities. MacRuairc explains:

> The cultural symbols (eg language register) of the working-class population, who are marginalised economically, are also the subject of a lack of prestige culturally because their cultural options are considered to lack knowledge and taste and become associated negatively as the problem with the working class.[57]

This stigma and prejudice towards working-class traits can be particularly problematic in schools. Schools place significant value on formality in communication and on "polite" behaviour. This may be justified by serving an educational function, but it is important to recognise its associated inequality. MacRuairc shows that it can lead to educational disadvantages for children who are unused to using this kind of language; for children from a working-class background, the formal register can be harder to comply with than for children from middle-class backgrounds because it requires a greater degree of change from their ordinary use of language.[58] This creates educational disadvantage because teachers then focus on the structural element of a child's communication, rather than on the content of what she or he says.[59] This leads to

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[55] Sandra Fredman, 'Facing the Future: Substantive Equality under the Spotlight' in Ockert Dupper and Christoph Garbers (eds) *Equality in the Workplace: Reflections from South Africa and Beyond* (Juta 2009); Wilkinson and Pickett (n 1) 163-166.
[56] Lynch and Baker (n 15) 144; Lynch and Lodge (n 10) 57; Annette Lareau, 'Linking Bourdieu's Concept of Capital to the Broader Field: The Case of Family-School Relationships' in Bruce Biddle (ed), *Social Class, Poverty, and Education: Policy and Practice* (RoutledgeFalmer 2001).
[57] Gerry MacRuairc, 'Where words collide: social class, schools and linguistic discontinuity' (2011) 32(4) British Journal of Sociology in Education 541, 542; Stephanie Lawler, 'Introduction: Class, Culture and Identity' (2005) 39(5) Sociology 797, 803.
[58] MacRuairc (n 57) 548-551.
[59] MacRuairc (n 57) 544.

three kinds of educational disadvantage. First, a teacher or examiner may perceive a child's academic ability to be lower than it actually is, which has tangible consequences as she or he progresses through a school system that relies heavily on prior performance and perceived ability. Secondly, it is easier for children from middle class backgrounds rather than working class backgrounds to engage with the schoolwork, which can contribute to unequal performance.[60] Thirdly, it creates a psychological barrier between the student and the school because the environment is more welcoming and comfortable for certain children than for others. An interesting, specific example of this is where some schools ban the use of nicknames, which are more common among children from working class rather than middle class backgrounds. MacRuairc suggests this causes some children to feel like their identity in school is contrived and disconnects them from their teachers:[61]

> It is clear that this disconnect provides a legitimate basis for groups to feel excluded from the school and, more importantly, this gap results in many children constructing a subordinate or stigmatised perception of his/her identity. It follows therefore that in order for many of the working-class children to retain a positive sense of themselves they have to reject the linguistic norms of the school. This often results in a rejection of a considerable amount of school experiences because of the manner in which language functions to mediate the cultural meaning system of the school. This suggests that linguistic discontinuity for working-class children in particular may function as a significant causal factor in patterns of disengagement from school.[62]

This structural bias towards middle class children places children from working class backgrounds at a disadvantage. Compounding this, schools are often not explicit about the existence of social class differences even while devaluing working class traits.[63] Lynch and Lodge report:

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[60] MacRuairc (n 57) 548-551.
[61] MacRuairc (n 57) 552-553.
[62] MacRuairc (n 57) 558.
[63] Lynch and Baker (n 15) 144; Lynch and Lodge (n 10) 57-59.

> There is a sense in which social class is a silent subject, one about which there is much embarrassment and denial. When trying to discuss the issues associated with class inequality, we sense a great unease, especially about calling anyone 'working class'. It was as if it were a term of denigration, something that one might be ashamed of and so left unclaimed.[64]

Further recognition inequalities come from streaming, stratification and banding of students within schools. The justification usually presented for this system is that streaming and stratification makes it administratively easier to coordinate the school and that classes are pitched at an appropriate level for the students.[65] The persuasiveness of this justification is doubtful. First, the evidence is contradictory on whether students in the top streams actually benefit from the system.[66] Even if it does appear to help these students, in Wilkinson and Pickett's phrase, "equality is better for everyone". They demonstrate that greater inclusion and equality in education leads both to better average performance but, significantly, also to better performance amongst the top students.[67] Secondly, the system is harmful to the children placed in lower streams. It leads to a hierarchy of weak and strong, which becomes associated with labels of "dumb" or "slow" or "better".[68] Lynch and Lodge demonstrate that this leads to significant problems of low self-esteem and has a knock-on effect on the learning environment and on the students' relationships with their peers and teachers.[69] Thus, for debatable benefit, the system causes significant harm.

Even if it were justified from an educational perspective, the practice of streaming causes significant social class inequalities. Children from working class backgrounds are far more likely to be placed in a lower stream, while their peers from upper-middle class backgrounds are far more likely to be found in the higher streams.[70] This is because the chosen criterion of "ability" is not objective

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[64] Lynch and Lodge (n 10) 63.
[65] Lynch and Lodge (n 10) 65.
[66] Emer Smyth and Selina McCoy, 'Improving Second-Level Education: Using Evidence for Policy Development' (ESRI Renewal Series Paper 5, December 2011) 10.
[67] Wilkinson and Pickett (n 1) 108-110.
[68] Lynch and Lodge (n 10) 71-73; Lynch and Baker (n 15) 136.
[69] Lynch and Lodge (n 10) 73-76, 80-82.
[70] Lynch and Lodge (n 10) 40.

or neutral in the way that it purports to be. The lack of objectivity arises because ability has to be defined by a person whose prejudices, stereotypes and opinions will inevitably have a bearing on what she or he considered to be meritorious. In addition, even a truly objective criterion of ability would be unable to compensate for the disadvantaged position from which some students begin, such as lacking early childhood education or a supportive learning environment at home. Much like the example of "merit" in recruitment decisions causing indirect discrimination on the grounds of ethnicity or gender,[71] the criterion of ability leads to indirect discrimination on the bases of poverty and social class. This reinforces the recognition inequalities associated with social class because, not only is lower prestige afforded to working class traits, this is then given the veneer of objective justification on the basis of educational performance.

Critiquing ability (or merit) so as to show how it operates as an instrument of inequality is not the same as arguing that it is non-existent. Of course people have different levels of ability. It would also be impossible to operate the current education system without any concept of ability. In response, Lynch and Baker argue for a redefined understanding of ability. Currently, the curriculum and method of assessment are biased towards versions of intelligence and types of skills that are more highly valued in middle class than in working class communities.[72] A particular example is the importance placed on written communication, which they suggest is a more dominant method of communication in middle class communities than in other groups. More broadly, Lynch and Lodge are critical of the unquestioning use of a singular, absolutist view of "ability" in the education system according to which students are stratified and permanently treated as of high or low intelligence. They say that what schools treat as an immutable ability is merely a narrow measure of a prior attainment in a given subject that schools think is important (normally a linguistic skill).[73] They support the view that there are several intelligences and abilities and that, rather than being fixed, each of them is changeable and can be improved.[74]

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[71] Fredman, 'Facing the Future' (n 55).
[72] Lynch and Baker (n 15) 138.
[73] Lynch and Lodge (n 10) 64.
[74] Lynch and Lodge (n 10) 64.

Lynch and Lodge summarise the kinds of recognition inequality associated with social class:

> Not only are upper middle-class students more likely to attend selective schools, and be allocated to less selective and higher status classes within these, they are also more likely to be in classes that are less disruptive and have a more work-oriented learning environment. Although it is evident that grouping procedures in schools are not coterminous with social class stratification systems, they are none the less quite closely interfaced with them. Grouping on the basis of prior attainment (so-called 'ability') is an integral proactive in the perpetuation of social class inequality in education.[75]

Inequalities in the recognition dimension also drive the choice ideology in the market-based approach to the education system. For example, school uniforms become "markers of distinction between schools."[76] This means that certain uniforms gain markers of prestige while others are seen as less desirable. Many of the elite schools opt for expensive uniforms rather than cheaper generic options, which encourages people with lower financial means to attend the less prestigious schools.[77] Schools are able to market themselves in such a way so as to attract middle class and discourage working class parents. A particularly common way of doing this is by fostering a sporting or cultural ethos based on middle-class values or expectations.[78]

1.3 Participative and Transformative Dimensions

Power inequalities in schools are profound. These affect equality in the participative and transformative dimensions. Schools are obviously hierarchical institutions; there is an explicit hierarchy of teachers over students, but also within the teacher group and within the student community as students progress through the school.[79] There are also concealed hierarchies on the basis of poverty, social class and socio-economic status. Education is influenced by and

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[75] Lynch and Lodge (n 10) 54.
[76] Lynch and Moran (n 30) 228.
[77] Barnardos, *School Costs Survey 2016: Briefing Paper* (n 40) 7-9, 24.
[78] Lynch and Moran (n 30) 227.
[79] Lynch and Lodge (n 10) 182.

influences power;[80] decision- and policy-making is done by those with power and influence, and so the content of the curriculum and the direction of the school will often serve the interests of the decision-maker more closely than those without power. In the education system, working-class parents have less power and exert less influence over the school than middle-class parents, which risks their children being put at an educational disadvantage.[81] Consequently, Lynch and Baker call for a wider understanding of intelligence in the school curriculum that is not exclusively reliant on linguistic or mathematical skill.[82]

Participation inequalities also exist between the fee-paying and non-fee-paying sectors, and between schools that expect a large voluntary contribution and those who do not. Schools that are expensive to attend attract middle class parents, partly for the additional educational resources they offer, but more significantly because of the social networks they provide. Connections made through the schools give the students a greater chance of accessing profession and political networks once they leave.

1.4 Educational Performance in an Unequal System

The existence of these inequalities correlates with unequal educational performance on the basis of poverty, social class and socio-economic status. Many sociologists have concluded that there is a causal relationship at play.

Smyth and McCoy outline a number of performance indicators showing children from middle and upper-middle class backgrounds receiving better results than children from working class backgrounds. Unequal reading scores are significant from early in primary level and continue into secondary school:

> [First year secondary school] students from higher professional backgrounds have a mean score of 43, considerably higher than the

[80] Lynch and Baker (n 15) 148.
[81] Lynch and Lodge (n 10) 182.
[82] Lynch and Baker (n 15) 140, 144-147; See also, Peter Hall, 'Social Class, Poverty, and Schooling: Social Contests, Educational Practices and Policy Options' in Bruce Biddle (ed), *Social Class, Poverty, and Education: Policy and Practice* (RoutledgeFalmer 2001) 226-227, 231.

score of 28 among those from semi- and unskilled manual backgrounds and 25 among those where neither parent is in employment.[83]

A similar trend exists in Junior Certificate results, where the average child from a higher professional background can expect to achieve two grades higher per subject than the average child with unemployed parents.[84] At Leaving Certificate, 58% of students from higher professional backgrounds and only 16% from semi- and unskilled backgrounds achieve four or more C or higher ("honour") grades.[85]

Overall, Ireland has improved its school completion rates from 60% in 1980 to over 80% in 1998,[86] and subsequently to 98% by 2013,[87] with 90.6% of the 2008 entry reaching Leaving Certificate level.[88] For children from working class backgrounds, completion rates have improved dramatically. By 2015, 82.09% of students in DEIS schools completed the Leaving Certificate and 96.79% reached Junior Certificate.[89] However, a long-term analysis of access to education in Ireland shows that expansion in access has not led to a reduction in the kinds of inequalities outlined above on the basis of poverty, social class and socio-economic status.[90] High overall completion rates also conceal terrible inequalities in the actual completion rates of some groups that intersect with poverty. Harvey, for example, reports that, the second level completion rate for Traveller children is a paltry 13%,[91] with less than 1% of Travellers progressing to third level according to Pavee Point.[92]

There is overwhelming evidence that people at the bottom of social spectrums face significant cultural barriers in education. Freyer, dealing with racial inequality

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[83] Smyth and McCoy, 'Investing in Education' (n 14) 7.
[84] Smyth and McCoy, 'Investing in Education' (n 14) 7-8.
[85] Smyth and McCoy, 'Investing in Education' (n 14) 8-9.
[86] Selina McCoy and Emer Smyth, 'Higher education expansion and differentiation in the Republic of Ireland' (2011) 61 Higher Education 243, 249.
[87] Department of Education and Skills, *Education at a Glance 2015: OECD Indicators: A Country Profile for Ireland: Statistics Section* (November 2015) 6.
[88] Department of Education and Skills, *Retention Rates of Pupils in Second Level Schools: 2008 Entry Cohort* (February 2015) 5.
[89] Department of Education and Skills (n 88) 12.
[90] Emer Smyth, 'Educational Inequalities Among School Leavers in Ireland 1979-1994 (1999) 30(3) The Economic and Social Review 267, 282.
[91] Harvey (n 7) 19.
[92] Pavee Point, *Submission to the Oireachtas Joint Committee on Education and Social Protection on the Draft General Scheme of an Education (Admission to Schools) Bill 2013* (31 October 2013) 1.

in schools in the US, has shown that black student face cultural pressure not to perform, because it is seen as "acting white", and those with the best school results are less popular than those with worse results (the opposite is true for white children).[93] Freyer's explanation is that cultural values influence the attitudes of members of disadvantaged groups to education:

> Within a group, the more successful individuals can be expected to enhance the power and cohesion of the group as long as their loyalty is not in question. But if the group risks losing its most successful members to outsiders, then the group will seek to prevent the outflow. ...
>
> Over the long run, the group faces the danger that its most successful members will no longer identify with its interests, and group identity will itself erode. To forestall such erosion, groups may try to reinforce their identity by penalizing members for differentiating themselves from the group.[94]

Analogously, Wilkinson and Pickett report a trend from research into groups defined by race, caste or social class in which children from disadvantaged groups perform tests identically to their peers from advantaged groups, until they are told that they are being "assessed". Once they are conscious of it being an assessment, the students from disadvantaged groups perform worse, while the students from advantaged groups raise their performance.[95] This is a manifestation of how the experience of poverty is the "internalisation of inferiority".[96] It demonstrates, along with Freyer's work, that social and cultural norms affect the performance of students, their attitudes to education and their

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[93] Roland Freyer, 'Acting White: The Social Price Paid by the Best and Brightest Minority Students' (2006) 6(1) Education Next 53.
[94] Freyer (n 93) 58.
[95] Wilkinson and Pickett (n 1) 113-117.
[96] John Jost and Orsolya Hunyady, 'The Psychology of System Justification and the Palliative Function of Ideology' (2002) 13 European Review of Social Psychology 111, 112, 115, 120; Dale Miller and Carol Porter, 'Self-blame in Victims of Violence' (1983) 39 Journal of Social Issues 139.

educational ambitions. In this way, recognition inequalities are direct causes of educational inequality.[97]

2. Consequences of Inequality

The premise of this thesis is that education is both intrinsically and instrumentally important.[98] If it is accepted to be intrinsically important, then the very fact of it being provided unequally raises moral concerns. Its instrumental importance causes any inequalities in the education system to be magnified and have ripple effects in all other areas of life where a good education is an advantage. There are three broad types of instrumental consequences: first, society-wide social class inequalities, secondly, individualised consequences of poor education, and thirdly inequalities in the transition into higher education.

2.1 Consequences at a Societal Level

Education is a significant contributor to pervasive and systemic inequalities in society. At a societal level, education becomes one of the many ways in which powerful groups are able to reproduce their advantage and pass it onto subsequent generations.[99] This advantage is made up of "capital"; *economic capital* in the form of wealth is easy to pass on, but other forms of capital can also be transferred, such as *social capital*, in the form of connections and integration into a society, *cultural capital* through the hierarchies and class structures in society, and *educational capital*, which refers to the advantages that can be gained by virtue of having good educational credentials and qualifications.

There is a strong correlation between the educational attainment level of children and their parents.[100] Smyth and McCoy report:

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[97] See also, David DuBois, 'Family Disadvantage, the Self, and Academic Achievement' in Bruce Biddle (ed), *Social Class, Poverty, and Education: Policy and Practice* (RoutledgeFalmer 2001) 133-169.
[98] Wilkinson and Pickett (n 1) 103.
[99] Darmody (n 6) 226.
[100] Smyth and McCoy, 'Investing in Education' (n 14) 51.

> over half of those whose mothers have tertiary educational qualifications themselves obtain such qualifications compared with a tenth of those whose mothers are pre- Junior Certificate leavers.[101]

They also say that there is strong evidence that parents' level of education correlates both with the level of education achieved by their children and with their performance (such as through grade performance). Significantly, they also note that this trend exists even when controlling, so far as is possible, for the individual ability of the child.[102]

Lynch and Lodge describe the transmission of capital as the "relational" nature of inequality; those who are advantaged will naturally want to give their children the best possible education so that they too will be in an advantaged position.[103] The Department of Education has recognised this:

> There is ample evidence to show that it is children from disadvantaged communities who constitute a majority of those who currently fail to benefit from the education system, and that under-achievement in school can have inter-generational effects on families and their communities.[104]

This can be described in a critical way, which implies that individual people are motivated by an inegalitarian agenda and consciously want their social group to remain dominant. However, it is more helpful to see the motivation as more benign, that people want to give their own children the best possible chance in life, but then to emphasise that the consequences of these cumulative decisions is that powerful groups remain powerful to the exclusion of others. I say "helpful" for two reasons. First, it avoids alienating the powerful groups who have the capacity to reform the education system, and secondly because it recognises that unequal consequences can come from actions based on good motivations. The best approach, as Wilkinson and Pickett argue, is to persuade all of society,

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[101] Smyth and McCoy, 'Investing in Education' (n 14) 52.
[102] Smyth and McCoy, 'Investing in Education' (n 14) 52.
[103] Lynch and Lodge (n 10) 182, ch3.
[104] Department of Education and Science, *DEIS (Delivering Equality of Opportunity in Schools): An Action Plan for Educational Inclusion* (May 2005) 16.

including the politically powerful groups, that equality in education is in everyone's interests.[105]

While education is not the only cause of class-based inequality in society, it is certainly a major cause:

> What has become abundantly clear as this research has progressed is that schools are major players in the determination of patterns of inequality in society. As knowledge-based industries and services gain increasing pre-eminence in the global economy, schools have become increasingly powerful players in the determination of life's chances. Their role as producers and disseminators of cultural products has also meant that they play a powerful role in determining the ordering of cultural relations in society, and in elevating and denigrating different cultural forms.[106]

2.2 Consequences at an Individual Level

For individuals, inequality manifests in numerous ways. One of the most significant is employment. In the classic example, a small number of elite schools have disproportionate alumni connections to key leadership positions in law, business and politics.[107] Right throughout the employment sector, educational qualifications are required for access to higher levels of employment and with corresponding higher levels of pay and prestige.[108] This means that those who lack the economic and social capital to access high quality education will experience relative educational disadvantage. At the other end of the employment spectrum, low levels of education closely correlate with high levels of unemployment.[109] When educational inequality is placed in conjunction with reliance on educational credentials in the jobs market, educational inequality can

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[105] Wilkinson and Pickett (n 1) 236-237.
[106] Lynch and Lodge (n 10) 5-6.
[107] Martin Power, Eoin Devereux, Amanda Haynes, Patricia Neville, Carmel Hannan and Cliona Barnes, *An Introduction to Irish Society: Transitions and Change* (Pearson 2012) 13-14.
[108] Smyth and McCoy, 'Investing in Education' (n 14) 42-44.
[109] Kelly, McGuinness and Walsh (n 19) 6.

replicate as societal wealth-poverty inequality.[110] Employment is largely premised on educational qualifications:

> For male [school] leavers, almost four in ten of those with no qualifications are unemployed compared with only 7 per cent of those with a Leaving Certificate. For female [school] leavers, the disparity is even greater: over half (53 per cent) of those with no qualifications are unemployed compared with 12 per cent of their Leaving Certificate peers. ... Thus, young women are less likely to leave school early than young men but experience significant labour market disadvantages if they do so.[111]

Educational inequality also correlates with inequalities in life more widely,[112] with lower educational performance associated with higher rates of reliance on welfare payments and State subsidies,[113] lower quality of health and higher levels of smoking, alcohol and drug consumption, [114] and higher likelihood of committing a crime and of being imprisoned.[115]

Education is by no means the sole cause of these inequalities. However, given the clear way in which the education system rewards those who are already in advantaged positions, and given that educational attainment increases the opportunities available to students, the inequalities in the school system make a significant contribution to these inequalities.

2.3 Consequences for the Transition to Higher Level Education

Predictably, inequalities in third level education reflect the inequalities earlier on in the education system. Access to third level education is significantly unequal in Ireland in favour of elite, predominantly middle class, schools,[116] affirmed by the latest feeder school tables, which document progression to third level from

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[110] Lynch and Baker (n 15) 135.
[111] Smyth and McCoy, 'Investing in Education' (n 14) 38.
[112] See Wilkinson and Pickett (n 1).
[113] Drudy (n 18) 178-179; Smyth and McCoy, 'Investing in Education' (n 14) 45.
[114] Smyth and McCoy, 'Investing in Education' (n 14) 47.
[115] Drudy (n 18) 178-179; Smyth and McCoy, 'Investing in Education' (n 14) 50-51.
[116] McCoy and Smyth (n 86) 254; Drudy (n 18) 177.

secondary schools.[117] Social class affects access to third level education in two ways. First, higher performance in school means that children from middle class backgrounds are statistically more likely to progress to higher education than their peers from working class backgrounds. Secondly, even amongst those who finish school and are qualified for third level, the children of higher professional parents are more likely to progress to higher education because of cultural values.[118] Even when they have the same academic results, students from higher social groups take more ambitious educational options than those of other social groups. Consequently, even though the State removed tuition fees in State-affiliated third level institutions in 1996, this did not reduce inequality of access because it did not address the cultural barriers in working class communities or the other cost barriers.[119]

There has been an increase in access to higher education for students from working class backgrounds but this is due to the huge increase in third level places generally, rather than to a reduction in inequality. In 1980, 20% of the relevant age group participated in third level education, but this had risen to 55% by 2004,[120] and remains reasonably steady at 52% in 2015.[121] A significant statistic is that, while participation in higher education by students from semi-skilled or unskilled backgrounds is around 25%, virtually every student from higher-professional backgrounds currently goes onto some kind of higher education.[122] This is evidence that the theory of "maximally maintained inequality" is applicable in Ireland, whereby the educational position of working class students only improves when there is saturation of middle class students in

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[117] Carl O'Brien and Deirdre Falvey, 'Feeder schools: Social class still drives school league tables' *The Irish Times* (Dublin, 3 December 2015); Brian Mooney, 'Analysis: What the feeder tables tell us' *The Irish Times* (Dublin, 3 December 2015). Interestingly, some schools have overcome these inequalities through reforms. Magh Éne College, a former vocational school, was the third most successful school in terms of transition to third level last year: Carl O'Brien, 'A Teaching Revolution that 'Makes the Classes Come Alive'' *The Irish Times* (Dublin, 12 January 2016).

[118] Smyth and McCoy, 'Investing in Education' (n 14) 9; Wilkinson and Pickett (n 1) 115-117.

[119] McCoy and Smyth (n 86) 252.

[120] McCoy and Smyth (n 86) 244-249.

[121] Higher Education Authority, *National Plan for Equality of Access to Higher Education 2015-2019* (HEA, December 2015) 40; Selina McCoy, Emer Smyth, Dorothy Watson and Merike Darmody, *Leaving School in Ireland: A Longitudinal Study of Post-School Transitions* (ESRI Research Series 36, August 2014) 34.

[122] McCoy, *et al* (n 121) 43; McCoy and Smyth (n 86) 245; Power, *et al* (n 107) 14-15.

third level education.[123] Thus, the inequalities in the system are not removed simply by increasing overall participation.

The statistics on access to third level can also conceal inequalities within the system. There is a two-tier third level system, of universities and other institutions or colleges, and so while overall access could equalise, the inequality of attainment remain because the more prestigious institutions recruit based on high prior academic achievement, which disproportionately favours middle class groups. A particularly telling statistic given by McCoy and Smyth is that:

> Young people from higher professional backgrounds are found to be 6.4 times more likely than those from semi/unskilled manual backgrounds to enter university across all periods [1980-2006].[124]

In summary, the inequalities outlined in section 1 can have significant consequences for individuals in various areas of life, such as employment, health, further education and even crime rates, and for society because educational inequality is one of the significant causes of systemic poverty and class-based inequality.

3. Measures to Resolve Inequality

The constitutional protection of the value of parental choice in education is of crucial importance when assessing these remedial measures. Article 42 is unequivocal in its commitment to parental choice. Article 42.1 states that the "primary and natural educator of the child is the Family", while Article 42.2 says "Parents shall be free to provide this education in their homes or in private schools or in schools recognised or established by the State." Article 42.3.1° prohibits the State from obliging parents from sending their children to State-run schools, "in violation of their conscience and lawful preference". Article 42.4 also commits the State to "supplement and give reasonable aid to private and corporate educational initiative" and to provide education systems while having due regard for "the rights of parents, especially in the matter of religious and moral formation." Despite this commitment to choice, the drafters were not

[123] McCoy and Smyth (n 86) 225, 253.
[124] McCoy and Smyth (n 86) 252.

motivated by an ideology of market liberalism.[125] Rather, the protection of choice in the Constitution has three origins. First, it reflects Catholic social teaching on the subsidiarity of the State to the family.[126] Market liberalism ideologies stem from the Locke social contract, which developed from the Reformation; it is thus contrary to the Catholic idea of collective rights that precede and are superior to market rights.[127] The overtly Catholic nature of Article 42 suggests that the drafters did not necessarily intend to enshrine a market place between schools. Secondly, parental autonomy as a barrier to state control of education was politically popular during the drafting period because of Ireland's post-colonial context, in which the previous State had sought to use education as a tool of colonisation, and because contemporaneously states across Fascist Europe and in post-revolutionary Russia were using schools to indoctrinate children.[128] Thirdly, the drafters saw a strong value of parental choice as necessary in order to protect religious minorities.[129] While lamenting the market-driven inequalities in the education system, Lynch and Moran say:

> In comparison with [the UK and Australia], Ireland does not have a market-driven, choice based education system, having outlawed league tables, eschewed the possibility of a voucher-based system and discouraged competition between schools by prohibiting selection of students on the basis of academic attainment. Yet to posit that the mechanics of choice do not operate in Ireland, or indeed to suggest that the narrative of choice is not therefore a constitutive feature of Irish public discourse, is to disregard the fact that Ireland's educational decisions have, as much as those of other more obviously 'pro-choice' countries,

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[125] Though for a contrary argument that the origins of the education system lie predominantly in elitism, see Ciaran O'Neill, *Catholics of Consequence: Transnational Education, Social Mobility, and the Irish Catholic Elite 1850-1900* (OUP 2014).

[126] Gerry Whyte, 'Education and the Constitution: Convergence of Paradigm and Praxis' in (1990–2) 25–27 Ir Jur 69; Gerard Hogan, *Origins of the Irish Constitution, 1928-1941* (RIA 2012) 224, 234, 227; Gerard Hogan and Gerry Whyte, *Kelly: The Irish Constitution* (4th edn, LexisNexis Butterworths 2003) 1940; Dympna Glendenning, *Education and the Law* (2nd edn, Bloomsbury Professional 2012) 69-70; William Nial Osborough and Eoin MacNeill, 'Guidelines for an Irish Educational Policy' (1979) 14(2) Irish Jurist 378.

[127] Cookson (n 46) 33.

[128] Desmond Clarke, 'Education, the State and Sectarian Schools' in Tim Murphy and Patrick Twomey (eds), *Ireland's Evolving Constitution 1937–1997: Collected Essays* (Oxford, 1998) 67.

[129] Lynch and Lodge (n 10) 40-42; Hogan (n 126) 249, 533.

> been made within an international educational context where choice has been established as a centrally defining logic. Moreover, school choice has existed in Irish education since the foundation of the State, arising from the constitutional provisions protecting both parental rights over the education of their children and denominational interests in education. ...
>
> While it is useful to understand the Irish education system as partially choice driven, it is necessary also to bear in mind the formative historical (and decidedly non-commercial) factors in this development.[130]

As well as being constitutionally mandated, a system based on parental choice could be morally justified on its own terms as serving autonomy. In theory at least, it is possible to separate the inequality from the value of autonomy. If it were possible to create a system that provides for choice but also ensures equality, it would surely be better than one that provides choice at the expense of equality (as in the current system) or one that provides equality but disregards any importance for the role of autonomy. Furthermore, as Wilkinson and Pickett argue, often the type of policy is not as determinative of inequality as the political attitude of the people who implement it:

> Because we conclude that these changes [increased inequality] have been driven by changes in political attitudes, we think it a mistake to discuss policy as if it were a matter of finding the right technical fix. As there are really hundreds of ways that societies can become more or less equal if they choose to, we have not nailed our colours to one or other set of policies. What we need is not so much a clever solution as a society which recognises the benefits of greater equality.[131]

Autonomy is a worthy goal to pursue, but it has to be recognised that the way it is currently provided comes at a cost to equality. As demonstrated above, the education system only provides choice to those who have to capital to avail of it. It is consequently not universally autonomy enhancing. It also hides the inequalities created by using the language of formal equality of opportunity.[132]

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[130] Lynch and Moran (n 30) 222, 224.
[131] Wilkinson and Pickett (n 1) xi-xii, 184, 246-247.
[132] Lynch and Moran (n 30) 222.

Given the constitutional endorsement of choice, which I discuss further in chapter 6, any measures designed to increase substantive equality of condition in the education system would have to be carried out by levelling up the availability of choice so that all parents (whether wealthy or not) are given reasonable access to a diversity of schools, rather than levelling down by removing any choice from all parents.

In the remainder of this section, I examine some measures that could be used to resolve inequality in the education system. These can be broken into measures that serve equality of opportunity, by tackling educational disadvantage, such as the DEIS programme, as well as measures that serve substantive equality of condition, such as working towards a more inclusive education system.

3.1 Equality of Opportunity Remedies

Equality of opportunity requires that everyone be given the same chances to obtain advantage and success. Despite the persistence of some inequality, there is a long history in the Irish education system of measures designed to improve equality opportunity. These are now largely collected under the Delivering Equality of Opportunity in Schools (DEIS) system.

The DEIS system comes from the Action Plan drawn up and implemented by the Department of Education in order to tackle "educational disadvantage" as defined under s.32(9) of the Education Act 1998:

> the impediments to education arising from social or economic disadvantage which prevent students from deriving appropriate benefit from education in schools.

The Action Plan deals with a significant segment of the education system, from pre-schooling to secondary school. It collects and integrates a number of pre-existing programmes, expanding some of them and introducing some new ones. The underlying philosophy of DEIS is explicitly equality of opportunity:

- every child and young person deserves an equal chance to access, participate in and benefit from education

- each person should have the opportunity to reach her/his full educational potential for personal, social and economic reasons and
- education is a critical factor in promoting social inclusion and economic development.[133]

The Department of Education launched the Action Plan in 2005. It recognised many of the inequalities set out earlier in this chapter and committed the State to tackling them.[134] In summary, the system targets disadvantaged schools (defined according to the school's educational performance and rates of poverty) and provides them with extra support programmes and additional funding. There are 836 schools in the system for the 2015/2016 school year. These include 330 urban primary schools and 316 rural primary schools as well as 190 secondary schools.[135]

DEIS is essentially a collection of discrete programmes. An important example is the Early Start programme. This has existed since the 1990s and provides pre-school education to children at risk of educational disadvantage. Though it has existed on a small scale in Ireland, teachers have reported that it has a positive effect on the students' progression through the education system.[136] This corresponds with the research from Barnardos,[137] the World Health Organisation[138] and from the United States[139] indicating that early childhood education is the most cost-efficient way of reducing educational disadvantage.

The DEIS system also includes a School Support Programme. This is a collection of programmes, one of which identifies the 150 most disadvantaged schools and sets maximum class sizes; for example, in primary schools these are 20:1 for

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[133] Department of Education and Science, *DEIS* (n 104) 7; for discussion of interventions based on equality of opportunity, see Michael Knapp, 'Policy, Poverty, and Capable Teaching: Assumption and Issues in Policy Design' in Bruce Biddle (ed), *Social Class, Poverty, and Education: Policy and Practice* (RoutledgeFalmer 2001) 186.
[134] Department of Education and Science, *DEIS* (n 104) 16-23.
[135] Department of Education and Skills, *DEIS: Delivering Equality of Opportunity in Schools* (May 2005) <http://www.education.ie/en/Schools-Colleges/Services/DEIS-Delivering-Equality-of-Opportunity-in-Schools-/> accessed 19 May 2016.
[136] Smyth and McCoy, 'Investing in Education' (n 14) 14.
[137] Barnardos, *Rise Up for Children Report* (25 November 2015) 18-21.
[138] Bjarne Bruun Jensen, Candace Currie, Alan Dyson, Naomi Eisenstadt and Edward Melhuish, *Early Years, Family and Education Task Group: Report* (World Health Organisation European Region 2013) 20.
[139] Smyth and McCoy, 'Investing in Education' (n 14) 3-4.

junior classes (up to 2nd class) and 24:1 for senior classes (3rd-6th).[140] A significant number of programmes are designed to improve the quality of the education provided within the targeted schools, including several literacy and numeracy programmes designed for late learners (such as the Reading Recovery initiative and the Junior Certificate School Programme Literacy Strategy and Demonstration Library Project). These programmes within schools are complemented by increased professional development and supports for teachers. Another strand of the DEIS system targets early school leaving with the School Completion Programme and the Home/School/Community Liaison Scheme, which is designed to include families and communities in decision-making and to empower them in the hope that it leads to greater engagement with schools.[141] These are particularly important given the evidence that cultural values limit progress through education for children from some disadvantaged communities. DEIS also includes programmes to encourage the transition to third level education. Some programmes, such as the School Book Grant Schemes, reduce costs of accessing education.[142] Finally, the DEIS system includes measures to record, report and review the progress of schools and the performance of the whole system.[143]

There is a temptation when considering educational disadvantage to attribute the inequality simply to lack resources. While DEIS is certainly designed to increase funding to disadvantaged schools, simply increasing funding is often ineffective, unless it is targeted through well-structured schemes. On the other hand, it is clear from the experience of Traveller education that, while increasing funding may not solve the problem, cutting whatever funding that does exist can have very harmful consequences.[144]

In reviews of the effectiveness of the DEIS system, the overall perspective is positive. The primary criticism is that the programmes involved are not comprehensive in how they tackle disadvantage. One concern is that several disadvantaged schools are excluded from the system. Smyth and McCoy note

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[140] Department of Education and Science, *DEIS* (n 104) 49.
[141] Department of Education and Science, *DEIS* (n 104) 40.
[142] Department of Education and Science, *DEIS* (n 104) 77.
[143] Department of Education and Science, *DEIS* (n 104) 55-57.
[144] Harvey (n 7) 35.

from surveying schools that there is a perception that some of the school selections were arbitrary and anomalous.[145] More worryingly, because the schools were chosen on the basis of both socio-economic indicators and educational outcomes, there is a perception among some principals that some schools that had done well in disadvantaged communities were being punished for that success, and that success can then lead to negative consequences:

> Looking to the future, fears were expressed that schools which are effective in using additional resources in the current DEIS programme would be 'thrown out' of the programme at the end of the current phase, in the same way as former disadvantaged schools had been.[146]

Another concern is that, because DEIS is implemented largely on a whole-school basis, it misses considerable levels of disadvantage within schools. For example, it entirely overlooks educational disadvantage in non-DEIS schools:

> However, it is not at all evident that all, or even the majority of, disadvantaged students attend DEIS schools. Unfortunately, no evidence is available on the primary sector but a national survey of school leavers indicates that 61 per cent of young people from semi/unskilled manual backgrounds and 56 per cent of those from non-employed households attend non-DEIS schools. These are groups that are likely to experience socioeconomic disadvantage and we know from existing research that they achieve poorer educational outcomes. Thus, a significant proportion of the potential target group do not fall within the remit of the DEIS second-level scheme. There has been allowance for such 'dispersed disadvantage' at primary level but not for second-level schools.[147]

In addition, this means that programmes within DEIS schools may not be tailored adequately to meet the greatest needs. For example, the Home-School-Community-Liaison Scheme, designed to promote the involvement of parents in disadvantaged schools, has received positive feedback from those involved but they have also reported significant difficulties in trying to reach those most in

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[145] Smyth and McCoy, 'Investing in Education' (n 14) 25.
[146] Smyth and McCoy, 'Investing in Education' (n 14) 25.
[147] Smyth and McCoy, 'Investing in Education' (n 14) 16-17.

need.[148] This shows a circular problem whereby the programme is designed to increase participation but in order for it to be effective it relies on a degree of self-motivation by the parents and communities involved. Similarly, Smyth and McCoy caution that, despite the successes of Early Start it is difficult to ensure that the children most in need take part.[149] Other weaknesses in the DEIS system include insufficient teacher training to deal with disadvantage and diversity:

> Views on the DEIS programme among education stakeholders were somewhat varied and diverse. Some felt the programme was a positive development in educational policy and is making valuable inroads in addressing the needs of those most marginalised in education... However, others were more sceptical, arguing the programme had not resulted in any substantial changes.[150]

DEIS is based on a principle of equality of opportunity, but given its reliance on a whole school approach, it is not very closely tailored. This may be relevant if a proportionality analysis were to be conducted by a court because it has been suggested by several commentators, such as Smyth and McCoy, that a more tapered approach that targets disadvantaged children, in addition to schools, would be more effective. A more fundamental criticism of DEIS involves a critique of the principle of equality of opportunity itself. Lynch in particular argues that equality of opportunity is insufficiently ambitious and that equality can only be achieved by measures based on substantive equality of condition.[151]

3.2 Substantive Equality of Condition Remedies

It is difficult to fashion a remedy that would guarantee substantive equality of condition; Lynch and Lodge note that while social science has been good at diagnosing equality problems, as a discipline it has been less successful at identifying solutions.[152] This is particularly so when seeking to resolve educational inequality where the most significant factor determining a child's

[148] Smyth and McCoy, 'Investing in Education' (n 14) 15.
[149] Smyth and McCoy, 'Investing in Education' (n 14) 57.
[150] Smyth and McCoy, 'Investing in Education' (n 14) 24.
[151] Lynch and Monan (n 30) 232; Lynch and Baker (n 15).
[152] Lynch and Lodge (n 10) 181.

performance is family background.[153] Although they would be insufficient on their own, three particular measures would be positive steps towards equality in education. First, the State could adopt a policy in favour of inclusive schooling. For example, as I consider in chapter 6, the State could make its funding conditional on schools not charging fees or by providing school book rental schemes or generic uniforms. Secondly, steps could be taken to democratise the education system. This would involve increasing the involvement and engagement of parents, families and communities with schools, [154] and diversifying the national curriculum and teacher training to reflect the interests of underrepresented groups. Thirdly, the State could provide universal early childhood education, [155] as part of its package of equality of opportunity measures. In 2013, only 46% of three year olds in Ireland were enrolled in pre-primary education.[156] However, as of 2016, the State now offers parents up to two years free pre-school education.[157]

Substantive equality of condition, as set out in chapter 1, is relatively easy to state, but very difficult to achieve because it is so multifaceted. The causes of inequality are numerous and interrelated (such as political exclusion, poor health, inadequate education, and social stigma and barriers), which means that remedial measures that tackle individual elements of the overall equality can be neutralised by the other causes of inequality. An example of this arises with racial segregation in schools in the United States. The Supreme Court of the US famously held formal segregation to be discriminatory in *Brown v Board of Education*.[158] However, the Court's attempts to achieve true integration were frustrated by numerous methods, such as the manipulation of school district boundaries, so that even several years later the school system was just as divided as it was before the Supreme Court's judgment.[159] In light of this, and

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[153] Wilkinson and Pickett (n 1) 103, 110-111.
[154] Joan Hanafin and Anne Lynch, 'Peripheral Voices: Parental Involvement, Social Class, and Educational Disadvantage' (2002) 23(1) British Journal of Sociology of Education 35; Hall (n 82) 228.
[155] Hearne and McMahon (n 27) 25.
[156] Department of Education (n 87) 14.
[157] Department of Children and Youth Affairs, *Budget 2016: Expansion of Free Pre-School* (7 December 2015) <http://www.dcya.gov.ie/documents/ecce-scheme/20151214FAQsBudget.pdf> accessed 31 July 2016.
[158] *Brown v Board of Education of Topeka* (1954) 347 US 483.
[159] Martha Minow, *In Brown's Wake* (OUP 2010) ch 1.

also other indirect causes, Minnow concludes that full desegregation in the US is only possible when there is true substantive equality between different racial groups.[160] Analogously in Ireland, Lynch and Moran caution that although school choice is an instrument of inequality, substantive equality of condition cannot be achieved by focusing just on the issue of choice because there are a myriad of other measures that preserve the privilege of middle class groups, such as private tutoring and the various indirect measures that schools can use to favour middle class children (for example through the curriculum or the requirement for formal language).[161]

The consequence is that educational inequality in the *redistributive dimension* cannot be dealt with in isolation and cannot be fully resolved within the education system itself. This is because these kinds of educational inequality are linked to numerous other kinds of inequalities[162] and, in particular, "are rooted in wider economically-generated inequalities." [163] Lynch and Baker examine international research, which indicates

> that attempts by states to improve the educational prospects of disadvantaged groups are generally neutralized by the efforts of economically advantaged households to increase their private investment in their own children. Thus there is no comprehensive 'internal settlement' to the problem of class inequality in education, as the defining source of class inequality lies outside the educational system. Eliminating income and wealth inequalities outside of school is essential if we are to ensure that excess resources cannot be used to undermine more egalitarian policies within schools.[164]

In one sense this is a frustrating conclusion, because educational inequality appears to be a problem resistant to change and cannot ultimately be eradicated without simultaneously overcoming inequality in an intimidating range of areas, such as health,[165] welfare[166] and housing.[167] On the other hand, an education

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[160] Minnow (n 159) ch 5.
[161] Lynch and Moran (n 30) 223, 226-228.
[162] Wilkinson and Pickett (n 1) 174.
[163] Lynch and Baker (n 15) 140.
[164] Lynch and Baker (n 15) 140; see also, Knapp (n 133) 186-187.
[165] Wilkinson and Pickett (n 1) chs 5, 6, 7.

system that is as conducive to equality as possible would be an important means of tackling this wider societal wealth inequality, which is the ultimate cause of educational inequality in the first place. This circular role of education means that, while it is a cause of inequality under the current system, it could become conducive to equality because "as a site of learning and conscientization, it can and does challenge social class and other injustices."[168]

3.2.1 The Principle of Inclusion

As a tool to achieve equality in the education system, possibly the single most effective measure would be to move towards an inclusive school system, with as few divisions on entry to individual schools as possible. By analogy, it is now accepted in the context of disability that inclusive schooling is preferable when accompanied by reasonable supports and good teacher/student ratios.[169] In the redistributive dimension, this would be insufficient on its own to achieve equality on the ground of poverty because of the effect of other measures such as private tutoring. However, it could still have a significant effect in this dimension by ensuring a core of education that is fundamentally equal. As demonstrated above, many of the causes of inequality are based on segregation, both between schools and within schools, so a system that breaks these down as much as possible (even if not totally) will be more equal in the redistributive dimension than the current system. International evidence demonstrates that inclusionary systems are more equal than those that are stratified and differentiated. Gorard and Smith report:

> Nationally comprehensive systems of schools tend to produce narrower social differences in intake and outcomes. Systems with more differentiation lead to greater gaps in attainment between social groups.[170]

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[166] Smyth and McCoy, 'Investing in Education' (n 14) 58.
[167] Drudy (n 18) 178.
[168] Lynch and Baker (n 15) 142.
[169] Glendenning (n 126) 172-173; for practical issues on inclusion in the context of disability, see NCSE, *Inclusive Education Framework: A Guide for Schools on the Inclusion of Pupils with Special Educational Needs* (National Council for Special Education 2011).
[170] Gorard and Smith (n 5) 25.

International evidence supports the Irish research that inequality between schools exacerbates social inequality, so that stratification and inequality between schools has a much greater effect on performance than individual inequality of circumstances between students in the same school.[171]

More dramatic successes from an inclusionary system would be seen in the *recognition dimension*. Recognition inequalities arise when groups are misunderstood, prejudiced, stigmatised and distrusted. Exposure to members of other groups is the best way of breaking down these recognition harms and, when dealing with school children, helping to prevent them forming in the first place. While the curriculum can teach children about respect for diversity of values, beliefs and lifestyles, true understanding is more likely to come from placing children from different communities in the same class room.[172]

Under the *participative dimension*, schools should minimise internal stratification between students. This practice is harmful to equality, with little trade-off in favour of educational performance. An inclusionary policy should not be conflated with universally consistent treatment in the school system, however. For example, the difficulties with integrating into mainstream education faced by many members of the Traveller community demonstrate that, while mainstreaming is to be encouraged, it has to be pursued with additional supports in place that are tailored to the needs of the community. The evidence of the recent integration attempts is that simply placing Traveller children in mainstream schools and seeking to treat them identically to members of the settled community has been extremely unsuccessful and has led to significant disengagement from school.[173] Consequently, effective measures to democratise the school system would increase equality in the participative dimension.[174]

The increase in diversity within schools would not necessarily have to be at the expense of diversity between schools. The current system provides for a range

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[171] Drudy (n 18) 177: "The results of the OECD's Programme for International Student Assessment (PISA) show that, in a number of different countries, the effect on student performance of a school's average economic, social and cultural status is very substantial and that socio economic differences at student levels are much less predictive for performance than the school's socio-economic context."
[172] Lynch and Baker (n 15) 144.
[173] Harvey (n 7) 37-38.
[174] See also Lynch and Baker (n 15) 144-148.

of religious, multi-denominational and single-sex schools. These are the all morally justifiable choices and envisaged in the Constitution.[175] The hidden diversity in the school system, however, is the divide along the lines of wealth and poverty. Unlike the other divisions in the education system, this type of diversity serves no morally plausible justification and also leads to severe educational disadvantage.

Article 42 can easily be read to envisage a system of parental choice. However, it would be misleading to argue that such a system exists in Ireland. There is diversity in the system and this gives a formal choice to parents, but a genuine choice exists only for those with the capital to avail of the options. As I analyse in chapters 6 and 7, it would likely be unconstitutional to level down the existence of choice, for example by requiring all students to attend the nearest school. Instead, the system ought to provide a genuine choice to all parents equally. This involves removing barriers to access and inequality between schools, while also maintaining diversity in the system. Policy measures to tackle this kind of inequality would have to be multifaceted. First, the numerous barriers to accessing schools would have to be broken down. This would include fees as well as indirect barriers that cause schools to select indirectly on the basis of social class. I consider whether a prohibition on charging fees would be constitutional in chapter 6. There could be a principled exception to the removal of fees if, for example, fees were necessary in order to sustain religious diversity in the system and the State was unable to provide adequate alternative sources of funding.

The more important policy goal should be to standardise funding for all schools so that indirect discriminations, such as the voluntary contribution scheme, cannot lead schools to select middle class children over children from working class backgrounds. There are two ways of achieving this. The State could prohibit schools from seeking contributions. Alternatively, it could make the contribution system truly voluntary, for example by requiring contributions to be anonymous. Allowing contributions would then be less problematic because the contribution system would be a less effective barrier to access. Of course, it

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[175] For analogous issues in the employment context, see Gerry Whyte, 'Protecting religious ethos in employment law: a clash of cultures' (2005) 27 DULJ 169.

would still be as a source of inequality between schools. The question of whether that difference in funding is justified depends on a proportionality balance between the negative effects of the inequality and the education values the contributions serve.

3.2.2 Other Measures Based on Substantive Equality of Condition

In addition to pursuing inclusionary policies, the State should guarantee universal free early childhood education. Research from Ireland and several other jurisdictions, including the US, demonstrates that early childhood education is the most cost effective way of reducing educational disadvantage. It is, thus, a valuable tool of educational equality.[176]

The State should also seek to democratise the education system.[177] In particular, it could encourage engagement by disadvantaged communities and families with schools and the Department of Education in the formulation of education policies and the curriculum. There is a long tradition of policies to promote parental involvement across the education system in Ireland, many of which are now included under the DEIS system such as Home/School/Community Liaison Scheme.[178] These have been effective,[179] but Mac Giolla Phádraig argues that the problem with many of the policies is that they have been static, based a one-size-fits-all approach that does not account for power imbalances and differences of capacity of parents and communities.[180] This leads to the alienation of some groups and the dominance of others.

The State should also diversify the syllabus and teacher training, so that the process of education would be more inclusive of working class norms. This would help to ensure that the system defines ability in a wider manner than currently. Finally, equality of opportunity policies, like those currently encompassed in the DEIS system, should continue. Some of them fall within the

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[176] For some discussion, see, Daniel Boffey, 'Oxbridge Colleges Named and Shamed for Failing to Admit Poorer Students' *The Guardian* (London, 12 December 2015).
[177] For some discussion, see Knapp (n 133) 186-191.
[178] Brian Mac Giolla Phádraig, 'Towards Partnership: The Development of Parental Involvement in Irish Primary Education Since 1970' (2010) 38 The Irish Journal of Education 73, 82-88.
[179] Mac Giolla Phádraig (n 178) 73.
[180] Mac Giolla Phádraig (n 178) 89-90.

measures based on substantive equality of condition. The others, however, remain valuable because, as I outline in chapter 1, substantive equality of condition is about both equality of opportunity and equality in circumstances. These equality of opportunity measures would help to compensate for the unequal starting position of students and ensure that all are in a position to benefit equally from the inclusive school system.

Conclusion

Pervasive inequality on the basis of poverty, social class and socio-economic status is a fact of Irish society. The education system is not irrelevant to this; it can either help to sustain that inequality or it can work to dismantle it. Currently, the school system sits in both camps. Through the DEIS system, the State oversees a number of important programmes that are helping to remedy educational disadvantage and thus to promote equality of opportunity. However, the fundamental design of the education system allows for segregation on the basis of wealth and class. This undermines the effectiveness of any efforts to remedy educational disadvantage because that disadvantage is not caused simply by a lack of resources. It is caused by the segregation of schools (and of students within schools) according to poverty, social class and socio-economic status. The DEIS system, while welcome, is limited in what it can ultimately achieve because equality of opportunity is impossible to guarantee in isolation. True equality of opportunity can only be achieved as part of substantive equality of condition.

While the education system cannot create substantive equality of condition by itself, it has the potential to make a significant contribution to equality. To do this, the State could strive to make the education system as internally egalitarian as possible. In particular, it should adopt three measures. First, the principle of inclusion should be the core value of the education system. Second, the State could enforce the important constitutional value of parental choice in substance as well as in form by democratising schools and the curriculum. This would help make the education system reflect a wider range of interests than currently. Thirdly, the State could guarantee universal free early childhood education, in

addition to the other equality of opportunity measures encompassed within the DEIS system.

In this thesis, I consider whether the State is under a constitutional obligation to use the education system to advance equality on the basis of poverty, social class and socio-economic status. In the face of the material in this chapter, it is difficult to argue that the current education system is morally justified. Whether the State is constitutionally bound or not, the extent of inequality should have demanded a more effective response from the political system long before now. The fact that it has not done so supports the claim, which I present in chapter 8, that a public interest law challenge would be justified in light of this political failure.

Ch 6: Right to Education in Ireland

Sections

1. Subsidiary Role of the State
    1.1 Nature of the State's Role
    1.2 Consequences of the Subsidiary Position
2. The Right to Education
    2.1 Enforcing the Right to Education
    2.2 Definition of Education
3. Is it constitutional for the State to permit schools to charge fees?
4. Would it be constitutional to prohibit charging fees?
5. Would it be constitutional to incentivise the removal of fees?

Introduction

The right to education is one of the most unusual in the Constitution. Many litigants have brought claims against the State, some with notable success. Those cases that end with a court judgment (rather than settlement with the State) have sparked significant academic coverage. Litigation on the right to education addresses religion[1] and disability,[2] parental rights, the role of the State and the doctrine of the separation of powers.[3] Though the issues of educational inequality on the basis of poverty, social class or socio-economic status have not

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[1] Eoin Daly, 'The Constitution and the Protestant Schools Cuts Controversy: Seeing the Wood for the Trees' (2010) 1 Irish Journal of Legal Studies 84; Eoin Daly, 'Religious freedom as a function of power relations: dubious claims on pluralism in the denomination schools debate' (2009) 28(3) Irish Educational Studies 235; Eoin Daly, 'Religious Freedom and the Denominational Education Model in the Republic of Ireland: the Shortcomings of 'Accommodationist' Reform' (2008) 9 Education Law Journal 242; Gerry Whyte, 'Education and the Constitution: Convergence of Paradigm and Praxis' in (1990–2) 25–27 Ir Jur 69; Gerry Whyte 'Education and the Constitution' in Dermot Lane (ed), *Religion, Education and the Constitution* (Columba, Dublin 1992); Desmond Clarke, 'Education, the State and Sectarian Schools' in Tim Murphy and Patrick Twomey (eds), *Ireland's Evolving Constitution 1937–1997* (Oxford, 1998), ch 6; Desmond Clarke, *Church and State: Essays in Political Philosophy* (Cork University Press 1984); Dympna Glendenning, *Religion, Education and the Law: A Comparative Approach* (Tottel, 2008).

[2] Gerry Whyte, *Social Inclusion and the Legal System: Public Interest Law in Ireland* (2nd edn, IPA 2015) 305-333; Mary Meaney, Nessa Kiernan and Karl Monahan, *Special Educational Needs and the Law* (Thomson Round Hall 2005) ch 4; Dympna Glendenning, *Education and the Law* (2nd edn, Bloomsbury Professional 2012); Conor O'Mahony, *Educational Rights in Irish Law* (Thomson Round Hall 2006) 156-177.

[3] Gerry Whyte, 'Public Interest Litigation in Ireland: The Emergence of the Affirmative Decree?' (1998) DULJ 198; Gerard Hogan and Gerry Whyte, *JM Kelly: The Irish Constitution* (4th edn, Lexis Nexis Butterworths 2003) 1937-1940.

arisen under Article 42, several insights relevant to those issues can be drawn from the primary cases.

In this chapter, I outline the core features of the right to education and consider whether Article 42 could either oblige or empower the State to take steps against educational inequality. I consider the complementary question of whether Article 42 in conjunction with the right to equality in Article 40.1 could have this effect in chapter 7.

The right to education in the Constitution is in Article 42:[4]

1. The State acknowledges that the primary and natural educator of the child is the Family and guarantees to respect the inalienable right and duty of parents to provide, according to their means, for the religious and moral, intellectual, physical and social education of their children.

2. Parents shall be free to provide this education in their homes or in private schools or in schools recognised or established by the State.

3. 1° The State shall not oblige parents in violation of their conscience and lawful preference to send their children to schools established by the State, or to any particular type of school designated by the State.

   2° The State shall, however, as guardian of the common good, require in view of actual conditions that the children receive a certain minimum education, moral, intellectual and social.

4. The State shall provide for free primary education and shall endeavour to supplement and give reasonable aid to private and corporate educational initiative, and, when the public good requires it, provide other educational facilities or institutions with due regard, however, for the rights of parents, especially in the matter of religious and moral formation.

Relevant also is Article 40.3 and the unenumerated rights doctrine:

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[4] By referendum, the people replaced Article 42.5 with Article 42A. This came into effect on 28 April 2015 after the Supreme Court upheld the validity of the referendum result in *Jordan v Minister for Children and Youth Affairs* [2015] IESC 33 and the President signed the Thirty-first Amendment of the Constitution (Children) Bill 2012 into law.

> 1° The State guarantees in its laws to respect, and, as far as practicable, by its laws to defend and vindicate the personal rights of the citizen.

In *G v An Bord Uchtála*[5] Parke J said that children have an unenumerated right to be "educated in a proper way".[6]

In Section 1 I analyse the subsidiary role of the State when it comes to education. This is the most important aspect of the outline of the educational system in Article 42. The State's limited power and duty flow from this subsidiary position and it has a profound impact on the ways in which the State can tackle inequality in the education system. Section 2 charts the cases dealing with the right to education, noting the initial flurry of successful litigation followed by some retrenchment by the courts. In Section 3 I question whether there could be an obligation on the State to dismantle inequality in the education system on the basis of Article 42. Sections 4 and 5 address the reciprocal issues, looking at the powers the State has to pursue equality policies, in particular, whether it would be constitutional for the State to prohibit or disincentive schools from charging fees for admission.

1. Subsidiary Role for the State

1.1 Nature of the State's role

It is unusual when dealing with the fundamental rights provisions of the Constitution to be able to make categorical statements about the extent of the State's powers and obligations. Two definitive features of Article 42, however, are, first, that the State is in a weak position relative to other educational stakeholders, and secondly, that parental choice is the paramount value.

In summary, the principle of subsidiarity works as a strong negative protection against State interference with the decisions of parents. It does not, however, lead to an equally strong positive obligation on the State. Laffoy J in *O'Sheil v Minister for Education*[7] held that there is a positive obligation on the State but that this does not require it to fund every single parental choice in education.

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[5] *G v An Bord Uchtála* [1980] IR 32.
[6] *G v An Bord Uchtála* [1980] IR 32, 100; Conor O'Mahony, *Educational Rights in Irish Law* (Thomson Round Hall 2006) 42-43.
[7] *O'Sheil v Minister for Education* [1999] 2 IR 321.

Thus, while the State has weak powers in the education field, it also has limited obligations.

The right to education, as with all rights held by children, is tripartite in having three protagonists. Children hold rights (which often have to be exercised on their behalf by parents or the State), while the State and parents both have rights, interests and duties.[8] This give parents power in their own right, rather than just as agents exercising rights held by their children.[9] This creates a tension in the role of the parent, seen across all areas of constitutional law dealing with the family, in which the child's rights have to be enforced either by the parents or the State against either the State or the parents. O'Mahony notes that this leads to two lines of cases in Irish constitutional law, one in which a State-centred approach dominates (as in *PW v AW*[10] and *G v An Bord Uchtála*[11]) and the other in which the courts prefer a parent-centred approach (as in *Re JH (an infant)*[12] and *North Western Health Board v HW*[13]). The introduction of Article 42A, through what was known as the "Children's Rights Referendum", did not fundamentally change this balance.[14]

The text of Article 42 envisages a three-way relationship, between parents, children and the State, where the State occupies a subsidiary role, and the choices of parents are given substantial weight. Article 42.1 states that the "primary and natural educator of the child is the Family", while Article 42.2 says "Parents shall be free to provide this education in their homes or in private schools or in schools recognised or established by the State." Article 42.3.1° prohibits the State from obliging parents from sending their children to State-run schools, "in violation of their conscience and lawful preference". Article 42.4 also commits the State to "supplement and give reasonable aid to private and corporate educational initiative" and to provide education systems while having due regard for "the rights of parents, especially in the matter of religious and

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[8] O'Mahony (n 6) 25-26.
[9] O'Mahony (n 6) 92-93.
[10] *PW v AW* (HC, 21 April 1980).
[11] *G v An Bord Uchtála* [1980] IR 32.
[12] *Re JH (an infant)* [1985] IR 375.
[13] *North Western Health Board v HW* [2001] 3 IR 662; see, O'Mahony (n 6) 92-93.
[14] Conor O'Mahony, 'Falling Short of Expectations: The 2012 Children Amendment, From Drafting to Referendum' (2016) 31(2) Irish Political Studies 252, 264-265.

moral formation." As I outline in chapter 5, this structure reflects three significant origins. First, Catholic social teachings on the respective roles of the family and a state emphasise the principle of subsidiarity in education.[15] Article 42 reflects these teachings and is part of the blend of liberal and communitarian philosophies in the Constitution.[16] The primacy of the family is firmly established in several constitutional provisions relating to social matters, and famously received Supreme Court approval in *North Western Health Board v W(H).*[17] Secondly, the subsidiary position is understandable given the history of the Irish State generally and the development of its education system in particular. Ireland had one of the world's first universal primary education systems, established in 1831, but it was originally implemented mainly through the churches so as not to lose popular support.[18] In addition, there was a history of the misuse of education as a tool of colonisation by the State, which sought to ensure that children were raised speaking English rather than Irish and in a Protestant rather than Catholic faith.[19] Post-independence, this experience fostered a belief that the State's role in education should be minimised, leaving parents and, in reality, the churches to dominate the field.[20] Reinforcing this belief was the growing international practice in the 1930s (when the Constitution was drafted) of states using education for indoctrination, in particular in Fascist Europe and post-revolutionary Russia.[21]

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[15] Gerry Whyte, 'Education and the Constitution: Convergence of Paradigm and Praxis' in (1990–2) 25–27 Irish Jurist 69; Gerard Hogan and Gerry Whyte, *JM Kelly: The Irish Constitution* (4th edn, Lexis Nexis Butterworths 2003) 1940; Gerard Hogan, *Origins of the Irish Constitution, 1928-1941* (RIA 2012) 224, 227, 234, 465-467; Dympna Glendenning, *Education and the Law* (2nd edn, Bloomsbury Professional 2012) 69-70; William Nial Osborough and Eoin MacNeill, 'Guidelines for an Irish Educational Policy' (1979) 14(2) Irish Jurist 378; O'Mahony (n 6) 35-36.

[16] Gerry Whyte, *Social Inclusion and the Legal System: Public Interest Law in Ireland* (2nd edn, IPA 2015) 94-96, 103; Rachel Walsh, 'Property Rights in the Drafting of the Irish Constitution: A Communitarian Compromise' (2011) 1 DULJ 86; Hogan, *Origins of the Irish Constitution* (n 15) 215-227; Glendenning (n 15) 62-65.

[17] *North Western Health Board v W(H)* [2001] IESC 90; similar sentiments about the weak position of the State relative to parents were expressed in the High Court in *Comerford v Minister for Education* [1997] 2 ILRM 134.

[18] Glendenning (n 15) 27-28; France and Prussia had universal systems in place and the UK government trialed the policy in Ireland before implementing it across the UK.

[19] Kathleen Lynch and Anne Lodge, Equality and Power in Schools: redistribution, recognition and representation (RoutledgeFalmer 2002) 40-42.

[20] Glendenning (n 15) 25-26.

[21] Desmond Clarke, 'Education, the State and Sectarian Schools' in Tim Murphy and Patrick Twomey (eds), *Ireland's Evolving Constitution 1937–1997* (Oxford, 1998) 67.

Thirdly, the drafters also saw parental choice as an important protection for religious minorities.[22]

The principle of subsidiarity and the explicit protection for parental choice in Article 42[23] should make parents the dominant actors in the education system, allowing them to make demands from the State and only permitting the State to intervene to a limited extent.[24] As Whyte notes, however, parents are in practice based at the bottom of a pyramid structure of the State, religions and parents.[25] This has changed slightly in recent years, for example with the Educate Together movement and establishment of more Gaelscoileanna, which were largely parental initiatives,[26] but the core point that the education system does not faithfully apply the principles expressed in Article 42 remains. Building on Whyte's observations, O'Mahony argues that, in practice, the pyramid structure rejects the importance of the interests of children in their own right,[27] which further reinforces the disconnect between the reality of the education system and that envisaged in the text of Article 42. Despite this, the courts frequently assert that the traditional and existing education system reflect the principles contained in Article 42.[28] The courts reach this conclusion by focusing on the fact that the State has a low degree of control, but they neglect to place significant weight on the importance of parental choice in practice.

The gap left by the weak position of the State is filled, not by parental choices, but by religious organisations. As Whyte points out, the permission (and

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[22] Lynch and Lodge (n 19) 40-42; Hogan (n 15) 249, 533.
[23] *Burke and O'Reilly v Burke and Quail* [1951] IR 216, (1950) 84 ILTR 70; *Re Blake, deceased* [1955] IR 89; Hogan and Whyte (n 24) 1943; John Kelly, *Fundamental Rights in Irish Law and Constitution* (2nd ed, Allen Figgis & Co 1967) 234-237; Clarke is critical of the parental choice value, saying it is used as an excuse to ignore the rights of minorities, in Clarke (n 21) 75-77.
[24] Gerard Hogan and Gerry Whyte, *JM Kelly: The Irish Constitution* (4th edn, Lexis Nexis Butterworths 2003) 1943; Glendenning (n 15) 17-18.
[25] Whyte, 'Education and the Constitution: Convergence of Paradigm and Praxis' (n 15); Glendenning (n 15) 21, 94-97.
[26] Glendenning (n 15) 46-50, 123; For interesting analysis of parental involvement in education, see Brian Mac Giolla Phádraig, 'Towards Partnership: The Development of Parental Involvement in Irish Primary Education Since 1970' (2010) 38 The Irish Journal of Education 73.
[27] O'Mahony (n 6) 99.
[28] *O'Keeffe v Hickey* [2009] 2 IR 302; *In re Article 26 and the Employment Equality Bill 1996* [1997] IESC 6; [1997] 2 IR 321; *Crowley v Ireland* [1980] IR 102.

obligation) to fund religious education only exists in the Constitution while that is the preferred choice of parents.[29] In light of this, Whyte observes:

> Drafted at a time when there was little or no demand for non-denominational education, these provisions reflected Roman Catholic social teaching by enshrining a principle of parental supremacy in respect of the education of children. Operating now in a different type of society to that of the 1930s, this constitutional principle may have practical consequences which were never envisaged nor intended by the authors of the Constitution.[30]

Building on this idea, I suggest below and in chapter 8 that the State could pursue reforms of the education system so as to achieve greater equality on the basis of levelling up the availability of parental choice. Under the current system, only those with high levels of economic, social and cultural capital can avail of the choices between schools. However, reforms that provide a degree of choice to more parents would serve both equality under Article 40.1 and the value of parental choice in Article 42.

1.2 Consequences of the subsidiary position

Three relevant consequences follow from this subsidiary position of the State. First, the State's obligations relating to education are weak. Second, though the State has limited general powers to control the education system, it is in a stronger position when the Constitution gives the State a specific or express power. Third, the main way the State can pursue reform in the education system is through cooperation with stakeholders.

Dealing with the first of these, the State is only subject to weak obligations in education. In particular, the State is not under an obligation *to educate* or "provide education", but rather has a weaker obligation "to provide for education".[31] This was a deliberate drafting decision after the Department of

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[29] Gerry Whyte, 'Education and the Constitution' in Dermot Lane (ed), *Religion, Education and the Constitution* (Columba 1992) 103; On the other hand, Glendenning (n 15) 146 suggests denominational education in particular, as well as choice simpliciter in general, is protected by the Constitution.

[30] Whyte, 'Education and the Constitution' (n 29) 84.

[31] See, O'Mahony (n 6) 148-151.

Finance expressed reservations that a strong educational obligation would lead to excessive financial burdens on the State.[32] The courts often assert the significant of this difference. For example, Kenny J for the Supreme Court in *Crowley v Ireland*[33] recognised that there are obligations on the State, but held:

> However, the State is under no obligation to educate. The history of Ireland in the 19th century shows how tenaciously the people resisted the idea of State schools. The Constitution must not be interpreted without reference to our history and to the conditions and intellectual climate of 1937 when almost all schools were under the control of a manager or of trustees who were not nominees of the State. That historical experience was one of the State providing financial assistance and prescribing courses to be followed at the schools; but the teachers, though paid by the State, were not employed by and could not be removed by it: this was the function of the manager of the school who was almost always a clergyman. So s.4 of Article 42 prescribes that the State shall provide for free primary education. The effect of this is that the State is to provide the buildings, to pay the teachers who are under no contractual duty to it but to the managers or trustees, to provide means of transport to the school if this is necessary to avoid hardship, and to provide minimum standards ... Thus the enormous power which the control of education gives was denied to the State: there was interposed between the State and the child, the manager or the committee or the board of management.[34]

Hardiman J expressed similar sentiments on a later Supreme Court bench in *O'Keeffe v Hickey*:[35]

> At Article 42.4 it is seen that the State is to "provide for" free primary education and in that connection to "endeavour to supplement and give reasonable aid to private and corporate educational initiative". It is however obliged "to provide" other educational facilities when the public good requires it. The distinction between "providing for" and "providing"

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[32] Hogan, *Origins of the Irish Constitution* (n 15) 371, ch 9, 452.
[33] *Crowley v Ireland* [1980] IR 102.
[34] *Crowley v Ireland* [1980] IR 102, 126-127.
[35] *O'Keeffe v Hickey* [2009] 2 IR 302, [29], [54], [132]; See also *O'C v Minister for Education and Science* [2007] IEHC 170.

> lies at the heart of the distinction between a largely State funded but entirely clerically/administered system of education on the one hand and a State system of education on the other. This distinction will be further referred to in discussing the authorities on the subject. It is however made perfectly clear in the primary, Irish language, version of Article 42.4 where the relevant contrasting phrases are "socrú a dhéanamh chun bunoideachas a bheith ar fáil in aisce" ("to arrange that free primary education is available") and "áiseanna nó fundúireachtaí eile oideachas a chur ar fáil" ("provide other educational facilities and institutions"). ...
>
> We have already seen, in the historical portion of this judgment, that the State involvement in the governance of national schools, for historical reasons, is indirect not to say oblique and general rather than particular. The role which the State might otherwise have occupied is, by their own urgent desire, occupied by the churches and other voluntary bodies, in this case the Catholic Church. ...
>
> In my view the Constitution specifically envisages, not indeed a delegation but a ceding of the actual running of schools to the interests represented by the Patron and the Manager.

The distinction between *providing* education and *providing for* education is a slightly strained argument, given that the division between them is narrow when pushed to its logical conclusion; if no one else is providing it, the State must provide free education directly. The State's duty under Article 42.4 is broader than the mere obligation to provide buildings and transport, set minimum standards, and pay teachers salaries, envisaged by Kenny J in *Crowley*. There are several ways of demonstrating this. First, O'Mahony argues that the Irish version of Article 42.4, which is determinative when the English version diverges from it, contains a stronger assertion of the State's duty:[36]

> Ní foláir don stat socrú a dhéanamh chun bunoideachas a bheith ar fáil in aisce ...

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[36] O'Mahony (n 6) 149.

The parties in *Crowley* agreed to translate this as, "The State must make arrangements to have basic education available free",[37] though, "It is necessary for the State to arrange for education to be available free" is a more direct but less natural translation. As O'Mahony argues, the Irish text requires the State to guarantee the outcome, that free education would be available. The ambiguity in the English version as to whether the State must simply make arrangements or whether it must ensure the successful delivery thus has to be resolved in favour of guaranteeing the outcome of free education.

Secondly, the State is also obliged by Article 42.4, "when the public good requires it, [to] provide other educational facilities or institutions...". If no private parties were guaranteeing free education, the public good would require the State to provide such education directly. Only if adequate alternative education exists it is true to say that there is no obligation on the State to provide education under Article 42.

In this way, Article 42 is more expansive that the right to education under the European Convention on Human Rights (ECHR), for example. Article 2 of Protocol 1 only guarantees a right of access to education that is already provided by the State or others, and there is no obligation on the State to provide education at its own expense.[38]

The second consequence of the subsidiary position is that the State also has limited power to intervene in education. The extent of that power to intervene is unclear. The Supreme Court in 1943 placed severe constraints on the State's capacity to regulate schools, but many commentators have doubted the strength of that precedent. In *Re Article 26 and the School Attendance Bill, 1942*,[39] the Court held unconstitutional a piece of legislation that sought to regulate both the content and the manner of education. The Bill made it an offence not to send a child to national school, unless it could be shown she was receiving suitable education elsewhere. One of the problems the Court found was that the Minister

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[37] *Crowley v Ireland* [1980] IR 102, 126.
[38] *Belgian Linguistics case* (1968) 1 EHRR 252; Robin White and Clare Ovey, *Jacobs, White & Ovey: The European Convention on Human Rights* (5th edn, OUP 2010) 508; O'Mahony (n 6) 61.
[39] *Re Article 26 and the School Attendance Bill, 1942* [1943] IR 334, (1943) 77 ILTR 96; see Glendenning (n 15) 100-106; Hogan and Whyte (n 24) 1944-1945.

for Education had the power to certify whether that alternative education was suitable, and this gave him the power to control not only the content of education but also the manner of its delivery.[40] The Supreme Court relied on the subsidiary role of the State to hold that this level of control could not constitutionally be given to a minister. Whyte notes that this case could dramatically curtail the State's power to regulate the education system but that there are reasons to doubt its precedential weight.[41] First, the *School Attendance Bill* case arose very early in the life of the Constitution and the contemporary presumption of constitutionality is much stronger than that applied in the case. It is likely that the double construction rule would be applied if the case arose today, such that the Minister could not require more than the constitutional certain minimum education when certifying "suitable education". Secondly, in practice it is not possible to maintain a strict distinction between the content and manner of education and it would be peculiar for Article 42 to grant the power to control one but not the other. In *DPP v Best*,[42] Keane J raised doubts about the validity of the Court's interpretation of Article 42.2.3 in the *School Attendance Bill* case and suggested that it should not be followed because it is inconsistent with a child's right to be educated and because the modern presumption of unconstitutionality would be enough to save a similar law.[43] The strength of the *School Attendance Bill* case is doubtful but it has not been overruled, and without a more generous understanding of the State's power in education, along the lines of Keane J's statement in *Best v DPP*, there will remain some doubts

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[40] This was one of the three problems the Supreme Court found with the Bill. The other two were, first, that a reasonable construction of the Bill would have permitted the Minister to require more than the certain minimum standard of education guaranteed under Article 42.3.2, thus infringing on the value of parental choice in education, and second, that the Bill did not treat the education as suitable *until* it had been so certified by the Minister, which meant a parent could be liable for the period after the child's sixth birthday but before such time as the Minister had certified the education. The first point could have been overcome by the modern presumption of constitutionality and the second was a rather technical point that could have been overcome by more careful drafting.

[41] Whyte, 'Education and the Constitution: Convergence of Paradigm and Praxis' (n 15); Whyte, 'Education and the Constitution' (n 29) 88-90; Hogan and Whyte (n 24) 1945; see also, Kelly, *Fundamental Rights* (n 23) 235-237; Francis Beytagh, *Constitutionalism in Contemporary Ireland: An American Perspective* (Dublin, Round Hall Sweet & Maxwell 1997) 46-47.

[42] *DPP v Best* [2000] 2 IR 17; [2000] 2 ILRM 1.

[43] *DPP v Best* [2000] 2 IR 17, 62; Hogan and Whyte (n 24) 1945.

about any attempts to legislate for the manner of educational provision.[44] Glendenning credits this case with leading to the traditional reluctance of the State to regulate the provision of education, as a result of which much of the education system was governed informally until the Oireachtas enacted the Education Act 1998.[45]

An absolutist restriction on regulating the manner of education seems excessive, but other limits on the State's power are more attuned to the value of parental choice in Article 42. In *Doyle v Minister for Education*,[46] for example, the Supreme Court struck down provisions of the Children Act 1941 that allowed the State to send a child to an industrial school against the wishes of her or his parents. The Supreme Court affirmed that the right of parents to provide education to their children cannot be removed by the State, provided the parents are willing and capable of giving the "certain minimum education required" by Article 42.3.2°.[47]

The State's powers over the education system are necessarily limited to the extent necessary to respect the value of parental choice in most instances. However, there are cases supporting the proposition that, once explicit authority is given to the State, it has a strong power to regulate education. Article 42.3.2° provides that the State shall ensure "that the children receive a certain minimum education, moral, intellectual and social." The courts have used this provision to uphold criminal convictions of parents who choose not to send their children to school and who fail to provide the required standard of education elsewhere.[48] The State's power to utilise the criminal law in furtherance of Article 42.3.2° is notable, given that it is the strongest available State power over individuals and it is applied directly in opposition to the value of parental choice, which is otherwise paramount in Article 42. From this it can be seen that the State is not powerless in the face of parental choice and that certain constitutional values are sufficient to overcome parental rights. The standard required by the "certain

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[44] Whyte, 'Education and the Constitution: Convergence of Paradigm and Praxis' (n 15); O'Mahony (n 6) 116.
[45] Glendenning (n 15) 14-18, 98, ch 6.
[46] *Doyle v Minister for Education* [1989] ILRM 277 (SC, 21 December 1955); Glendenning (n 15) 97.
[47] *Doyle v Minister for Education* [1989] ILRM 277, 280-281.
[48] *DPP v Best* [2000] 2 ILRM 1; *Duffy v Deery* (HC, 15 April 2003); Glendenning (n 15) 106-115.

minimum education" is low; the Supreme Court in *DPP v Best* held that the standard is not necessarily the same as (and implied that it would usually be lower than) the national primary school curriculum[49] and Denham J held that it varies over time and across circumstances, accounting for, *inter alia*, family means and the nature of the particular child.[50] The State's power under Article 42.3.2° is thus not particularly relevant to the question of educational inequality, but it is significant as a demonstration that, when given clear constitutional authority, the State has the power to override parental choices. This is relevant to chapter 7, in which I consider whether Article 40.1 could be interpreted in conjunction with Article 42 to impose an obligation on, or grant a power to, the State to achieve equality in the education system.

The third conclusion to be drawn from the subsidiary position is that it is difficult for the State to achieve change without the cooperation of the other stakeholders in the education system.[51] In theory, these stakeholders should be parents but, as noted above, Whyte explains that in practice they are primarily religious orders and private boards of management.[52] In a particular example, the High Court in *Carmody v Meehan*[53] held that the State did not have the power to compel a certain primary school to enrol a particular student.

Notably, in the recent *Stokes v CBS Clonmel* litigation, the Equality Tribunal found that a school had indirectly discriminated against Travellers in its admissions policy and part of the remedy granted was an order for the school to enrol John Stokes.[54] The implication of the Equality Tribunal's finding is that, while the State cannot direct a particular primary school to enrol a child, it can so direct a post-primary school. This issue did not arise in the superior courts, which dismissed the case at an earlier stage of the equality analysis. It is unlikely that the superior courts would have supported this distinction between primary and post-primary education, however, given that State subsidiarity applies to all

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[49] *DPP v Best* [2000] 2 ILRM 1, 17, 21.
[50] *DPP v Best* [2000] 2 ILRM 1, 17-18.
[51] Glendenning (n 15) 127-128.
[52] Whyte, 'Education and the Constitution: Convergence of Paradigm and Praxis' (n 15)
[53] *Carmody v Meehan* (HC, 14 September 1993) *The Irish Times* (15 September 1993); Hogan and Whyte (n 24) 1940.
[54] *Stokes v CBS Clonmel* DEC-S2010-056 (7 December 2010) [12].

levels of education.[55] The power of the Equality Tribunal to compel the admission of a student who has been discriminated against, therefore, is questionable. There may, however, be some variation in State powers across the education because *Prendergast v Higher Education Authority*[56] demonstrates that the State has greater discretion in how it funds second and third level education than primary education.

Even if the State does have stronger powers in relation to secondary education, the need for cooperation is still a practical reality. The protracted on-going reforms of the Junior Certificate and the collapse of the Admissions to Schools Bill 2015, due to a failure to achieve consensus, are contemporary examples of this need for cooperation.[57]

2. The Right to Education

Education is important, both to society and to individuals. In contemporary Ireland, it is difficult for an individual to function without education. The employment market, in particular, is highly reliant on education. This importance leads some to suggest that the right to education is the most important right. O'Mahony, for example, quotes from Glendenning on this point and, while careful not to agree overtly, appears sympathetic to the claim:

> Dympna Glendenning has described the right to education as "... that most significant human right, the right to education, in the absence of which many other human rights are likely to be beyond reach." In this statement she has neatly captured one of the most significant aspects of the right to education – the fact that it is a prerequisite to the exercise of many other rights. This hints at the fact that the right to education is one of the most fundamental of all human rights.[58]

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[55] O'Mahony (n 6) 109.
[56] *Prendergast v Higher Education Authority* [2010] 1 IR 490.
[57] Ben Mitchell, 'Irish Government Abandons Plans to Reduce Elitism in Schools' (Oxford Human Rights Hub Blog, 15 December 2015) <http://ohrh.law.ox.ac.uk/irish-government-abandons-plans-to-reduce-elitism-in-schools/> accessed 2 June 2016.
[58] O'Mahony (n 6) 18; quoting Dympna Glendenning, *Education and the Law* (1st edn, Butterworths 1999) 251.

The trouble with these largely rhetorical statements is that we could say the same about many other human rights, such as the rights to life, bodily integrity, liberty, freedom of expression, and the core economic, social and cultural rights such as to food, water and housing. The fact that they are essential is exactly what makes them fundamental rights. Human rights are inter-reliant. Simply pointing out this feature of one of them does not bolster the claim that it is necessarily more important than others. Instead, the importance of the right to education can only be demonstrated by reference to the content of the right itself. O'Mahony seeks to do this by highlighting the right's inherent connection to human dignity and its widespread recognition in human rights documents.[59]

Whether or not the right to education is the most important human right is not particularly significant for the protection it offers. A feature of the right that is significant, however, is that it transcends the different categories (or "generations") of rights. The right to education is a quintessential economic, social and cultural right.[60] However, it also contains elements of a civil and political right, in the freedom granted to parents to choose how to educate their children and, as is particularly evident in the Irish Constitution, in the protection against State interference with that freedom.[61]

The civil and political right elements arise when considering the State's subsidiary position. The socio-economic right element arises because the Constitution places an express obligation on the State to spend money.[62] Unsurprisingly, therefore, Article 42 has been the site of major disputes over the separation of powers. In this section, I consider the socio-economic side of the right to education and outline the strength of the State's positive obligations.

2.1 Enforcing the Right to Education

The majority of cases testing the positive obligations on the State have been about enforcing the rights of particular children, very often relating to special educational needs and children at the fringes of the education system. Systemic

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[59] O'Mahony (n 6) 20-21.
[60] O'Mahony (n 6) 23.
[61] O'Mahony (n 6) 22.
[62] Conor O'Mahony, 'Education, Remedies and the Separation of Powers' (2002) 24 DULJ 57.

issues that affect all children in mainstream education arise infrequently in the courts, with rare examples being the unsuccessful challenge to the dominance of religious education in *Campaign to Separate Church and State*,[63] the failed attempt to oblige the State to fund Steiner education in *O'Shiel*, and the provision of education during a teachers' strike in *Crowley*.

The Constitution does not expressly provide for a right to education. The courts have identified the right as a corollary of the State's obligation to provide for education.[64] In *Crowley v Ireland*, the Supreme Court adopted a minimalist view of the State's duty but nonetheless implicitly found that each child has a right to free primary education.[65] O'Higgins CJ in dissent and McMahon J in the High Court explicitly held that the State's duty to provide for free primary education gives a child a corresponding right to such education.[66] The High Court in *O'Donoghue* and the Supreme Court in *Best* used similar reasoning.[67] The existence of a right to free primary education implies the existence of a more general right to education as well.

The existence of a right to free primary education is significant, but it is subject to limitation. First, Whyte cautions that the right may not be as strong as it first appears, given that *Crowley* occurred in the context of "a pathological situation resulting from a trade dispute and may only be of limited value when considering the obligation of the State to provide for primary education generally."[68] Secondly, the Supreme Court in *Sinnott v Minister for Health*[69] imposed an upper age limit on the right of 18 years for children with learning difficulties and suggested that the right expires much earlier than that for most children. Thirdly, the State's constitutional obligation to provide for free education is only in relation to primary education and makes no commitment to post-primary

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[63] Campaign to Separate Church and State v Minister for Education [1998] 3 IR 321.
[64] Glendenning (n 15) 196; Mary Meaney, Nessa Kiernan and Karl Monahan, *Special Educational Needs and the Law* (Thomson Round Hall 2005) 95.
[65] *Crowley v Ireland* [1980] IR 102.
[66] *Crowley v Ireland* [1980] IR 102, 108, 122; Hogan and Whyte (n 24) 1950-1951; Glendenning (n 15) 118-123, 141-142; Beytagh (n 41) 84.
[67] *O'Donoghue v Minister for Health* [1996] 2 IR 20, 57-58; *DPP v Best* [2000] 2 IR 17, 49.
[68] Whyte, 'Education and the Constitution' (n 29) 110.
[69] *Sinnott v Minister for Education* [2001] 2 IR 545.

education. There are persuasive calls to extend the right to post-primary education, given its importance in contemporary Ireland.[70]

Despite these limitations, the right appeared to be an effective one before the courts for a period of time. In two lines of cases in the 1990s, the High Court relied on Article 42 to empower (and sometimes oblige) the State to make provision for children with severe or profound learning difficulties[71] and children at risk of neglect who were in need of accommodation.[72] For a period of time, the right appeared to be strong enough to allow the High Court to issue mandatory orders against the Executive, directing it to spend money implementing specific educational and residential care policies.[73] When the matters arose before the Supreme Court in the early 2000s, in *Sinnott v Minister for Education* and, particularly, *TD v Minister for Education*, [74] the Court shut down these developments. A majority of the Court embraced a rigid doctrine of the separation of powers and held that the judiciary could only issue a mandatory order enforcing constitutional rights against the executive if there had been, in Murray J's words, a

> conscious and deliberate decision by the organ of state to act in breach of its constitutional obligation to other parties, accompanied by bad faith or recklessness.[75]

Agreeing with this, Hardiman J said:

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[70] O'Mahony (n 6) 148. Beytagh (n 41) 159; The All-Party Oireachtas Committee on the Constitution, *Report of the Constitution Review Group* (Stationary Office 1996) 332.
[71] *O'Donoghue v Minister for Health* [1996] 2 IR 20; *Sinnott v Minister for Education* [2001] 2 IR 545.
[72] *FN v Minister for Education* [1995] 1 IR 409; *DT v Eastern Health Board* (HC, 24 March 1995); *DD v Eastern Health Board* (HC, 3 May 1995); *DB v Minister for Justice* [1999] 1 IR 29; *GL v Minister for Justice* (HC, 24 March 1995); *Comerford v Minister for Education* [1997] 2 ILRM 134.
[73] *DB v Minister for Justice* [1999] 1 IR 29; *Sinnott v Minister for Education* [2001] 2 IR 545; *TD v Minister for Education* [2000] 2 ILRM 321 (HC); Whyte, *Social Inclusion and the Legal System* (n 16) 292-302; Whyte, 'Public Interest Litigation in Ireland: The Emergence of the Affirmative Decree' (n 3); Glendenning (n 15) ch 5; Hogan and Whyte (n 24) 1937-1939; O'Mahony, 'Education, Remedies and the Separation of Powers' (n 62).
[74] *TD v Minister for Education* [2001] 4 IR 259; Whyte, *Social Inclusion and the Legal System* (n 16) 301; Hogan and Whyte (n 24) 1939-1940; Gerry Whyte, 'The Role of the Supreme Court in our Democracy: A Response to Mr Justice Hardiman' (2006) 28 DULJ 1.
[75] *TD v Minister for Education* [2001] 4 IR 259, 337.

> Such an order, in my view, could only be made as an absolutely final resort in circumstances of great crisis and for the protection of the constitutional order itself.[76]

The courts have affirmed the Supreme Court's test in a number of subsequent cases.[77] As Whyte and others have documented, this creates difficulties for the enforcement of socio-economic rights, which include obligations on the State to spend money.[78]

2.2 Definition of Education

The Constitution also does not expressly define education. It does not define primary education, which forms the content of the State's positive obligation, nor does it define the certain minimum education that parents are obliged to provide.[79] These two standards (of primary and a certain minimum education) are not synonymous. The State's duty to provide for free primary education is not discharged simply by providing that certain minimum free of charge.[80] The right to education can thus be more demanding against the State than against

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[76] *TD v Minister for Education* [2001] 4 IR 259, 372.
[77] *McD v Minister for Education and Skills* [2013] IEHC 175; *McCrystal v Minister for Children and Youth Affairs* [2012] IESC 53.
[78] Gerry Whyte, 'Judicial Capacity to Enforce Socio-Economic Rights' (2014) 37 DULJ 203; Whyte, 'Public Interest Litigation in Ireland: The Emergence of the Affirmative Decree?' (n 3); Whyte, *Social Inclusion and the Legal System* (n 16) 190-196, 292-301, 312-340; O'Mahony (n 6) 216-245; Hogan and Whyte (n 24) 1955-1960; O'Mahony, 'Education, Remedies and the Separation of Powers' (n 62); Oran Doyle 'The Duration of Primary Education: Judicial Constraint in Constitutional Interpretation' (2002) 10 ISLR 222; Shivaun Quinlivan and Mary Keyes 'Official Indifference and Persistent Procrastination: An Analysis of Sinnott' (2002) 2 Judicial Studies Institute Journal 163; Fergus Ryan, 'Disability and the Right to Education: Defining the Constitutional Child' (2002) 24 DULJ 96; Rory O'Connell, 'From Equal Before the Law to the Equal Benefit of the Law' in Oran Doyle and Eoin Carolan (eds), *The Irish Constitution: Governance and Values* (Thomson Round Hall 2008); David Langwallner, 'Separation of Powers, Judicial Deference and the Failure to Protect the Rights of the Individual' in Oran Doyle and Eoin Carolan (eds), *The Irish Constitution: Governance and Values* (Thomson Round Hall 2008); Oran Doyle, *Constitutional Equality Law* (Round Hall 2005) 45; Alan Keating & Anthony Lowry, 'The Separation of Powers - The Supreme Courts Approach to Affirmative Duties - Part 1 and 2' (2003) 21 ILT 103; [2003] 21 ILT 118; Bláthna Ruane, 'The Separation of Powers and the Grant of Mandatory Orders to Enforce Constitutional Rights' (2000) 5 Bar Review 416.
[79] O'Mahony (n 6) 63, 131; the State can enforce the right to education on behalf of a child against parents; *G v An Bord Uchtála* [1980] IR 32, 79; *Re JH (an infant)* [1985] IR 375, 394; *PH v John Murphy & Sons Ltd* [1987] IR 621, 627.
[80] As stated by Laffoy J in *O'Sheil v Minister for Education* [1999] 2 IR 321, [1999] 2 ILRM 241, 275 and Denham and Keane JJ in *DPP v Best* [2000] 2 IR 17, 17-18; Hogan and Whyte (n 24) 1947; O'Mahony (n 6) 14, 131-133.

parents. This is consistent with the underlying values of Article 42, in which parental autonomy takes primacy over the position of the State.

The definition of education is not a crucial issue to the research in this thesis because the kinds of inequalities I am concerned with occur squarely within any plausible definition of education. However, the courts' approach to the definition of education is indicative of their deferential attitude when addressing the right to education. This is relevant to considerations of the State's powers and obligations to address inequality.

After a high point in the 1990s, the courts have retracted on the definition of education in Article 42. Initially, the courts disagreed about whether Article 42 referred exclusively to scholastic education (meaning the traditional curriculum of maths, science, etc.) or whether it was something broader.[81] The latter view has been dominant, with the courts often citing the famous statement of O'Dálaigh CJ for the Supreme Court in *Ryan v Attorney General*[82] in support:

> Education essentially is the teaching and training of a child to make the best possible use of his inherent and potential capacities, physical, mental and moral.[83]

O'Hanlon J adopted this in in *O'Donoghue v Minister for Health*,[84] where he brought it to its logical conclusion, by defining education as contextual to each child. He held that primary education:

> involves giving each child such advice, instruction and teaching as will enable him or her to make the best possible use of his or her inherent and potential capacities, physical, mental and moral, however limited these capacities may be.[85]

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[81] *Ryan v Attorney General* [1965] IR 294; *Landers v Attorney General* (1975) 109 ILTR 1; Glendenning (n 15) 13-14, 192-199.
[82] *Ryan v Attorney General* [1965] IR 294; Hogan and Whyte (n 24) 1948-1949; Kelly, *Fundamental Rights* (n 23) 238-239.
[83] *Ryan v Attorney General* [1965] IR 294, 350.
[84] *O'Donoghue v Minister for Health* [1996] 2 IR 20; Hogan and Whyte (n 24) 1949.
[85] *O'Donoghue v Minister for Health* [1996] 2 IR 20, 65.

The High Court has endorsed this definition on several occasions.[86] The Supreme Court has not decided the issue since *Ryan v Attorney General*, and even then the issue was not central to the case. The Court gave it some consideration in *Sinnott*, in which Murphy and Hardiman JJ suggested that the definition of education should be narrower and confined to scholastic education.[87] However, as the State did not challenge the claim that the type of training at issue was primary education within Article 42, this suggestion was *obiter*.[88] Thus, O'Dálaigh CJ's broad understanding of primary education remains good law but, with only High Court precedents behind it, there is scope for the Supreme Court to restrict or reject it.

O'Mahony has drawn attention to the change in the courts' rhetoric (without explicitly upsetting O'Dálaigh CJ's definition of education) when stating the quality of education that children are entitled to claim from the State.[89] Initially, in cases dealing with education for children with disabilities, the courts explained the entitlement to free primary education as an entitlement to the instruction necessary to allow a child make the "best possible" use of her or his capabilities. This language was a response to the complete absence of genuine attempts by the State to educate children with severe or profound learning difficulties.[90] Whyte has suggested that the courts adopted this language as a way of rejecting the State's argument that these children were ineducable and then moved away from it in later cases once made greater provision for education.[91] The strong language was thus partially rhetorical and now that educational provision for children with severe and profound disabilities has improved, the courts have turned towards more measured language.

In recent cases, the courts have held that providing "appropriate" education will satisfy the Article 42 duty. In *O'Carolan v Minister for Education*,[92] for example, a

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[86] *Comerford v Minister for Education* [1997] 2 ILRM 134, *Sinnott v Minister for Education* [2001] 2 IR 545; *O'Carolan v Minister for Education* [2005] IEHC 296; O'Mahony (n 6) 12-16.
[87] *Sinnott v Minister for Education* [2001] 2 IR 545, 672, 693.
[88] *Sinnott v Minister for Education* [2001] 2 IR 545, 672; O'Mahony (n 6) 15-16.
[89] Conor O'Mahony, 'The Right to Education and "Constitutionally Appropriate" Provision' (2006) 28 DULJ 422.
[90] Glendenning (n 15) 188-189.
[91] Whyte, *Social Inclusion and the Legal System* (n 16) 307-308, 332-333.
[92] *O'Carolan v Minister for Education* [2005] IEHC 296.

child with moderate to severe autism sought State funding for education in a centre in Wales on the basis that the placement available in Dublin was unsuitable and would potentially worsen his condition. MacMenamin J held that it was not a question of which placement was best, but whether that available in Dublin was appropriate. MacMenamin J cited *TD v Minister for Education* and *Sinnott v Minister for Education*, establishing a deferential role for the courts in this issue, and went on to hold that the Dublin placement was in fact appropriate. Peart J applied similar reasoning in *O'C v Minister for Education*.[93] In that case, the applicant sought State funding for a type of education for a child with autism known as Applied Behavioural Analysis (ABA). Peart J accepted that this was superior to the eclectic programme offered by the State but held that the eclectic programme was "appropriate" and satisfied Article 42.

3. Is it constitutional for the State to permit schools to charge fees?

In the remainder of this chapter I consider, first, whether the State violates Article 42 by permitting schools to charge fees; second, whether the State could constitutionally prohibit schools from charging fees; and third, whether it could incentivise schools to remove or reduce fees. I consider these and related questions under a conjoined application of Article 42 and 40.1 in chapter 7.

Although any interpretation that is not explicitly discounted is technically possible, it would be difficult for a court to read Article 42 as a prohibition on charging fees. The State's positive obligation under Article 42 is unlikely to stretch to requiring the removal of fees. As O'Mahony says:

> The scope of the State's duty to educate under both international law and Irish constitutional law would seem strictly speaking, to be confined to the provision of free primary education. ... As long as adequate resources are provided and the State does not attempt to hide behind the failures of third parties, this issue [the State's positive obligation] is not unduly problematic.[94]

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[93] *O'C v Minister for Education and Science* [2007] IEHC 170.
[94] O'Mahony (n 6) 177.

Precedent also supports this interpretation. Peart J in the High Court in *O'C v Minister for Education*[95] did not see inequality itself as a problem under Article 42:

> It must be remembered also that the Minister for Education and Science is obliged under the Constitution to provide for education, and not to provide education. ... The fact that one child or a group of children attend a school where the quality of education may be different from another, or less than optimal, or the class size is greater than another school or schools elsewhere, does not mean that the Minister has failed to provide for an appropriate education as required by the Constitution.

Furthermore, Article 42.2 and Article 42.4 contain explicit protection for private schools. Although, as demonstrated below and in chapter 5, private schools are not necessarily fee-paying schools, it would be a difficult argument for a court to accept that these provisions allow for the prohibition on private schools opting to charge fees. Article 42 on its own terms is unlikely to oblige the State to stop schools charging fees. The only way such a positive obligation could arise is if, as I consider in chapter 7, the conjoined application of Article 42 with Article 40.1 would give rise to a right to equality in education.

4. Would it be constitutional to prohibit charging fees?

The second issue is whether the State has the power (rather than an obligation) to stop schools from charging fees. It is firmly established that parents have constitutional authority to establish their own schools, based on the strong value of parental choice.[96] It is also clear that the various religious orders in the State can establish and maintain schools. Far from being constitutionally problematic, therefore, the existence of private schools is envisaged by the Constitution and explicitly endorsed in Article 42.2 and by the reference to "private and corporate educational initiative" in Article 42.4. Private schools are not, however, synonymous with fee-paying schools. In Ireland, the vast majority of schools are privately owed, for example by religions or trusts, even though only a few of them charge fees. The subsidiary position of the State means that, while it provides

[95] *O'C v Minister for Education* [2007] IEHC 170.
[96] O'Mahony (n 6) 121.

the funding and sets the curriculum in most school, the ownership and management is often private.

The entitlement of private bodies to establish schools, however, does not always result in an entitlement to claim State funding because the government is given discretion in that regard. In *O'Shiel v Minister for Education* the issue of State funding for a privately owned school based on Steiner principles arose. The Court held that the government's discretion over funding meant that it did not have to fund every possible school choice even though it could not simply offer one type of school on a take-it-or-leave-it basis. Instead, the State's obligation is to have regard for the various parental choices and then to make rational choices about which ones to fund. As a result, there would need to be an appreciable number of parents choosing that type of education in order to make it a rational choice.

There is consequently no obligation on the State to fund every school established privately. This is an obstacle for any effort to prohibit fees because it would be impossible for parents to exercise the authority to establish private schools if they were prohibited from charging fees but also not guaranteed to receive State funding. Such an outcome would likely be held by the courts to infringe the value of parental choice in Article 42.

It would be possible for parents to exercise that choice if the State offered a blanket guarantee that it would fund any school set up privately. This, however, would still be subject to constitutional problems and it would raise additional practical problems. Dealing with the practical issues, inevitably it would be argued that a blanket guarantee would be unaffordable. The current system of semi-private education has saved the State a lot of money, which would have to be taken on by a blanket guarantee. A more problematic issue is that a blanket guarantee would see the State funding education in schools that are not necessarily of a high standard and of which it does not necessarily approve. Under the current system, these schools have to be accepted, provided they ensure the certain minimum education for the students, but they do not have to be endorsed or supported by the State. Under a blanket guarantee, however, the State would be directly supporting these schools without any authority to require

better quality education. A blanket guarantee would also be open to abuse. The Constitution and s.14 of the Education (Welfare) Act 2000[97] allow for home schooling but the State currently provides no financial support for parents who educate their children at home.[98] It would be difficult to define the schools entitled to funding without including home schooling parents. This could create a perverse situation of parents being paid not to send their children to school.

On a constitutional level, it could be problematic to prohibit fees and replace them with a blanket guarantee of funding. The courts could interpret the value of parental choice to encompass the right to choose how to fund education, as well as simply the choice of school. In that case, providing a single model of funding would fail to protect that aspect of parental choice. Articles 42.2 and 42.4 acknowledge the existence of private and corporate education. As noted above, this does not necessitate the existence of fees, but it is an inescapable fact the private education in Ireland and elsewhere has relied on fees. There is no reason in principle for fees to be conflated with private education under Article 42.4, but, as noted above, the courts have often said that Article 42 reflects the traditional and existing education system and it is foreseeable that a court could interpret the reference to private education as support for the existence of fees.

That interpretation of the value of parental choice is contestable, however, by relying on Raz's conception of positive autonomy. Raz argues that autonomy relies on the existence of a range of valuable options and that the state has the power to discriminate between valuable and non-valuable options in order to serve its positive duty to promote autonomy.[99] If the State is obliged to maximise parental choice, this does not necessarily have to mean as free a choice as possible. That is a negative understanding of parental choice. Instead, that value could be served by increasing the amount of parents who are given a choice, even if that comes at the expense of some degree of choice currently exercised by those with the most choice. Rather than allowing some parents to choose fee-paying schools, with the consequence that other parents have no effective

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[97] Upon registration with the Child and Family Agency, Tusla.
[98] Citizens Information, 'Teaching Your Child at Home' (Citizens Information Board, 2 January 2014) <http://www.citizensinformation.ie/en/education/the_irish_education_system/home_education.html> accessed 14 June 2016.
[99] Joseph Raz, *The Morality of Freedom* (OUP 1986) 378-380, 416.

choice, the State would be ensuring that as many parents as possible have some choice between schools. That is a positive understanding of parental choice.

In order to interpret Article 42 as based on positive autonomy, the first issue is to establish whether positive autonomy is consistent with Catholic teachings on subsidiarity. Given that subsidiarity is about allowing for decision-making at the least centralised level possible, an understanding of parental choice that ensures this in practice is more consistent with the principle of subsidiarity than the merely technical understanding of parental choice that exists in the current education system. The second issue is whether the courts are more likely to adopt a positive or negative understanding of autonomy, both of which are open to them. Given the formalism of the courts' interpretations of rights, there is reason to expect them to adopt the negative understanding. On the other hand, in cases on the right to education such as *O'Donoghue*, the courts have sought to ensure that the right to education is practically exercisable, rather than merely technically available, to children. By analogy, the parental rights to choice relating to education are reduced to mere technical availability if the courts adopt a negative understanding of autonomy.

I discuss the extent to which economic, cultural and social capitals limit the choices of some parents in chapter 5. Thus, the policy of prohibiting fees could be justified under Article 42 as serving (by levelling up) parental choices. The fact that the State is obliged to provide diversity in the education system, as Laffoy J held in *O'Sheil*, also supports this argument. As O'Mahony summarises, the fact that most parents do not have choice between schools is arguably unconstitutional.[100] The State could thus argue that the decision to prohibit fees, thus increasing the effective choices available to some currently choice-less parents, is a reasonable response to its obligation to provide for choice in the education system.

Separately, and relevant only to denomination schools, Article 44.2.5° guarantees the right of:

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[100] O'Mahony (n 6) 126.

> Every religious denomination ... to manage its own affairs, own, acquire and administer property, movable and immovable, and maintain institutions for religious or charitable purposes.

It would be open to a court to interpret the use of fees as a matter within the religious denomination's own affairs. This is not necessarily fatal to the blanket guarantee policy because this right, like all constitutional rights, is not absolute. An alternative challenge could be through Article 44.2.6°, which states:

> the property of any religious denomination or any educational institution shall not be diverted save for necessary works of public utility and on payment of compensation.

A creative interpretation of this provision would be to read "property" to include the right to charge fees, and thus to see the ban on charging fees as a diversion of property. A more likely interpretation, however, is to give it a more restrictive meaning (as referring to land). This is because Article 44.2.6° refers to diversion necessary for works of public utility, which suggests it is a reference to the State entering land, for example to lay ESB lines, rather than a reference to intangible property like stocks, shares and income. If a prohibition on charging fees is a restriction on the right, then it is a question of whether that passes a proportionality test. Relying on the arguments in chapter 4, that poverty and social class inequality are of concern to Article 40.1, a court could uphold the prohibition on fees as proportionate. First, it pursues the legitimate aim of furthering the constitutional value of equality. Secondly, it is rationally connected to that aim by removing one of the clearest barriers to equal access to schools. Thirdly, it impairs the rights of religious denominations as little as possible by providing an alternative income to offset any loss and does not interfere with their ability to manage the rest of the schools affairs. Finally, overall it is proportionate given the significant social justice benefit to be derived and the fact that the schools only lose out on the ability to impose fees, which does not serve an important constitutional value in its own right and is directly contrary to the constitutional value of equality.

The final constitutional hurdle to the policy of replacing fees with a blanket guarantee of funding is the precedent in the *School Attendance Bill* case. In that

case, the Supreme Court said that the manner of education could not be regulated by the State. On the basis of this case, Whyte suggests that it would be unconstitutional for the Minister to force reform of the way schools are governed.[101] Much like the question whether fees are part of a religious denomination's own affairs, it is an open question whether the way a school is funded is part of the manner in which education is delivered. On a broad reading, the manner of education covers the entire school environment, in which case fees clearly are encompassed. However, such a broad reading would also include things such as child welfare laws and hygiene standards. It would be surprising for the courts to hold these regulations unconstitutional under the *School Attendance Bill* case and so it seems the broad reading of manner of education is inappropriate. Instead, a narrow reading is appropriate such that the manner of education refers to the specific teaching and delivery skills that a teacher brings to the classroom. This narrow reading is consistent with the general principle of the State's subsidiary role because it creates a realm of autonomy for the schools over the art of education. Either way, the doubts noted above about the strength of the *School Attendance Bill* case as a precedent could also be sufficient to overcome this constitutional hurdle.

In summary, a simple prohibition on fees would be unconstitutional because it would prevent parents exercising the right to establish private schools. That could be overcome by providing a blanket guarantee of funding for all schools in the State but it would lead to practical problems. In addition, the value of parental choice may include the right to choose how schools should be funded, and the rights of religious denominations to manage their own affairs may support a right for schools to charge fees. Each of those rights can be restricted according to a proportionality test, however, so it could be constitutional to prohibit fees provided a blanket guarantee of funding were given in its place. In addition, a prohibition on fees could be seen as a support for, rather than restriction on, parental choice because it would increase the options available to many parents who currently have very limited choice between schools. The *School Attendance Bill* case is a problem for this policy on a literal reading of the

[101] Whyte, 'Education and the Constitution: Convergence of Paradigm and Praxis' (n 15).

judgment, but the likelihood of the courts adopting a strict reading of its principles is doubtful.

5. Would it be constitutional to incentivise the removal of fees?

A more promising approach than a negative prohibition on fees may be to adopt a funding regime that makes it more rewarding for schools to accept funding from the State, on the condition of not charging fees, than to opt for fees and forego any State support. This model is based on the contract compliance methods in the US or the use of public procurement to advance equality in the UK.[102] The classic example of this comes from the United States, where federal contracts, for example in construction, were awarded on condition that the contracting firms adopted a racial equality policy.[103]

Under the current arrangements for new schools, the State provides 95% of the start up costs, owns the school and then leases it back to the parents who run the school.[104] Within that structure, it would be very easy for the State to introduce conditions to the lease that no fees can be charged and that the school follows an equal admissions agenda. The State could also use this approach to pursue the other equality measures considered in chapter 5, such as the reduction in streaming of students within schools. Even with established schools, the State currently offers more favourable funding to school in the non-fee-paying sector than to those in the fee-paying sector, which implies that it would have the power to makes the terms for the non-fee-paying sector even more favourable.

From a constitutional perspective, the core benefit of a contract compliance approach is that it is opt in, rather than mandatory. This means there would be voluntary cooperation of schools so the State would not be overstepping its subsidiary position. It would also mean that parents would have the right to opt

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[102] Bob Hepple, 'The New Single Equality Act in Britain' (2010) 5 Equal Rights Review 11, 19; Colm Ó'Cinnéide, 'Fumbling Towards Coherence: The Slow Evolution of Equality and Anti-Discrimination Law in Britain' (2006) 57 NILQ 57; Christopher McCrudden, 'Using Public Procurement to Achieve Social Outcomes' (2004) 28(4) Natural Resources Forum 257

[103] Christopher McCrudden, *Buying Social Justice: Equality, Government Procurement and Legal Change* (OUP 2007) 131-157.

[104] Glendenning (n 15) 168.

out and set up their own privately funded private schools, rather than opt into the publically funded private school system. It would thus respect the value of parental choice. (As discussed above, however, this is only one of the available interpretations of parental choice and it would be open to the courts to adopt a more egalitarian understanding of parental choice.) In addition, the State would be providing support to privately owned schools, which I suggest would satisfy the obligation to "endeavour to supplement and give reasonable aid to private and corporate educational initiative" in Article 42.4.

There are questions about the efficacy of this policy, but from a constitutional perspective the only significant stumbling block is whether it is consistent within Article 42.4. In short, is the provision of support to schools on the condition that they do not charge fees "reasonable aid" as required by the text? O'Mahony argues that this obligation, particularly since it only requires the State to "endeavour" to give aid, is too weak to be a positive duty.[105] In Farry's words:

> while an endeavour must be made to supplement, it need not lead to success in doing so ... the use of the word "endeavour" seems to indicate that this provision *is merely aspirational* and not obligatory.[106]

As noted above, the State generally has weak powers in education but when it is given an explicit power under Article 42, such as the right to determine the certain minimum education required for each child, the courts have recognised that power to be strong. In the context of this proposal, the State has an explicit power (and only a weak obligation) to endeavour to give reasonable aid to private schools and it should have the power to pursue an equality policy through that power. A similar proportionality analysis to that in section 5 would apply. First, the policy serves a legitimate aim by furthering the egalitarian value in Article 40.1. This relies on the arguments in chapters 3 and 4, that the Constitution can be interpreted to guarantee substantive equality of condition, or at least that social class inequality and poverty are protected grounds under Article 40.1. In addition to serving Article 40.1, this policy would support the general communitarian philosophy in Article 42 and elsewhere in the Constitution. If the

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[105] O'Mahony (n 6) 119, ch 6.
[106] Michael Farry, *Education and the Constitution* (Round Hall Sweet & Maxwell 1996) 34; O'Mahony (n 6) 147.

courts were to interpret parental choice to mean *de facto* or genuine valuable choices, rather than mere formal freedoms, the policy would also be in support of Article 42 rather than in tension with it. More interestingly, it could also be argued that Article 45 would support the policy. As discussed in chapter 4, Article 45 provides the *Directive Principles of Social Policy*, which have limited enforceability before the courts. However, the Article's unenforceability is in the context of litigants seeking to make demands from an unwilling State under the values endorsed in Article 45. If this policy were implemented and then challenged, however, the State could argue that it is acting in furtherance of Article 45, which specifically mandates it to pursue social policies though law:

> The principles of social policy set forth in this Article are intended for the general guidance of the Oireachtas. The application of those principles in the making of laws shall be the care of the Oireachtas exclusively, and shall not be cognisable by any Court under any of the provisions of this Constitution.
>
> 1. The State shall strive to promote the welfare of the whole people by securing and protecting as effectively as it may a social order in which justice and charity shall inform all the institutions of the national life. ...

Secondly, it is rationally connected to those goals because it encourages schools to opt for an equal admissions policy, rather than discriminating on the basis of poverty, social class and socio-economic status. Thirdly, it impairs the values of choice and autonomy as little as possible because the policy would ensure each school had enough funding to be run properly. In addition, the policy could allow for the voluntary contribution system to remain, provided it was operated in a way that did not create a barrier to entry as is currently the case, so that schools could still supplement their State income with contributions from parents. Being an opt-in policy, the schools could also choose to remain entirely outside the system. Fourthly, the policy would be proportionate to the values of parental choice and the subsidiarity of the State by advancing social justice while also seeking to preserve the value of parental choice to the greatest degree possible.

The variable in this analysis is that the text of Article 42.4 relies on the vague phrase "reasonable aid", which means the text is not determinative of what kind of support for private schools is required. This exacerbates the inevitable ambiguity in constitutional law, which means, as Whyte has shown, there is scope for a judge's political values to influence the interpretation of the Constitution.[107] In reality, there is no objectively correct interpretation of "reasonable aid". This is partially a fault of the constitutional law for not determining what method(s) of interpretation should be adopted.[108] The wider problem, however, as Whyte shows, is that it is almost impossible for any individual, a judge included, to be truly objective because we are all fundamentally influenced by our own domain and pre-interpretive values.[109] Notwithstanding the inherent unpredictability of constitutional law, there is a strong possibility that a policy like this would be constitutional.

A separate question, however, is whether the policy would be effective. The opt-in nature of the policy is important in order to make it constitutional (at least if the value of parental choice is interpreted negatively), but it could also be the fatal flaw for its efficacy. In Ireland currently, only 2% of students attend fully private schools, with the remaining 98% attending schools that accept public funding (some of those schools are fee-paying and rely on both sources of income).[110] If those numbers remained unchanged, the policy could be very successful because fees would be removed from almost all schools. However, if the funding arrangements are changed, there is a danger that the policy backfires by driving more parents to choose schools that are entirely outside the State funding system. This risks creating super elitist schools, as exist in the UK, rather than the partially elite schools that exist under the semi-private system that dominates private education in Ireland. The efficacy of the policy thus turns on the relative harms of a larger number of semi-private schools, with fees ranging between

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[107] Gerry Whyte, 'Discerning the Philosophical Premises of the Report of the Constitution Review Group: An Analysis of the Recommendations on Fundamental Rights' (1998) 2 Contemporary Issues in Irish Law and Politics 216, 227; Whyte, *Social Inclusion and the Legal System* (n 16) 35-36, 432-433.

[108] Whyte, 'Education and the Constitution' (n 29) 98-104; Doyle, 'The Duration of Primary Education' (n 69).

[109] Whyte, *Social Inclusion and the Legal System* (n 16) 429-430, 432-433.

[110] See ch 5; Dympna Glendenning, *Religion, Education and the Law: A Comparative Approach* (Tottel, 2008) 291.

€2,600 to €12,646 for day students,[111] and smaller number of entirely private schools that have to fund themselves without any State funding. Sociology teaches us that powerful groups will always act to preserve their privilege, which means that a policy such as this one, which relies on people opting in, risks failure if enough people opt for the greater personal benefits that may be derived outside the State-funded system. The obvious answer to this risk is simply that the State should guarantee so much funding to schools that it becomes prohibitively expensive for parents to opt-out of the State system in order to achieve greater advantages. That would be an ideal outcome but, given the low starting point, the likelihood of the State providing this level of funding is slim.

Ultimately, in order to guarantee the success of a universally inclusive education system without fees, constitutional change would be required. The proposals I consider here are the most ambitious ones available based on the existing constitutional order.

Conclusion

Education is of crucial importance to individuals and to society. As a human right, it involves a complex interaction between children, their parents, the State and, particularly in Ireland, religious organisations. Article 42 in the Constitution provides for the right to education and enshrines the principle of State subsidiarity and the importance of parental choice. These values have been highly influential in the cases on Article 42.

It would be difficult for a court, using Article 42 in isolation, to hold that the State was constitutionally obliged to prohibit schools from charging fees. This is based both on the text of Article 42 and on how the courts have interpreted the values of subsidiarity and parental choice. However, it is possible that a court would uphold a ban on charging fees if the State decided to implement it, so long as the State provided some kind of blanket funding so that parents could still establish and run their own schools. Given the worrying practical implications of such a policy, a preferable approach to a complete ban would be for the State to

[111] Katherine Donnelly, 'Enrolments on rise as country's fee-paying schools begin to enjoy the fruits of recovery' *Irish Independent* (Dublin, 2 January 2016) 4; Lynch and Lodge (n 19) 40-42.

provide funding in such a way as to incentivise schools to remove fees and to implement other equality policies. The opt-in nature of such a policy would be its great constitutional strength, but it would also be its practical weakness because the risk that some parents would opt out of the State-funded system entirely would remain.

Ch 7: Education and Equality: Rights in Conjunction

Sections

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Introduction

It is an adage of constitutional law that the provisions of the text are not individual clauses isolated from one another but rather are components of a cohesive whole. The contextual or harmonious nature of the Constitution ordinarily arises when courts deal with the interpretation of particularly vague provisions of the text, for example, when determining the meaning of "unjust attack", "common good", or the right to liberty.[1] In cases such as these, despite taking a harmonious approach, the court remains concerned primarily with the meaning of an individual provision of the text; it is simply that the other parts of the Constitution influence the meaning of that provision. In this chapter, I

[1] *Attorney General v Paperlink* [1984] ILRM 373; *Dillane v Attorney General* [1980] ILRM 167.

consider a second implication of seeing the Constitution as a cohesive whole: could two (or more) provisions, applied in conjunction, have a different effect to their individual applications? Could the sum of two constitutional rights be different from their collective parts? In particular, can the right to equality in Article 40.1 operate differently when applied in conjunction with (or in the context of) the right to education in Article 42?

There are no clear answers to these questions in Irish constitutional law. This chapter considers the potential for constitutional rights to be applied in conjunction by analysing domestic and comparative materials. Section 1 outlines the relevant domestic issues: first, the egalitarian values implicit in the right to universal free primary education, second, academic arguments about the role of equality in protecting socio-economic rights in the Constitution, and third, some doctrinal issues that would have to evolve in order for the rights to equality and education to apply in conjunction effectively. This last part deals with the reluctance of Irish courts to deal with legislative omissions (the "*Somjee* problem"). Sections 2 and 3 address alternative models of conjoined application of rights. Section 2 considers whether the standard of review the courts apply in equality cases could change when it applies in conjunction with another constitutional right. This section looks both at some domestic cases that appear to follow this model and comparatively at the application of the equal protection clause to the allocation of fundamental interests under the Constitution of the United States. I argue that the context of discrimination approach to Article 40.1 could be revived, not as an alternative, but as a complement to the basis of discrimination approach. An intensive standard of review could apply to inequalities in the context of other constitutional rights (the context of discrimination approach) and to inequalities on the basis of the presumptively proscribed grounds of discrimination (the basis of discrimination approach). I outline the current status of both of these approaches to Article 40.1 in chapter 3. Section 3 considers an alternative version of the conjoined application of rights and equality, under which the scope of constitutional protection is enhanced by a conjoined application. This section incorporates comparative analysis from the European Convention on Human Rights (ECHR) and Canada. I

argue that a conjoined application of the right to education with the right to equality ought to give a right to equality in education.

1. Domestic Preliminary Issues

This section outlines a number of issues that influence whether the rights to equality and education could operate in conjunction under the Constitution.

1.1 Egalitarian Values in the Right to Education

The principal methods of constitutional interpretation in Ireland are the literal, historical, broad, harmonious and natural law interpretive methods.[2] Natural law as an interpretive methodology has largely lost its appeal in recent years,[3] and the harmonious interpretation is not useful when identifying the values embedded in a discrete provision. In this section I set out the egalitarian values in the right to education as interpreted by the first three interpretive methods; literal, historical and broad.

The right to free primary education exists in Article 42.4:

> The State shall provide for free primary education and shall endeavour to supplement and give reasonable aid to private and corporate educational initiative, and, when the public good requires it, provide other educational facilities or institutions with due regard, however, for the rights of parents, especially in the matter of religious and moral formation.

The courts have identified the right as a corollary of the State duty to provide for free education.[4] "Equality" or similar words do not appear in the text but there is a textual commitment to substantive universalism based on the reference to the education being "free". Several rights in the Constitution are formally granted to all people but only receive negative protection, such as the inviolability of the

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[2] Gerard Hogan and Gerry Whyte, *Kelly: The Irish Constitution* (4th edn, LexisNexis Butterworths 2003) 3; Oran Doyle 'The Duration of Primary Education: Judicial Constraint in Constitutional Interpretation' (2002) 10 ISLR 222.

[3] *Re Article 26 and the Regulation of Information (Services Outside the State for Termination of Pregnancies) Bill 1995* [1995] 1 IR 1.

[4] *Crowley v Ireland* [1980] IR 102; *O'Donoghue v Minister for Health* [1996] 2 IR 20, 57-58; *DPP v Best* [2000] 2 IR 17, 49; Hogan and Whyte (n 2) 1950-1951; Dympna Glendenning, *Education and the Law* (2nd edn, Bloomsbury Professional 2012) 118-123, 141-142; Francis Beytagh, *Constitutionalism in Contemporary Ireland: An American Perspective* (Round Hall Sweet & Maxwell 1997) 84.

dwelling in Article 40.5 or the property rights in Articles 40.3.2° and 43; there is no obligation to provide a dwelling or to give people property. As a result, these rights are formally universal but substantively less so because they effectively only protect those with certain material means. Taking a literal construction of these differences, the right to free primary education is more expansive, and contains a stronger egalitarian value, than the negative rights because it imposes a positive obligation on the State.

An egalitarian value could also be drawn from Article 42.4 based on an historical interpretation. Hogan cautions that the original philosophical source for the provisions and rights of the Constitution are not essential to their interpretation because, as Hogan describes it, the provisions have "broken loose of that particular inspiration source" and the rights now have their own distinct meanings.[5] The historical record, however, shows that the distinction between negative protection of most rights and the substantive protection of the right to free primary education reflects the drafters' intentions. The majority of the fundamental rights provisions are based on liberal philosophical foundations but the right to education is placed in a separate article and treated differently.[6] As Whyte explains, this is because the right is based on Catholic teachings of communitarianism rather than traditional liberalism, upon which many of the other fundamental rights are based. [7] This philosophy embraces some egalitarianism because it recognises the need for universal values or rights and the need for supports in order to make them accessible for people who are disadvantaged. An important historical fact to account for is that the drafters deliberately sought to limit the State's responsibility by changing the language from "shall provide free primary education" to "shall provide *for* free primary education".[8] However, this change was only intended to restrict the scope of the State's duty, rather than to restrict the scope of the right. As I argue in chapter 6,

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[5] Gerard Hogan, *Origins of the Irish Constitution, 1928-1941* (RIA 2012) 227; Gerard Hogan, 'The Constitution, Property Rights and Proportionality' (1997) 32 Irish Jurist 373, 396.

[6] Hogan, *Origins of the Irish Constitution* (n 5) 272, 318.

[7] Gerry Whyte, *Social Inclusion and the Legal System: Public Interest Law in Ireland* (2nd edn, IPA 2015), 94-96; Hogan, Origins of the Irish Constitution (n 5) 215-216.

[8] Hogan (n 5) 371, ch 9, 452 (emphasis added); the courts have adopted the implications of this distinction, see eg *Crowley v Ireland* [1980] IR 102, 126-127 and *O'Keeffe v Hickey* [2009] 2 IR 302, [29], [54], [132].

the difference between "providing" and "providing for" should not be overstated because if no one else is providing free education, the State is under a duty to provide such education itself. The drafting change leaves the right itself unqualified (an entitlement to free primary education) and thus preserves the essential universalism implicit in Article 42.4.

A "broad" interpretation of the Constitution is also based on the text but is purposive, without being confined by the original purpose of the drafters, and is aware of the Constitution's dual role as both a political and legal document. This approach builds on the distinction between the right to free primary education as a positive right and the other negative rights in the Constitution. The purpose of the right to free primary education is to ensure access to education for all. This could be drawn from the literal approach because of the word "free". A broad interpretation can go further and recognise that the underlying egalitarian principle in Article 42.4 is a commitment to a minimum degree of equality in primary education. While the right does not guarantee the same education for each child, the State's two obligations, first, offering universal free primary education and, second, guaranteeing a certain minimum education to all children, implies some sense of equality. An example of this approach is O'Hanlon J's High Court judgment in *O'Donoghue v Minister for Health*.[9] O'Hanlon J held that the plaintiff, who was physically and mentally disabled and needed a high degree of basic care, was entitled to claim his right to free primary education and rejected the State's claim that he was "ineducable". Throughout the judgment, there are references to equality and the crux of O'Hanlon J's holding is that all children are equally entitled to free primary education, which is encapsulated by his definition of primary education:

> I conclude, having regard to what has gone before, that there is a constitutional obligation imposed on the State by the provisions of Article 42.4 of the Constitution to provide for free basic elementary education of all children and that this involves giving each child such advice, instruction and teaching as will enable him or her to make the best

[9] *O'Donoghue v Minister for Health* [1996] 2 IR 20; Hogan and Whyte (n 2) 1949.

> possible use of his or her inherent and potential capacities, physical, mental and moral, however limited these capacities may be.[10]

Using a broad interpretation, O'Hanlon J took the egalitarian principle underlying the right to free primary education and held that, as well as ensuring primary education for those who cannot afford to pay, it guaranteed equality in access to education. A caveat to this broad interpretation is the change in reasoning in subsequent cases under Article 42. In *O'Carolan v Minister for Education*[11] and *O'C v Minister for Education*[12] the High Court did not use the formula of the State having to help a child to realise its full potential and instead held that it only extends to providing "appropriate" education.

Under any of the primary methods of constitutional interpretation, there is a value of equality embedded in the right to education. Though it may not be a particularly strong egalitarian value, it demonstrates that equality is not an alien concept to Article 42. Reading the right to education in conjunction with the right to equality, therefore, seems less radical than initially assumed because there is already a close relationship between the rights.

1.2 Equality and Socio-Economic Rights in the Constitution

The suggestion that the right to equality could overlap with other rights is not unheard of in the Irish constitutional context. O'Connell indirectly discusses this possibility while arguing that equality could be used to make up for the lack of judicially enforceable socio-economic rights in the Constitution.[13] O'Connell's suggestion is that it is for the political branches to determine social policy but that the courts can then have a role in critiquing those policies through the prism of equality to ensure that benefits conferred by the State are for the advantage of all rather than just for the majority or politically powerful groups.[14] This is a

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[10] *O'Donoghue v Minister for Health* [1996] 2 IR 20, 65.
[11] *O'Carolan v Minister for Education* [2005] IEHC 296.
[12] *O'C v Minister for Education and Science* [2007] IEHC 170.
[13] Rory O'Connell, 'From Equal Before the Law to the Equal Benefit of the Law' in Oran Doyle and Eoin Carolan (eds), *The Irish Constitution: Governance and Values* (Thomson Round Hall 2008).
[14] O'Connell (n 13) 335; see also, Irish Human Rights Commission, *Economic Social and Cultural Rights Discussion Document* (IHRC, 2006) 105-107 <http://www.ihrec.ie/download/pdf/escrdiscussiondocument.pdf> accessed 25 June 2015.

different issue to looking at the cumulative effect of constitutional rights in conjunction with equality but some of the same challenges arise, which O'Connell outlines clearly at the end of his paper. He suggests that, while his thesis could plausibly be adopted in Ireland, its development is militated against by the Irish courts' reluctance to deal with omissions in legislation, the traditionally individualistic approach to the liberal rights in the Constitution and what O'Connell perceives as an unwillingness to tackle laws that rest on paternalistic stereotypes.[15]

The third of these concerns is a criticism of the legal culture but the response to it is not to make drastic changes of approach or to amend the Constitution, but to place greater faith in the legal process. Stereotypes are a product of lazy or defective reasoning and their use in judicial reasoning can be challenged through more detailed argument and more accurate representations of the real-life conditions that are being stereotyped.

The second of these concerns, the traditionally individualistic approach to rights, is being challenged throughout the course of this chapter; if it is persuasive to argue that equality can be applied in conjunction with rights, it is inevitable that this application would be less individualistic than when the right is applied in isolation. An example of this, which I discuss again in section 3, is the European Court of Human Rights (ECtHR) case of *DH v Czech Republic*.[16] This case involved a successful challenge to the operation of special needs schools in the Czech Republic, which placed disproportionate numbers of Roma children into segregated schools. The challenge was based on the right to education in Article 2 of Protocol 1 (A2P1) to the ECHR in conjunction with the Article 14 prohibition on discrimination. The first-instance Chamber rejected the application because it took an individualistic assessment of each child's challenge, holding that it could only examine each case of an applicant being placed in the special schools individually and could not look at the systemic inequality that the policy created.[17] The Grand Chamber, on appeal, held that the influence of Article 14 was that the Court could look at the systemic nature of the disadvantage

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[15] O'Connell (n 13) 345.
[16] *DH and Others v Czech Republic* App No 57325/00 (13 November 2007).
[17] *DH and Others v Czech Republic* App No 57325/00 (7 February 2006); Sandra Fredman, *Discrimination Law* (2nd edn, OUP 2011) 184.

created. The Grand Chamber used statistical evidence of disproportionate segregation of Roma children to find the existence of indirect discrimination in breach of the ECHR. The Grand Chamber emphasised that an individualistic assessment had to be avoided when assessing Article 14 indirect discrimination challenges.[18] The *DH* case is an example of how equality applied in conjunction with a right can move the analysis away from a purely individualistic assessment and allow consideration of systemic disadvantage.[19] Finally, O'Connell's first concern, the reluctance of the Irish courts to deal with legislative omissions, is a reference to the "*Somjee* problem" and I consider this in detail in the next subsection.

1.3 The Unconstitutionality of Legislative Omissions or Lacunae: The Somjee Problem

An expansive constitutional equality doctrine would involve the courts declaring unconstitutional clauses of statutes that are underinclusive in the provision of a benefit. The barrier to this is the idea that judicial power is negative; while the courts can strike down unconstitutional legislation, they cannot rewrite it. Consequently, the courts traditionally only have the power to "level down" in order to achieve equality because striking down the law would not confer the benefit on the plaintiff. This issue arises in several jurisdictions.[20] Without a "levelling up" remedy, such as a suspended declaration of unconstitutionality or an ability to rewrite the law, the courts are unable to improve the position of the applicant and so choose to offer no relief at all.

The most famous example of this reasoning in Ireland is in the High Court judgment of Keane J in *Somjee v Minister for Justice*.[21] The case challenged direct sex discrimination in the Irish Nationality and Citizenship Act 1956, which provided that a woman marrying a male Irish citizen would automatically receive

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[18] *DH and Others v Czech Republic* App No 57325/00 (13 November 2007) [188], [191]. [193], [209].

[19] The growing recognition of indirect discrimination in Irish constitutional equality law suggests the individualistic approach to rights in not absolute, eg *DX v Buttimer* [2012] IEHC 175, [14].

[20] Sandra Fredman, 'Providing Equality: Substantive Equality and the Positive Duty to Provide' (2005) 21 S Afr J on HR 163.

[21] *Somjee v Minister for Justice* [1981] 1 ILRM 324; see also, *Reynolds v Attorney General* (HC, February 1973) *The Irish Times* (Dublin, 18 February 1973), mentioned in Hogan and Whyte (n 2) 262; *Norris v Attorney General* [1984] IR 36.

citizenship, whereas a man marrying a female Irish citizen had to satisfy a 5 year residency requirement before receiving citizenship. Keane J upheld the law by applying the "invidious discrimination" standard of review, which the courts have subsequently abandoned. [22] Keane J also said that, even it had been unconstitutionally discriminatory, the challenge was purely an "academic exercise" and "utterly futile so far as the plaintiffs are concerned" because the only remedy available would be to strike down the law, which would leave no mechanism for the plaintiff to obtain citizenship and thus not improve his position:[23]

> [Counsel for the plaintiff submitted that] the court would be entitled to declare that the plaintiffs' rights had not been vindicated by the Oireachtas in the expectation that the Oireachtas would take whatever steps were necessary to ensure that their rights were in fact protected. No authority was cited in support of this proposition and I am satisfied that it is not well founded. The jurisdiction of this Court in a case where the validity of an Act of the Oireachtas is questioned because of its alleged invalidity having regard to the provisions of the Constitution is limited to declaring the Act in question to be invalid, if that indeed be the case. The court has no jurisdiction to substitute for the impugned enactment a form of enactment which it considers desirable or to indicate to the Oireachtas the appropriate form of enactment which should be substituted for the impugned enactment.[24]

MacEochaidh J recently adopted this reasoning in *CA v Minister for Justice*.[25] The plaintiff challenged the adequacy of the weekly payments made to asylum seekers under the "direct provision" system (€19.10 for adults and €9.50 for children). MacEochaidh J rejected the challenge, *inter alia*, on the basis that a declaration of unconstitutionality would be of no benefit to the plaintiff:

> It is recalled that the applicants seek an order declaring these payments to be unlawful. If the court were to make this order, the immediate effect

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[22] *Somjee v Minister for Justice* [1981] 1 ILRM 324, 325-326.
[23] *Somjee v Minister for Justice* [1981] 1 ILRM 324, 327-328.
[24] *Somjee v Minister for Justice* [1981] 1 ILRM 324, 327.
[25] *CA v Minister for Justice* [2014] IEHC 532.

> would be that the payment to Ms A and her son (and to every other person in 'direct provision') would cease. Ms A says there is no reality to this and that the Oireachtas would be compelled to make proper provision for cash payments to persons such as her and her son through the enactment of emergency legislation if necessary. This is a rash suggestion. The court should not make an order which would have significant negative consequences for the applicants and for all other persons in receipt of this money in the expectation that the legislature would cure the negative effect of the order of the court.[26]

The *Somjee* problem provides the legislature with an easy trick that would allow full apartheid law to be upheld as constitutional. Doyle explains:

> Imagine an unlikely piece of legislation which imposes a general prohibition on using beaches but then provides that particular classes of beaches may be used by particular persons: Dollymount Strand for white people; Sandymount Strand for black people. A black person could not, if *Somjee* is followed to its logical conclusion, challenge the reservation of Dollymount Strand for white people, as the effect of a declaration that the relevant provision was unconstitutional would not result in any advantage for the black person: she would still not be allowed to go to that beach.[27]

Somjee effectively allows the State to discriminate on any grounds and in any context, so long as it can construe the legislation as providing a benefit rather than imposing a disadvantage because this means the plaintiff cannot gain from having the law struck down. *Somjee* has not been overruled explicitly, but there has been a long period of academic criticism as well as judicial developments that challenge its core principle.[28] Hogan and Whyte suggest that the Supreme Court hinted at a move away from *Somjee* in *McKinley v Minister for Defence*,[29] where the majority rejected concerns about "judicial legislation" when it levelled up the common law cause of action for loss of consortium, granting a benefit to

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[26] *CA v Minister for Justice* [2014] IEHC 532, [13.25].
[27] Oran Doyle, *Constitutional Equality Law* (Round Hall 2004) 86.
[28] Whyte, *Social Inclusion and the Legal System* (n 7) 38; Doyle, *Constitutional Equality Law* (n 27) 85-88; James Casey, *Constitutional Law in Ireland* (3rd edn, RoundHall Sweet and Maxwell 2000) 468.
[29] *McKinley v Minister for Defence* [1992] 2 IR 333.

wives that had previously only been available to husbands.[30] A more definite move away from *Somjee* is evident in recent cases, in which the courts level up omissions in legislation rather than at common law. This implicates separation of powers concerns to a greater degree than arose with *McKinley*, in which the Court was simply updating the judge-made common law.

The effect of the *Somjee* problem received pointed criticism from Clarke J in the High Court in a judgment on a preliminary matter in *MD v Ireland*,[31] the case that ultimately produced the Supreme Court judgment in *MD v Ireland*,[32] discussed elsewhere in this thesis. MD, a fifteen year old boy at the time of the alleged offence, sought an interlocutory injunction staying his criminal trial for having sexual intercourse with a girl who was fourteen years old at the time, contrary to s.3(1) of the Criminal Law (Sexual Offences) Act 2006 (2006 Act). His substantive challenge was on the basis of direct sex discrimination because the law criminalises the actions of both parties to "consensual" underage sexual activity, and then s.5 provides a benefit to underage girls by granting them immunity from prosecution. The 2006 Act is thus primed to benefit from the *Somjee* problem because by challenging the discrimination, the most the plaintiff could obtain would be a declaration of unconstitutionality relating to the inequality, which would remove the immunity for underage girls, but would not remove the criminalisation of the underage boy's actions. The State asserted this argument in resisting the application for an interlocutory injunction.[33] Clarke J granted the interlocutory injunction and, without mentioning Keane J's judgment in *Somjee*, rejected the State's argument and was critical of the implication that this drafting trick could create unreviewable discriminations:

> It seems likely that the way in which the relevant legislation was crafted was designed precisely to deal with a situation where it might be determined that it was impermissible to discriminate between underage males and underage females in the way in which this legislation does. In those circumstances it is at least arguable that the appropriate order for

[30] Hogan and Whyte (n 2) 263.
[31] *D (a minor) v Ireland* [2009] IEHC 206, [5.2]-[5.3]; see Oran Doyle and Estelle Feldman, 'Constitutional Law' in Raymond Byrne and William Binchy, *Annual Review of Irish Law 2009* (Round Hall 2009) 251-254.
[32] *MD v Ireland* [2012] IESC 10.
[33] *D (a minor) v Ireland* [2009] IEHC 206, [3.7].

> the court to make would be to declare s.5 inconsistent with the Constitution and thus leave s.3(1) intact. In those circumstances the legal position would be that both underage males and underage females would be capable of being prosecuted. That, in itself, would not avail Mr D.
>
> However it seems to me that there are possible outcomes of this litigation which could avail Mr D. If, for example, s. 5 was found to be impermissibly discriminatory, it might well then be the case that Mr D would be entitled, at least in some circumstances, to question criminal proceedings in which one only of the two parties to a consensual sexual act (both being underage) was prosecuted. While in general terms it is no answer to a criminal charge to complain that others too have committed the same offence but have not been prosecuted, it is at least arguable that there may be limited circumstances where a party may be able to claim that a prosecution of one but not all of the participants in a single act is discriminatory unless there are good grounds for not prosecuting other parties. In those circumstances I have come to the view that Mr D has made out a fair case to be tried.[34]

Both the reasoning, that a discriminatory criminalisation could see courts preventing a prosecution, and the holding of Clarke J, now a judge of the Supreme Court, are significant and suggest that *Somjee* may not undermine the right to equality in the way that O'Connell and Doyle feared.

In order to overcome *Somjee*, there are three approaches the courts could take. The first is to apply the traditional power to strike down unconstitutional laws. This would either remove the benefit that has been unconstitutionally granted in a selective way or it would strike down the underlying legal structure that caused the omission to be relevant. The second is to prevent the State taking any further action under the discriminatory provisions. The third is to adopt a positive jurisdiction, declare the law to have created an unconstitutional inequality through an omission, and "read in" and apply the legislation as though the inequality had already been corrected.

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[34] *D (a minor) v Ireland* [2009] IEHC 206, [5.3]-[5.4].

The High Court judgment of Laffoy J, now also on the Supreme Court, in *McCann v Judges of Monaghan District Court*,[35] is an example of the first approach. The Enforcement of Court Orders Act 1940 provided a scheme for the imprisonment of a debtor who failed to pay because of wilful refusal or culpable neglect. The law created an inequality because it failed to provide a system of legal aid, despite the existence of the legal aid system for defendants facing similar lengths of imprisonment in criminal trials. It was on the basis of this failure, *inter alia*, that Laffoy J held the scheme for imprisoning debtors to be unconstitutional. Like *Somjee*, this case involved an unconstitutional omission. However, as Whyte notes, the cases are not directly analogous;[36] Ms McCann was challenging the scheme under which she was committed to prison, rather than challenging the legal aid system that failed to provide for her. The law's flaw was thus to implement a scheme while not extending a benefit that had been given to comparators in different situations; this was seen in the litigation as a failure of the debt enforcement scheme, rather than of the legal aid system. Had Ms McCann's challenge been to the legal aid system, as for example in *Carmody v Minister for Justice*,[37] then Laffoy J may have been less willing to rely on the negative power to strike down legislation and instead may have considered taking the second approach.

The second approach has arisen recently, in which the courts prevent the State from taking further steps on the basis of the impugned legislation to the disadvantage of the plaintiff but do not strike it down. In *Carmody* the Criminal Justice (Legal Aid) Act 1962 granted the right to apply for legal aid in order to cover representation by a solicitor in the District Court. It omitted, however, to provide for the possibility of representation by counsel. Murray CJ for the Supreme Court found this to be a breach of the right to a fair trial in the circumstances and then faced the problem of a remedy for the unconstitutional omission. The *Somjee* reasoning would have found the unconstitutionality unremediable, but Murray CJ adopted a broader view of remedies, saying:

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[35] *McCann v Judges of Monaghan District Court* [2009] 4 IR 200; Whyte, *Social Inclusion and the Legal System* (n 7) 40.
[36] Whyte, *Social Inclusion and the Legal System* (n 7) 40.
[37] *Carmody v Minister for Justice* [2010] 1 IR 635.

> this Court has jurisdiction pursuant to the provisions of the Constitution and in particular Article 40.3 to grant such remedy as it considers necessary to vindicate the right concerned.[38]

Murray CJ did not strike down the legal aid regime, or hold that it granted a right to apply for representation by counsel in the District Court, but he did hold that the State's prosecution of Mr Carmody could not proceed "unless and until he is afforded an opportunity to apply for legal aid to include solicitor and counsel".[39] Murray CJ overcame the *Somjee* problem without asserting a positive jurisdiction. The jurisdiction exercised by the Supreme Court remained negative in nature; it prevented the State from prosecuting a defendant until the State had taken certain positive steps, but the Court avoided assuming that positive role for itself.

The third approach, which is the positive jurisdiction to "level up" or "read into" the legislation to remedy the omission has not been fully established in Irish law. Two important High Court judgments of Hogan J, *BG v Murphy (No 2)*[40] and *Byrne v Oberstown*,[41] however, come close to this approach. In *BG*, a defendant with a mental disability was charged with a sexual assault that could be tried in either the District Court or the Circuit Criminal Court. Despite the DPP being prepared to proceed in the lower court, the defendant's fitness to plead could only be determined in the Circuit Court. Once in the Circuit Court, however, there was no means for the case to return to the District Court, which meant an inequality was created between Mr BG and non-disabled comparators because he would then be liable to the more severe sentences available in the higher court.[42] Hogan J found that, despite probably being an accidental oversight, the omission created an unconstitutional inequality. The *Somjee* problem of the appropriate remedy for an unconstitutional omission then arose:

> Indeed, one of the peculiarities of unconstitutional legislative omissions is that the remedy of invalidation often would really serve no purpose at all, other than a Samson-like collapsing of the legislative pillars which gave

[38] *Carmody v Minister for Justice* [2010] 1 IR 635, 668.
[39] *Carmody v Minister for Justice* [2010] 1 IR 635, 668.
[40] *BG v Judge Murphy (No 2)* [2011] IEHC 445.
[41] *Byrne v Oberstown* [2013] IEHC 562.
[42] *BG v Judge Murphy (No 2)* [2011] IEHC 445, [5].

> rise to the unconstitutionality in the first instance. This was, for example, the case in *Somjee v Minister for Justice* ... [quoting from Keane J's judgment]
>
> But with deep respect to the views of that very great judge, if that were indeed the law, then the capacity of the courts to provide an effective remedy in those cases where the Oireachtas had breached Article 40.1 by unjustly conferring a privilege or benefit on one select group of society might have been compromised. While it is, of course, true that the court cannot indicate to the Oireachtas how or in what manner a particular enactment might be repealed or altered, for reasons which I will now endeavour to set out, it is clear from the subsequent post *Somjee* case-law that it can declare that the law in question fails to meet constitutional norms by reason of an unconstitutional omission, even if the court refrains from actually declaring that law to be unconstitutional.[43]

This quote from Hogan J envisages a judicial power that is not purely negative in its ability to enforce constitutional norms. Instead, relying on the Supreme Court judgments in both *McKinley* and *Carmody*, Hogan J identified two alternative remedies. One is purely declaratory, in which the court identifies the constitutional flaw in the legislation but does not invalidate the law, leaving it for the Oireachtas to resolve the problem.[44] Denham J in the Supreme Court had previously discussed this in *A v Governor of Arbour Hill Prison*,[45] where she suggested that suspended declarations of unconstitutionality could be granted. The alternative is more creative and is consequently confined, in Hogan J's words, to "rare and special cases".[46] In such cases the court can apply the impugned law in a manner that removes the unconstitutional inequality. This is a kind of "reading in" remedy but it is implicit in Hogan J's judgment that it is both temporally limited pending Oireachtas correction of the law and confined to the particular application that arose in the litigation rather than general. Rather than

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[43] *BG v Judge Murphy (No 2)* [2011] IEHC 445, [35]-[36].
[44] *BG v Judge Murphy (No 2)* [2011] IEHC 445, [41]; this occurred in *McMenamin v Ireland* [1996] 3 IR 1.
[45] *A v Governor of Arbour Hill Prison* [2006] 4 IR 88.
[46] *BG v Judge Murphy (No 2)* [2011] IEHC 445, [40].

declaring the law unconstitutional, Hogan J's declaration in *BG* limited the sentencing powers of the Circuit Court to those available in the District Court:[47]

> [If] this Court grants a *Carmody*-style declaration, it can thereby take effective steps to safeguard the applicant's rights by extending the scope of s. 4(4) to cater for a case of this kind. If one may be permitted to use a dental analogy, this is in the nature of a temporary filling - rather than a full extraction - pending the appropriate repair and overhaul of the legislative scheme at some stage in the future by the Oireachtas.[48]

Rather than striking down the law, Hogan J was able to apply it in a manner consistent with the Constitution, even though that departed from the wording of the statute. Hogan J described his remedy as a *Carmody*-style declaration and said that he could then extend the scope of the impugned law so as to avoid the inequality. Despite Hogan J's description, he order is innovative and goes beyond *Carmody* because he actually extended the scope of the law himself, rather than constraining the State from proceeding unless it extended the scope of the law.

The discrimination in *BG* appeared accidental and was caused by a technical application of court rules, but this enhances the significance of *Byrne v Director of Oberstown House* because the discrimination in that case was a deliberate legislative policy. Mr Byrne was a minor detained in Oberstown House, a children's detention school. He sought remission of his sentence in accordance with ordinary rules for detention. Notwithstanding the fact that the Oireachtas had deliberately decided to exclude Oberstown House from the ordinary detention rules, Hogan J ordered that Mr Byrne was "to be treated as if the provisions of Rule 59 were in fact applicable to him", despite this being directly contrary to the legislative intent.[49] In the equality analysis, *BG* and *Byrne* are indistinguishable in that the impugned law in each created an inequality by selectively conferring a benefit by excluding one group. The remedy provided was also identical and involved applying the statute to the particular case in a way that complied with the Constitution but conflicted with the clear statutory

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[47] *BG v Judge Murphy (No 2)* [2011] IEHC 445, [46]-[47].
[48] *BG v Judge Murphy (No 2)* [2011] IEHC 445, [45].
[49] *Byrne v Oberstown* [2013] IEHC 562, [51] and [14].

language. The separation of powers concerns are, however, more pronounced in *Byrne*.

BG and *Byrne* come close to the third approach but neither is a complete assertion of a positive jurisdiction to remedy unconstitutional omissions. In *Byrne*, Hogan J granted an order of *habeas corpus* because the detention was not in accordance with law. The order thus restrained the State from doing something coercive (detaining the plaintiff) rather than requiring it to provide a positive benefit to the plaintiff. As Whyte cautions, this involves preventing the State from acting unless it takes certain positive steps, rather than directly obliging the State to take those positive steps:

> As it happens, all of the recent cases on unconstitutional legislative *lacunae* arise in the context of oppressive State action taken against the plaintiff and in such cases, judicial remedies, whether declarations, injunctions or declarations of unconstitutionality, that in effect restrain the State from acting are adequate to resolve the difficulty faced by the plaintiff. We still await a case in which the plaintiff's grievance could only be resolved by ordering the State to take some positive action for his/her benefit.[50]

The remedy in *BG* comes close to crossing this divide because Hogan J's remedy was phrased so as to read the law as though it applied to the applicant, rather than holding that the prosecution was wrongful unless the law was changed.

Hogan J in *BG* did not adopt Murray CJ's negative formulation of the remedy in *Carmody*, which was to prevent the trial "unless and until" certain steps were taken. Murray CJ's approach left it to the other organs of government to decide between either granting the right to apply for legal aid or choosing to drop the prosecution of Mr Carmody. In contrast, Hogan J in *BG* took those steps directly and allowed the trial to continue by limiting the sentencing powers of the Circuit Court to those of the District Court. Hogan J did not, however, order the State to do something positive. Consequently, while *Byrne* and *BG* suggest that the third approach, the positive jurisdiction to remedy unconstitutional omissions, may

[50] Whyte, *Social Inclusion and the Legal System* (n 7) 41 (italics original).

develop in Ireland, it is too early to say that the courts have overcome the *Somjee* problem entirely.

2. Change in the Standard of Review

This section considers whether the standard of review applied in the equality analysis could change when Article 40.1 applies in conjunction with another constitutional right. This is the first of the two ways in which the right to equality could be applied in conjunction with another right, with the second way considered below in section 3. In the first part of this section I examine the application of the equal protection clause to the allocation of fundamental interests under the Constitution of the United States. I also outline analogous approaches in Canada and under the ECHR. In the second part of the section I look at some Irish cases that appear to follow this model.

A standard of review is essentially a statement of the level of intensity with which courts will review impugned state action.[51] It provides for deference to the political organs, particularly if the court adopts a weak standard such as only requiring "rationality" or "reasonableness" on the part of the State. As well as providing deference, the standard of review has a secondary conceptual role, which is to state the strength of the right on its own terms, before concerns about the separation of powers come into effect. The standard of review is the mechanism for holding, for example, that there is a strong right to freedom of expression or a weak right to social welfare or health care. It is important to recognise these two distinct conceptual functions of the standard (first, accounting for the separation of powers and second, reflecting the strength of the right) even though they are conflated in practice.

The standard of review applied in the equality analysis under Article 40.1 is notoriously unclear.[52] The courts do not even state the ordinary rationality

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[51] I refer here to "intensive" or "weak" standards of review, rather than "higher" or "lower" standards because the high-low scale is ambiguous as its meaning depends on perspective: a high standard of review could mean a high level of scrutiny, such that the court is more willing to intervene in state action, or instead a high standard could mean a high hurdle or threshold for a plaintiff to meet, meaning that court is less likely to intervene in state action.

[52] Oran Doyle, 'Judicial scrutiny of legislative classification' (2012) 47 Irish Jurist 175.

standard with much consistency.[53] However, I show in chapter 4, building on earlier writings of Doyle, that the courts appear increasingly open to a variable standard of review. The courts have not fully outlined this but in a series of Supreme and High Court cases the judges suggest that the standard of review could intensify in certain circumstances.[54] In chapters 3 and 4 I offer an outline of Irish constitutional equality law as it currently stands. In summary, the courts generally apply a deferential rationality standard of review. This contrasts with other constitutional rights, for which proportionality is the standard of review. However, when the presumptively proscribed grounds of discrimination (such as race or gender) arise the courts have indicated that a more intensive standard of review is applicable. This understanding of the law is yet to be applied in a neat manner but it has a large volume of *obiter* support.

In chapter 4 I consider whether poverty, socio-economic status or social class could be included in the list of presumptively proscribed grounds of discrimination, with the result that a more intensive standard of review would be applicable. In this section I consider an alternative basis on which a more intensive standard of review could apply, which is when the right to equality arises in conjunction with another constitutional right, namely the right to education.

In Ireland, the courts grappled for a time with what Whyte has described as the "context of discrimination" approach to the human personality doctrine.[55] This restricted the development of equality jurisprudence, until the recent dominance of the "basis of discrimination" approach, which focuses on the ground rather

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[53] In *Dokie v DPP* [2010] IEHC 110, Kearns P applied *Heaney* proportionality to an equality challenge. In contrast, a "legitimate legislative purpose" standard was used in *Re Art 26 and the Illegal Immigrants (Trafficking) Bill 1999* [2000] 2 IR 360, while a standard of "invidious discrimination" was used in *O'Brien v Keogh* [1972] IR 144. More recently, O'Donnell J in the Supreme Court in *Murphy v Ireland* [2014] 1 IR 198 endorsed the idea of a variable standard of review but said it was unnecessary to set out either the intensive or weaker standard of review.

[54] *Murphy v Ireland* [2014] 1 IR 198; *Gilligan v Ireland* [2013] 2 IR 745; *Fleming v Ireland* [2013] 2 ILRM 73 (SC); *Fleming v Ireland* [2013] 2 ILRM 9 (HC); *An Blascaod Mór Teo v Commissioner of Public Works* [2000] 1 IR 6; *Re Art 26 and the Employment Equality Bill 1996* [1997] 2 IR 321; *Quinn's Supermarket v AG* [1972] IR 1.

[55] Gerry Whyte, 'A Comment on the Constitution Review Group's Proposals on Equality' in Rosemary Byrne and William Duncan (eds), *Developments in Discrimination Law in Ireland and Europe* (ICEL 1997).

than context of the discrimination.[56] In this section I consider whether it would be possible under Article 40.1 to see these approaches not as alternative but as complementary; the basis of discrimination approach would be the primary mechanism for analysing inequality but a more expansive version of the older context of discrimination approach could supplement the protection offered by the Constitution. This version of the context of discrimination approach is different to that applied by the Irish courts in the past. Rather than being restricted to discriminations in the context of "essential human attributes", which is almost impossible to imagine,[57] this context of discrimination approach would ask whether discriminations between people in the particular context at issue are liable to violate their human dignity, regardless of the basis of that discrimination. Consequently, while it would take some judicial creativity to develop this doctrine, the building blocks for such an evolution are already in place.

2.1 Equal Allocation of Fundamental Interests in the United States

In US Equal Protection Clause jurisprudence, "strict scrutiny", which is the most intensive standard of review, applies to discrimination on the most serious grounds (particularly race). The Equal Protection Clause is in Section 1 of the Fourteenth Amendment to the US Constitution:

> All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No state shall ... deny to any person within its jurisdiction the equal protection of the laws.

A subset of Equal Protection Clause jurisprudence sees the courts also apply strict scrutiny when a state discriminates between people in the way in which it provides a service related to a fundamental interest, whether or not race is the

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[56] See ch 4.

[57] *Quinn's Supermarket v Attorney General* [1972] IR 1, per Kenny J; *Murtagh Properties v Cleary* [1972] IR 330; *Madigan v Attorney General* [1986] ILRM 136; *McMenamin v Ireland* [1996] 2 IR 100; *O'Q v Buttimer* [2009] IEHC 25.

ground of that discrimination.[58] O'Connell notes the existence of this principle in the US and suggests that it could be adopted in Ireland.[59]

Unlike Ireland, the United States equality jurisprudence focuses on a clearly structured variable standard of review. There are three standards: rational basis review, intermediate review and strict scrutiny.[60] Under rational basis review, the most deferential standard, the impugned state action will be upheld provided it is rationally related to achieving a legitimate government purpose. A law challenged on this standard will almost always be upheld, though there are some exceptions.[61] The intermediate standard of review is considerably vaguer than either of the other two standards and developed in the context of gender discrimination in *United States v Virginia*;[62] Justice Ginsburg stated that gender discrimination requires "exceedingly persuasive" justification and that the measure must be substantially related to achieving an important government objective.[63] Strict scrutiny, the most intensive standard, is also the most consistent, with almost every example of its application seeing the impugned law held inconsistent with the Equal Protection Clause.[64] Under this standard, the

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[58] Discussion on this doctrine also often refers to 'substantial' or 'substantive' interests; Jesse H Choper, Richard H Fallon, Jr, Yale Kamisar and Steven H Shiffrin, *Constitutional Law: Cases – Comments – Questions* (10th edn, Thomson West 2006) 1363-1442.

[59] O'Connell (n 13) 337.

[60] Fredman, *Discrimination Law* (n 17) 118-125. The conventional understanding of the variable standard of review in the US is that these are three discrete categories. Occasionally, however, judges describe it as a pure spectrum, without discrete categories or standards, where the intensity varies depending on the context and the wrongfulness of the discrimination. Justice Marshall articulated this position in his dissent in *San Antonio Independent School District v Rodriguez* (1973) 411 US 1, 98-99:
[a] principled reading of what this Court has done reveals that it has applied a spectrum of standards [which] clearly comprehends variations in the degree of care with which the Court will scrutinize particular classifications, depending [on] the constitutional and societal importance of the interest adversely affected and the recognized invidiousness of the basis upon which the particular classification is drawn.

[61] *Romer v Evans* (1996) 517 US 620; *City of Cleburne v Cleburne Living Center, Inc* (1985) 473 US 432.

[62] *United States v Virginia* (1996) 116 S Ct 2264.

[63] *United States v Virginia* (1996) 116 S Ct 2264, 2274, 2279-2282.

[64] There are some exceptions: *Korematsu v United States* (1944) 323 US 214; *Grutter v Bollinger* (2003) 539 US 306; both of these cases are controversial in their application of strict scrutiny, though for different reasons.

courts require the impugned measure to be necessary and closely tailored to achieving a compelling government purpose.[65]

When applying strict scrutiny to discriminations in the context of fundamental interests, the US courts have struggled with the identification of what counts as "fundamental". Judges and commentators[66] have debated whether the interest needs to be a constitutional right (either explicit or implied) or whether it is sufficient that it be a socially or economically important interest. This is less of a problem in Ireland because the collection of rights in the Irish Constitution is more comprehensive than the US Bill of Rights and, crucially, education is a constitutional right in Ireland but not in the US.

As a result of education not being a constitutional right in the US Constitution, the US Supreme Court has been slow to find that education is a fundamental interest for the purposes of the Equal Protection Clause. There are some cases, however, that treat it as a fundamental interest. For example, in *Plyer v Doe*,[67] the Court found that a Texas law that provided free public education throughout the State but denied access to children of illegal immigrants violated the Equal Protection Clause. Justice Brennan, for the majority, applied strict scrutiny on the basis that education was fundamental in this context, even though he accepted the arguments of the State and the minority that "illegal aliens" are not a suspect class under the Equal Protection Clause and the right to education is not a constitutional right. In a concurring judgment, Justice Powell held that intensive scrutiny (he did not describe it as "strict") was appropriate, not because of the ground of discrimination, but because of the importance of education:

> Our review in a case such as these is properly heightened. The classification at issue deprives a group of children of the opportunity for

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[65] *Shapiro v Thompson* (1969) 394 US 618; *Kramer v Union Free School District* (1969) 395 US 621.

[66] For a sample, see, Choper, *et al* (n 58) 1363; Martha Morgan, 'Fundamental State Rights: A New Basis for Strict Scrutiny in Federal Equal Protection Review' (1982-1983) 17 Georgia Law Review 77; Robert Nagel, 'Legislative Purpose, Rationality, and Equal Protection' (1972-1973) 82 Yale LJ 123; Ralph Winter, 'Poverty, Economic Equality, and the Equal Protection Clause' [1972] Supreme Court Rev 41, 43; Gerald Gunther, *In Search of Evolving Doctrine on a Changing Court: A Model for a Newer Equal Protection* (1972) 86(1) Harv LR 1; Note, 'Developments in the Law: Equal Protection' (1965) 82 Harv LR 1065.

[67] *Plyer v Doe* (1982) 457 US 202; Choper, *et al* (n 58) 1440-1442.

> education afforded all other children simply because they have been assigned a legal status due to a violation of law by their parents. These children thus have been singled out for a lifelong penalty and stigma. A legislative classification that threatens the creation of an underclass of future citizens and residents cannot be reconciled with one of the fundamental purposes of the Fourteenth Amendment. In these unique circumstances, the Court properly may require that the State's interests be substantial and that the means bear a 'fair and substantial relation' to these interests.[68]

In other cases in the education context, however, the Court has declined to apply strict scrutiny on the basis that there is no constitutional right to education and that it is therefore not a fundamental interest. The most famous example of this is the earlier case of *San Antonio Independent School District v Rodriguez*.[69] This was a class action suit that challenged the Texan system of funding public education through local taxation. The system created a base level of state and federal funding and each district could make a contribution on top of this through local taxation. The District Court had found this to be unconstitutional having applied strict scrutiny, because it discriminated on the basis of wealth, which it said was a suspect classification, and in addition because education was a fundamental interest for the purposes of the Equal Protection Clause.[70] The Supreme Court, however, rejected both of these arguments and upheld the law having applied rational basis review. I deal with the first issue, whether wealth could be a suspect classification, in chapters 2 and 4.

Rejecting the second argument, that the education constituted a fundamental interest under the Equal Protection Clause, Justice Powell emphasised that education was neither an explicit nor implicit constitutional right and that its societal importance alone was insufficient to justify the application of strict scrutiny. The stark contrast between Justice Powell's positions in *San Antonio Independent School District* and the later case of *Plyer v Doe* are hard to reconcile. In *Plyer*, Justice Powell endorsed the view that the contextual

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[68] *Plyer v Doe* (1982) 457 US 202, 238-239 (internal footnotes and citations omitted).
[69] *San Antonio Independent School District v Rodriguez* (1973) 411 US 1; Choper, *et al* (n 58) 1431-1438; see also ch 2.
[70] *San Antonio Independent School District v Rodriguez* (1973) 411 US 1, 16.

importance of education justified a more intensive standard of review. This is consistent with the traditional view of the application of the Equal Protection Clause to the allocation of fundamental interests, captured in Justice Marshall's dissent in *San Antonio Independent School District*:

> [It] is true that this Court has never deemed the provision of free public education to be required by the Constitution. ... Nevertheless, the fundamental importance of education is amply indicated by the prior decisions of this Court, by the unique status accorded public education by our society, and by the close relationship between education and some of our most basis constitutional values.[71]

The application of this doctrine to other fundamental interests demonstrates that the interest does not always have to be a constitutional right in order to justify the imposition of strict scrutiny. For example, in a number of cases dealing with equality in the provision of voting facilities, the Supreme Court has held that even though the federal Constitution does not guarantee a right to vote in all state elections, once the franchise is extended to the people it must be granted equally and the Court can apply strict scrutiny review in order to ensure this.[72] For example, in *Harper v Virginia State Board of Elections*,[73] a poll tax in a state election was held to be unconstitutional:

> The right to vote in state elections is nowhere expressly mentioned. [There is no need to consider whether it is implicit] For it is enough to say that, once the franchise is granted to the electorate, lines may not be drawn which are inconsistent with the Equal Protection Clause of the Fourteenth Amendment. ... We have long been mindful that where fundamental rights and liberties are asserted under the Equal Protection Clause, classification which might invade or restrain them must be closely scrutinized and carefully confined.[74]

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[71] *San Antonio Independent School District v Rodriguez* (1973) 411 US 1, 111.
[72] *Harper v Virginia State Board of Elections* (1966) 383 US 663; *Kramer v Union Free School District* (1969) 395 US 621; *Reynolds v Sims* (1964) 377 US 533; *Karcher v Daggett* (1983) 462 US 725.
[73] *Harper v Virginia State Board of Elections* (1966) 383 US 663.
[74] *Harper v Virginia State Board of Elections* (1966) 383 US 663, 665, 670.

Once the fundamental interest has been identified, the case law applying strict scrutiny has been consistent. The clearest cases relate to equality in voting,[75] travel[76] and access to the courts.[77] Discriminations in the provision of these rights and interests are subject to strict scrutiny, which means they would need to be justified as necessary to serve a compelling state interest. For example, in *Shapiro v Thompson*,[78] a state law that restricted welfare payments only to those who had been resident in the state for at least a year was held to violate the equal protection clause. Having found that the right to travel was a fundamental interest, Justice Brennan held that the law failed the justification analysis. The only plausible compelling interest he identified was the desire to prevent fraud, but he held that the measure was not necessary to serve that interest because less discriminatory alternatives would be capable of achieving it.

In theory, discriminations on any basis in the context of a fundamental interest would be subject to strict scrutiny. In practice, however, the US Supreme Court sometimes gives consideration to the basis at issue as well as the context, and where it appears to be a particularly unfair basis, the Court is more willing to apply strict scrutiny. This may help explain the otherwise conflicting cases of *San Antonio Independent School District* applying rational basis review and *Plyer v Doe* applying a more intensive standard of review even though both involved an inequality in the context of education provision.

Despite this degree of uncertainty, the doctrine's principal focus is on the context of the inequality, which complements the primary Equal Protection Clause jurisprudence focusing on the basis of the inequality. This dual approach significantly expands the protection offered by the Constitution, allowing for discriminations on the basis of poverty, which ordinarily would only receive rational basis review, to be subject to strict scrutiny.[79] For example in *Griffin v*

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[75] *Harper v Virginia State Board of Elections* (1966) 383 US 663; *Kramer v Union Free School District* (1969) 395 US 621; *Reynolds v Sims* (1964) 377 US 533; *Karcher v Daggett* (1983) 462 US 725.
[76] *Shapiro v Thompson* (1969) 394 US 618; *Zobel v Williams* (1982) 457 US 55; *Saenz v Roe* (1999) 526 US 489.
[77] *Griffin v Illinois* (1956) 351 US 12; *Douglas v California* (1963) 372 US 353; *MLB v SLJ* (1996) 519 US 102.
[78] *Shapiro v Thompson* (1969) 394 US 618; see also, *Kramer v Union Free School District* (1969) 395 US 621.
[79] *Griffin v Illinois* (1956) 351 US 12; *Douglas v California* (1963) 372 US 353.

Illinois,[80] the Supreme Court held that a state must give an "indigent" criminal defendant a free trial transcript where it is necessary for "adequate and effective appellant review" of his conviction. Justice Black for the court held that the right of access to the courts was a fundamental interest and that to create an inequality like this between rich and poor violated the Equal Protection Clause. On the same reasoning, in *Douglas v California*,[81] the Supreme Court held that the Equal Protection Clause requires the State to pay for representation by counsel so that a defendant could lodge an appeal. Justice Douglas held that, without such guarantee of representation, an unacceptable discrimination between rich and poor would be created:

> Absolute equality is not required ... But where the merits of the one and only appeal an indigent has as of right are decided without the benefit of counsel, we think an unconstitutional line has been drawn between rich and poor. ... [There] is lacking that equality demanded by the Fourteenth Amendment where the rich man, who appeals of right, enjoys the benefit of counsel's examination into the record, research of the law, and marshalling of arguments on his behalf, which the indigent, already burdened by a preliminary determination that his case is without merit, is forced to shift for himself. The indigent, where the record is unclear or the errors are hidden, has only the right to a meaningless ritual, while the rich man has a meaningful appeal.[82]

The US Equal Protection Clause is not a perfect comparator for Article 40.1 in the Irish Constitution. However, it is an important model for the application of equality in conjunction with other rights and interests. The debate in the US has focused on the identification of fundamental interests; in the context of this thesis, that is less pressing because Article 42 in the Irish Constitution grants the right to free primary education.

Other legal systems have adopted a similar approach to the US Equal Protection Clause jurisprudence. Under the European Convention on Human Rights, for example, the margin of appreciation, which affects that standard, varies

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[80] *Griffin v Illinois* (1956) 351 US 12.
[81] *Douglas v California* (1963) 372 US 353.
[82] *Douglas v California* (1963) 372 US 353, 357-358.

according to the circumstances, subject-matter and background of the discrimination.[83]

The Canadian Supreme Court has not fully developed a context-sensitive approach but there are some suggestions in the case law of a variation to the standard of review depending on the context. The Court in *Law v Canada*[84] gave four contextual factors that are used to identify whether a distinction is discriminatory. Since *R v Kapp*,[85] these are relevant but non-determinative. The fourth factor is the nature of the interest affected by the alleged discrimination. Iacobucci J explained the significance of this in *Law*:

> [T]he discriminatory calibre of differential treatment cannot be fully appreciated without evaluating not only the economic but also the constitutional and societal significance attributed to the interest or interests adversely affected by the legislation in question. Moreover, it is relevant to consider whether the distinction restricts access to a fundamental social institution, or affects "a basic aspect of full membership in Canadian society", or "constitute[s] a complete non-recognition of a particular group".[86]

L'Heureux-Dubé J dissenting in *Egan*[87] expressed similar sentiments and the Supreme Court has also indicated that important interests include employment,[88] eligibility to vote,[89] parental rights,[90] and autonomy.[91]

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[83] *Stec v UK* App Nos 65731/01 and 65900/01 (ECHR, 12 April 2006); *Burden v UK* App No 13378/05 (ECHR, 29 April 2008); *Andrejeva v Latvia* App No 55707/00 (ECHR, 18 February 2009); Robin White and Clare Ovey, *Jacobs, White & Ovey: The European Convention on Human Rights* (5th edn, OUP 2010) 563-564.
[84] *Law v Canada* [1999] 1 SCR 497.
[85] *R v Kapp* [2008] 2 SCR 483.
[86] *Law v Canada* [1999] 1 SCR 497, [40].
[87] *Egan v Canada* [1995] 2 SCR 513, [48]-[57], [62]-[66].
[88] *Lavoie v Canada* [2002] 1 SCR 769, [45]; *Nova Scotia (Workers' Compensation Board) v Martin* [2003] 2 SCR 504, [104].
[89] *Corbiere v Canada* [1999] 2 SCR 203, [17].
[90] *Trociuk v British Columbia* [2003] 1 SCR 835, [14]-[15].
[91] *Carter v Canada* [2015] 1 SCR 331; *Little Sisters Book and Art Emporium v Canada* [2000] 2 SCR 1120.

2.2 Varying the Standard of Review in Ireland: A New Role for the "Context of Discrimination" Approach?

In the US, Canada and ECHR equality jurisprudence, the standard of review varies depending on the context in which the impugned discrimination occurs. A variation in the standard of review is the first of two versions of conjoined application explored in this chapter. The theory proposed in this subsection is that the conjoined application in this way would not be a dramatic evolution in Irish constitutional law. The necessary roots for such a development are already in place and it would just take a conscious re-interpretation of previous case law in light of the move in Irish constitutional equality law towards a more substantive version of equality.[92] Indeed, the level of equality protection already varies, albeit in the other direction, when other constitutional values are at stake. The courts have previously held that discriminations appearing to breach Article 40.1 can be saved if they serve another constitutional value.[93] The proposal here is that this should also work in reverse, so that the standard of review intensifies when equality and the other constitutional value are pointing in the same direction.

2.2.1 A Variable Standard of Review in Conjoined Equality and Rights Cases

Before outlining the potential for this development, it is worth noting that Doyle briefly considered the possibility that the application of Article 40.1 in conjunction with another constitutional right would be subject to a more intensive standard of review.[94] As Doyle notes, the High Court judgments of Quirke J in *Breathnach v Ireland*[95] and Budd J in *O'Donovan v AG*[96] appear to apply a higher standard of review for Article 40.1 in conjunction with the right to vote in Article 16.

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[92] See, Ben Mitchell, 'Process Equality, Substantive Equality and Recognising Disadvantage in Constitutional Equality Law' (2015) 53 Irish Jurist 36.
[93] *O'Brien v Stoutt* [1984] IR 316; Hogan and Whyte (n 2) 1374-1377; Doyle, *Constitutional Equality Law* (n 27) 99-103; Similarly, Whyte and Doyle demonstrate that the courts have sometimes applied greater deference to government action relating to socio-economic rights than in other areas and conclude, "The standard of review is dependent on the sphere of review." in Oran Doyle and Gerry Whyte, 'The Separation of Powers and Constitutional Egalitarianism after the *Health (Amendment) (No 2) Bill Reference*' in Eoin O'Dell (ed), *Older People in Modern Ireland: Essays on Law and Policy* (First Law 2006).
[94] Doyle, *Constitutional Equality Law* (n 27) 112.
[95] *Breathnach v Ireland* [2000] 3 IR 467.
[96] *O'Donovan v AG* [1961] IR 114.

In *Breathnach*, the High Court found that the denial of postal voting to a prisoner was a breach of his right to equality under Article 40.1 because the limited provision of postal voting was under-inclusive by failing to account for people in custody.[97] Unfortunately, Quirke J did not articulate the standard of review but he did analyse the impugned State action under Articles 16 and 40.1 concurrently. Doyle's view that the case "suggested a tendency to read Art.40.1 in conjunction with Art.16, thus producing a more stringent standard of review"[98] is sustained more in the simple fact that Quirke J found a violation of the right to equality, and in the amalgamation of the arguments under both Articles, rather than in any explicit reasoning on the standard of review.

Similarly, as I analyse in chapter 3, in *O'Donovan*, the Court held that disparities in the ratio between members of Dáil Eireann and the population of the constituencies was a breach of Article 16. Budd J used a harmonious interpretation of Articles 16 and 40.1 to find that Article 16 presumes equality between voters.[99]

Budd J did not set out a standard of review, and also did not say that it was "heightened" or intensified, but the discussion of justification throughout the judgment relies on the idea of necessity. Necessity is a less deferential standard than rational relationship, which is more usually applied when Article 40.1 is at stake. Despite the High Court judgments in *O'Donovan* and *Breathnach*, Doyle doubts whether they are representative of Irish law. Keane CJ in the Supreme Court in *Breathnach* overturned the High Court judgment and addressed Articles 16 and 40.1 separately.[100] The standard of review favoured by Keane CJ seemed to be based on reasonableness, which is more deferential than a necessity standard, though, once again, the judgment does not articulate the specifics.[101]

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[97] *Breathnach v Ireland* [2000] 3 IR 467, 471, 476-477.
[98] Doyle, *Constitutional Equality Law* (n 27) 112.
[99] *O'Donovan v AG* [1961] IR 114, 137.
[100] Similarly, Denham J in *Sinnott v Minister for Education* [2001] 2 IR 545, 660-661, adopted a disjunctive approach to Articles 40.1 and 42, analysing each separately. Denham J held that Jamie Sinnott's right to be held equal before the law entitled him to free primary education. Denham J thus did not see Article 40.1 offering any additional protection above that given by Article 42. Dissenting on this issue, Denham J also held that his mother, Kathy Sinnott, had been discriminated against contrary to Article 40.1; Conor O'Mahony, *Educational Rights in Irish Law* (Thomson Round Hall 2006) 127-130.
[101] *Breathnach v Ireland* [2001] 3 IR 230, 238.

Despite the Supreme Court in *Breathnach* taking a different approach, the courts have not explicitly rejected the possibility that a conjoined application of rights with equality leads to a more intensive standard of review. Several subsequent cases fit this model, including *Redmond v Minister for the Environment*,[102] *DX v Buttimer*,[103] and *BG v Murphy*.[104]

2.2.2 Developing a Variable Standard of Review in Irish Law

Applying a more intensive standard of review when Article 40.1 applies in conjunction with, or in the context of, other rights would not be a revolutionary move in constitutional equality law. The crucial first step, analysing inequality according to the context in which it occurred rather than on the basis of the discrimination, has already been a feature of constitutional law in Ireland in the "context of discrimination" approach to the human personality doctrine.

That approach was associated with a restrictive interpretation of Article 40.1, which the courts have subsequently avoided.[105] My argument, therefore, is not to resurrect the traditional context of discrimination approach[106] but to rehabilitate the core idea of that doctrine, which is that inequality in some contexts can be more problematic than in other contexts. This basic idea is fundamental to statutory equality law,[107] which in Ireland only deals with discrimination in the contexts of employment and the provision of good, services, property and education. This version of the context of discrimination approach would be concerned with discriminations that offend the essential human dignity of people being discriminated against.

There are a number of issues raised by this proposal. First, the role played by dignity is different to the role it plays when identifying grounds of discrimination.

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[102] *Redmond v Minister for the Environment* [2001] 4 IR 61; Doyle, *Constitutional Equality Law* (n 27) 112-113, n 95.
[103] *DX v Buttimer* [2012] IEHC 175.
[104] *BG v Judge Murphy (No 2)* [2011] 3 IR 748.
[105] Hogan and Whyte (n 2) 1342-1350; Whyte, 'A Comment on the Constitution Review Group's Proposals on Equality' (n 55); Doyle (n 27) 126-135; John O'Dowd, 'The Principle of Equality in Irish Constitutional and Administrative Law' (1999) 11 European Review of Public Law 769.
[106] *Quinn's Supermarket v Attorney General* [1972] IR 1; *Murtagh v Cleary* [1972] IR 330; see also, *Madigan v Attorney General* [1986] ILRM 136; *McMenamin v Ireland* [1996] 2 IR 100; *O'Q v Buttimer* [2009] IEHC 25.
[107] Fredman, *Discrimination Law* (n 17) 143.

The principle of dignity is inherent to equality under Article 40.1 by virtue of the phrase "as human persons". As I demonstrate in chapter 4, the Irish courts use dignity as the principal way of identifying the presumptively proscribed grounds of discrimination, such as race or gender. Dignity is used to identify the ground, but it does not confine the equality protection just to discriminations that offend dignity; instead, it protects against all the types of inequality that the Constitution recognises, whether or not the impugned discrimination itself violates dignity.

In the resurrected "context of discrimination" approach I propose here, however, dignity would be the outer limit for the equality protection. For example, if the right to equality were to apply in conjunction with the right to education, certain discriminations would be problematic, such as distinguishing children according to hair colour, or even social class, whereas others, such as age, would be less problematic in this context. The difference between them is that discrimination on the basis of hair colour is a dignity violation in this context, as it has no relevance to the child's ability to benefit from education, whereas discrimination on the basis of age can be important in education as it often correlates to the academic stage of the child. Hair colour, however, does not have to become a presumptively proscribed ground of discrimination. There may be instances where discrimination on the basis of hair colour is unproblematic and the groups defined by hair colour are not subject to systemic wrongful inequality and so would not automatically need a more intensive standard of review across a range of contexts. The revived "context of discrimination" approach thus relies on the importance of the other constitutional right or interest to expand the protection beyond that offered by Article 40.1 alone.

The second issue is to outline and emphasise the limits of this version of the context of discrimination approach. The greatest challenge for people interested in equality is to construct principled limits to the concept. Equality itself is an abstract concept; anything can be considered equal or unequal to another thing, depending on the criterion we use to measure equality. As a result, we have to say what kinds of inequality matter to our right to equality because, as the courts

regularly assert, "there is a sense in which to legislate is to discriminate" and not all distinctions are constitutionally problematic.[108]

US equal protection jurisprudence is limited by either the basis of discrimination, when the challenge is founded on the ground of discrimination, and alternatively by the context of the discrimination, when the challenge is to the unequal allocation of fundamental interests. The context of discrimination approach advocated here would be analogous to the US model, and would be limited by the contexts that are problematic to Article 40.1.

The US courts have debated whether the protected contexts are limited to constitutional rights or whether they include other socially or economically protected interests. In Ireland, this debate could arise but it would be less pronounced because the Irish Constitution is more comprehensive than the US Bill of Rights. Consequently, even on the narrower version, there are several explicit and implicit rights recognised in the Irish Constitution and equality in the context of those rights could be protected. A slightly more expansive approach could look to values, other than rights, that are endorsed by the Constitution and protect equality in those contexts as well. For example, the Directive Principles of Social Policy in Article 45 endorse values that implicate equality, such as "the welfare of the whole people", the access of all to adequate livelihood, a spread of ownership of private property throughout the community, and the State's pledge "to safeguard with especial care the economic interests of the weaker sections of the community". There are numerous values endorsed in Article 45 and, even though the extent to which the courts can implement them on their own terms is contested,[109] O'Connell argues that courts could scrutinise any provision that the State makes in the context of these values for discriminations and inequalities that violate dignity.[110] Finally, the most expansive version could follow Justice

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[108] *An Blaoscaod Mór Teoranta v Commissioner of Public Works (No 3)* [2000] 1 IR 6, 18; *Brennan v Attorney General* [1983] ILRM 449, 480.

[109] See ch 4. Whyte argues, building on the Kenny J's approach in *Murtagh Properties v Cleary* [1972] IR 330, 335, that the courts cannot use Article 45 when reviewing legislation but can use it for other purposes, such as the identification of implied constitutional rights; Whyte, *Social Inclusion and the Legal System* (n 7) 54-55; the High Court in *Attorney General v Paperlink* [1984] ILRM 373 endorsed this use of Article 45.

[110] O'Connell (n 13) 337.

Marshall's approach and protect equality in the context of substantial interests, even without a constitutional endorsement of that interest.

2.2.3 Confining the Doctrine to Reasonable Limits

The contexts protected under Article 40.1 would be limited in several ways. First, the courts would limit the protected context just to those implicating constitutional values, or would adopt principles identifying additional contexts, such as a high degree of social and economic importance.

Secondly, the doctrine would also be limited by the requirement that the inequality at stake violate the dignity of the people discriminated against. This requirement would maintain the textual link to Article 40.1's reference to "as human persons". Under the basis of discrimination approach, this textual link is maintained by the fact that the grounds that receive more intensive scrutiny (those that are presumptively proscribed) are identified according to dignity, or are important human characteristics.

Thirdly, both the "basis of discrimination" and the revived "context of discrimination" approaches can exist in tandem under Article 40.1. They were historically incompatible because the pre-interpretive values of the judges who used them were in tension. The context of discrimination approach was used to nullify Article 40.1 entirely; far from being a conception of how the right to equality should operate, it was motivated by a desire to have no right to equality at all. On the other hand, the basis of discrimination approach to Article 40.1 was motivated by a view that the right to equality is concerned with status-based inequality and that discriminating on the basis of certain grounds violates dignity. The most important difference between the positions is the underlying motivation, rather than the legal mechanisms used to implement Article 40.1. There is thus no reason for the two approaches to be incompatible.

Analogous to the Equal Protection Clauses jurisprudence, the basis of discrimination approach would be the primary mechanism for implementing Article 40.1 and the revived context of discrimination approach would be secondary. This would expand the protection offered by Article 40.1. However, it would not be a dramatic act of judicial creativity, because it would rely on

doctrinal roots that have a long, though tarnished, pedigree in constitutional law. The expansion would also be principled. As I discuss above and in chapter 1, a right to equality cannot guarantee all types of equality in all instances for all people. The great danger with a right to equality, therefore, is that judges can use it selectively to invalidate laws without a principled explanation of why certain inequalities are constitutional and other are not. Adopting a revived context of discrimination approach in tandem with the basis of discrimination approach thus offers a limited expansion in equality protection that is guided by the principle of dignity in Article 40.1 and that relies on the principles and values that exist in the Constitution.

2.3 Sketch of a Future Constitutional Equality Law

If the courts were to accept the arguments in this chapter and thesis, Article 40.1 would be more protective of equality, applied with greater consistency and have a clear principled approach. At a basic level, Article 40.1 would apply generally to all discriminations according to a deferential rationality standard of review. The courts use Article 40.1 in this manner in the three categories of cases, which I distinguish from true equality cases in chapter 3.[111] This generalised application of Article 40.1 to any distinction does not protect substantive equality of condition directly but it does guarantee consistency, which is an important and sometimes undervalued aspect of substantive equality,[112] and is crucial to the rule of law.[113] It is a common approach for states with an open-textured constitutional guarantee of equality that does not list any grounds, such as Ireland and the USA,[114] but in countries such as Canada where the Charter of

[111] Eg uphold differences in extradition mechanisms depending on the receiving country or the scheme under which the deportation is being made (*Minister for Justice, Equality and Law Reform v Tobin* [2012] 4 IR 147); different sentencing practices for people convicted of different crimes (*Gilligan v Ireland* [2013] 2 IR 745); see also, *Webster v Dun Laoghaire/Rathdown County Council* [2014] IEHC 181; *Murphy v Ireland* [2014] 1 IR 198; *Quinn v IBRC* [2013] 1 IR 393; *Brehuta v DPP* [2012] IEHC 498; *Canty v Ireland* [2011] IESC 27; *O'Sullivan v Chief Executive of the Irish Prison Service* [2010] 4 IR 562; *State (Hartley) v Governor of Mountjoy Prison* (SC, 21 December 1967).

[112] Robert Wintemute, 'Sexual Orientation and the Charter: The Achievement of Formal Equality (1985-2005) and its Limits' (2004) 49 McGill LJ 1143; Fredman, *Discrimination Law* (n 17) 8.

[113] Tom Bingham, *The Rule of Law* (Penguin 2010) 55.

[114] Fredman, *Discrimination Law* (n 17) 118.

Fundamental Rights and Freedoms provides a list of protected grounds there is no generalised application of the right in this way.[115]

A variable standard of review would also apply. This is where Article 40.1 would begin to protect a right to equality based on substantive equality of condition. The more intensive standard of review would be used to protect equality on the presumptively proscribed grounds of discrimination, such as race, gender or social class. This would occur whenever the State is implicated in an inequality on the basis of a presumptively proscribed ground,[116] whether this is through direct discrimination on the part of the State or a failure to account for a difference or pre-existing disadvantage that causes or perpetuates an inequality. Direct and indirect discrimination would be justiciable, as would a failure by the State to intervene and take reasonable steps to rectify persistent inequality on these grounds. The more intensive standard of review would also apply to inequalities in certain contexts that are important to the Constitution, such as education, and would protect against discriminations that violate dignity, such as systemic social class inequality in school. The more intensive standard of review would be accompanied by a partial shift in the burden of proof. This could be a shift in the evidential burden, without affecting the ordinary presumption of constitutionality. The plaintiff would have to demonstrate a *prima facie* breach of Article 40.1 and the State's evidential burden would be either to rebut the *prima facie* case or to demonstrate an adequate justification on the more intensive standard of review.[117]

This is not a radical interpretation of Article 40.1. First, none of the arguments presented in this thesis are entirely speculative; each of them has some basis in

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[115] Lynn Smith and William Black, 'The Equality Rights' in Errol Mendes and Stéphane Beaulac (eds), *Canadian Charter of Rights and Freedoms* (5th edn, LexisNexis 2013) 985-990; Peter Hogg, *Constitutional Law of Canada* (Volume 2, 5th edn, Thomson Carswell 2007) 627.

[116] Doyle, Constitutional Equality Law (n 27) 136-142; *Quinn's Supermarket v Attorney General* [1972] IR 1, 13-14; *Re Article 26 and the Employment Equality Bill 1996* [1997] 2 IR 321, 347; *An Blascaod Mór Teoranta v Commissioner of Public Works* [2000] 1 IR 6; *Fleming v Ireland* [2013] 2 ILRM 73, [130]; *Gilligan v Ireland* [2013] 2 IR 745; *Murphy v Ireland* [2014] 1 IR 198, [34].

[117] Doyle, 'Judicial scrutiny of legislative classification' (n 52); see also, Fredman arguing discriminations in the distribution of resources may well be legitimate but that can only be determined if the State offers a justification that can then be tested by the courts, Fredman, 'Providing Equality' (n 20) 173.

precedent. Secondly, the reason this vision does not exist already is largely to do with arbitrary restrictions that have been placed on the right to equality, rather than principled limits on its application. The only fundamental change from the current version of constitutional equality law is that the version envisaged here is coherent and follows the existing principles to their logical conclusions.

3. Rights and Equality in Conjunction: The Basis for a Right to Equality in Education

In this section I consider an alternative version of conjoined applications of rights with equality. Unlike the version in section 2 above, in which the two rights and their analysis remain distinct, under this model the contents (as well as the application) of the independent rights are conjoined. I ask whether the conjoined application of the rights to equality and to education is a basis for a "right to equality in education". This would expand the rights protection in order to respect constitutional norms more completely.[118]

As I discuss below, there are some cases that could be interpreted under this model but in none of these did the reasoning rely explicitly on the idea of conjoined application. I conclude that though this model is interpretively possible, it is unlikely to develop under the Irish Constitution. Before considering its plausibility in Ireland, I examine comparative models under the ECHR and the Canadian Charter of Rights and Freedoms.

3.1: Equality and Education under the European Convention on Human Rights

In the primary text of the ECHR, there is no right to equality as such.[119] Article 14, however, contains a prohibition on discrimination on a number of grounds:

> The enjoyment of the rights and freedoms set forth in this Convention shall be secured without discrimination on any ground such as sex, race,

[118] Using the example of South Africa, Fredman argues that a conjoined application, rather than simply interpreting the other right "in light of" equality, leads to greater protection of distributive equality because the courts are less deferential when making conjoined applications than when applying equality in isolation; Fredman, 'Providing Equality' (n 20) 175.

[119] Separately, Article 1 of Protocol 12 provides an equality guarantee but most states (including Ireland) have not adopted it and it has not yet received detailed consideration by the European Court of Human Rights. As a result, White and Ovey suggest it is an unimportant provision, White and Ovey (n 83) 568.

> colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status.

An important feature of Article 14 is its "parasitic" nature, which means that it does not prohibit discrimination by states in all contexts, but only when the discrimination occurs within the "ambit" of an other right under the ECHR. In *Kafkaris v Cyprus*,[120] the European Court of Human Rights (ECtHR) summarised this feature of Article 14:

> The Court reiterates that Article 14 of the Convention has no independent existence, since it has effect solely in relation to the rights and freedoms safeguarded by the other substantive provisions of the Convention and its Protocols. However, the application of Article 14 does not presuppose a breach of one or more of such provisions, and to this extent it is autonomous ... A measure which in itself is in conformity with the requirements of the Article enshrining the right or freedom in question may however infringe this Article when read in conjunction with Article 14 for the reason that it is of a discriminatory nature ... Accordingly, for Article 14 to become applicable it suffices that the facts of a case fall within the ambit of another substantive provision of the Convention or its Protocols ...[121]

Article 14 has a function independent of other articles, which means that it is possible to bring a claim based only on discrimination without asserting a breach of a substantive right under the ECHR.[122] The added value of Article 14 is that conduct otherwise permissible on the terms of the substantive right can be held

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[120] *Kafkaris v Cyprus* App No 21906/04 (ECHR, 12 February 2008).

[121] *Kafkaris v Cyprus* App No 21906/04 (ECHR, 12 February 2008), [159]; see also, *Abdulaziz, Cabales and Balkandali v United Kingdom* App No 9214/80, 9473/81, 9474/81 (ECHR, 28 May 1985); *Belgian Linguistics Case* (No 2) (1968) 1 EHRR 252; See Mel Cousins, 'The European Convention on Human Rights, non-discrimination and social security: great scope, little depth?' (2009) 16(3) Journal of Social Security Law 120; Irish Human Rights Commission, *European Convention on Human Rights Guide for the Civil & Public Service* (IHRC 2012) 65-66.

[122] The substantive right does not need to be violated on its own terms for an Article 14 claim to be taken; *Abdulaziz, Cabales and Balkandali v United Kingdom* App No 9214/80, 9473/81, 9474/81 (ECHR, 28 May 1985).

to violate the ECHR by virtue of being discriminatory.[123] For example, in *Stec v UK*,[124] the Court held that even though there is no obligation on a state to set up a social security system under the right to property in Article 1 of Protocol 1 (A1P1), if a state establishes one it cannot discriminate while doing so.[125] Another famous and relevant example is *Belgian Linguistics*.[126] There the Court held that even though the right to education in Article 2 of Protocol 1 (A2P1) does not impose an obligation to provide publically funded schools, once the state chooses to provide them it cannot have discriminatory entry requirements:

> Thus, persons subject to the jurisdiction of a Contracting Party cannot draw from Article 2 of the Protocol (P1-2) the right to obtain from the public authorities the creation of a particular kind of educational establishment; nevertheless, a State which had set up such an establishment could not, in laying down entrance requirements, take discriminatory measures within the meaning of Article 14 (art. 14).[127]

Once a distinction between people on the basis of a protected ground has been determined to be "discriminatory", the state then carries the burden of proving that it is justified by pursuing a legitimate aim and has proportionality between the means and that aim.[128] The Court has held that relevant distinctions can be either on the face of the law or in its effect, thus covering both direct and indirect discrimination.[129]

Article 14 effectively operates to change the scope of what the rights protect. It covers conduct that would be acceptable under the substantive right, if applied in isolation, and the equality provision itself cannot be applied in isolation. Thus,

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[123] When the state action has been held to violate the substantive right, the Court will generally not consider the Article 14 challenge as well, unless "a clear inequality of treatment in the enjoyment of the right in question is a fundamental aspect of the case". *Chassagnou v France* App Nos 25088/94, 28331/95 and 28443/95 (ECHR, 29 April 1999), [89].

[124] *Stec v UK* App No 65731/01 and 65900/01 (ECHR, 12 April 2006).

[125] *Stec v UK* App No 65731/01 and 65900/01 (ECHR, 12 April 2006); White and Ovey (n 83) 555.

[126] *Belgian Linguistics Case (No 2)* (1968) 1 EHRR 252.

[127] *Belgian Linguistics Case (No 2)* (1968) 1 EHRR 252, [I.B.9]; White and Ovey (n 83) 548.

[128] See, *Burden v UK* App No 13378/05 (ECHR, 29 April 2008); *Chassagnou v France* App Nos 25088/94, 28331/95 and 28443/95 (ECHR, 29 April 1999); *Andrejeva v Latvia* App No 55707/00 (ECHR, 18 February 2009).

[129] *DH and Others v Czech Republic* App No 57325/00 (ECHR, 13 November 2007).

it is the unique confluence of the two Articles that makes the discriminatory conduct unacceptable. Applied in conjunction in the education cases, they protect a degree of equality in education.

The ECHR is an interesting basis for this idea, but it is important to clarify the extent to which it is a not a perfect fit for the model. The core of my suggestion is that the scope of protection increases when rights and equality are applied in conjunction. The comparative analysis of Article 14 offers a structure (or method to follow), based on the "ambit" of the substantive right. Article 14, of course, cannot be applied in isolation so it is impossible to test whether the scope of the equality protection is increased or whether it is just the scope of protection offered by the substantive right that increases. Even though Article 1 of Protocol 12 (A1P12) does provide a right to equality that can be applied in isolation, it is difficult to compare this protection of equality with that offered by Article 14 because A1P12 has been ignored by many states, including Ireland. Consequently, its operation has been virtually non-existent. The irrelevance of this Article means the ECHR does not offer a complete example of this model of conjoined application of rights with equality. What it does offer, however, is an explicit structure for a conjoined application of rights and equality.

A number of important ECHR cases deal with the conjoined application of Article 14 with the right to education in A2P1. These cases are worth outlining because they offer a glimpse of the right to "equality in education". A2P1 is not a particularly progressive manifestation of the right to education. For example, despite education's place as a quintessential social, economic and cultural right, A2P1 adopts a negative formulation that reflects instead the liberal traditions of the ECHR:

> No person shall be denied the right to education. In the exercise of any functions which it assumes in relation to education and to teaching, the State shall respect the right of parents to ensure such education and teaching in conformity with their own religions and philosophical convictions.[130]

[130] For analysis of the strength of this right, see White and Ovey (n 83) ch 21.

Negative language notwithstanding, the ECtHR regularly applies the right to education in conjunction with Article 14. Claims based on the right to education in conjunction with equality have sometimes been more effective than claims based on the right to education alone. For example, in *Belgian Linguistics*,[131] the first ECtHR case to consider the right to education, the Court rejected each of the claimants' arguments based on A2P1, except for one in conjunction with Article 14. The Court held that the educational provision satisfied the requirements of the substantive education right, but then held that there was unjustified direct discrimination between French and Dutch speaking students.

The case concerned the complex compromise in Belgian linguistic laws, the relevant parts of which ensured education would be through Dutch in Dutch-speaking regions and through French in French-speaking regions. In designated "unilingual" areas, education provided in another language would not be supported by the State. In six communes near Brussels, however, a blended system existed that allowed for both French and Dutch schools. The Court upheld the vast majority of the provisions but it found a violation of Article 14 in conjunction with A2P1 on one discrete issue. The violation arose because of direct discrimination in the rules of admission to the language schools. Dutch speaking children living in French speaking regions were allowed access to the Dutch speaking schools in these six communes, but the reciprocal arrangements were not the same for French speaking schools. French children living in Dutch speaking regions were not allowed use the French schools in these communes.[132] The Court held that the direct discrimination violated the ECHR:

> in so far as it prevents certain children, solely on the basis of the residence of their parents, from having access to the French-language schools existing in the six communes.[133]

This case is rightly seen as foundational but the Court reached a narrow conclusion. The applicants only succeeded on one discrete argument, and the Court held that it was consistent with A2P1, on its own terms and in conjunction with Article 14, to have segregated unilingual education. An important feature of

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[131] *Belgian Linguistics Case (No 2)* (1968) 1 EHRR 252.
[132] *Belgian Linguistics Case (No 2)* (1968) 1 EHRR 252.
[133] *Belgian Linguistics Case (No 2)* (1968) 1 EHRR 252.

the case is that the Court appeared to accept the argument by the European Commission of Human Rights that the conjoined application means "it is necessary for Article 2 (P1-2) to be read 'as though Article 14 (art. 14) were its third paragraph, so to speak'."[134] This reinforces the claim made earlier that the conjoined application guarantees a degree of equality in education.

More recently, the case of *DH v Czech Republic*[135] is one of the most successful Article 14 cases.[136] The applicants, members of the Roma community, successfully challenged the segregation of disproportionate numbers of Roma children into special schools as racial discrimination. The case is notable as one of the strongest acknowledgements by the Court that indirect discrimination violates Article 14,[137] and that statistical evidence can be used to establish this claim.[138] Its significance for this thesis lies in the emphasis on substantive equality in the context of education. At the time, the Czech Republic provided schools that catered exclusively for children with special needs. Despite having laudable aims, as noted by the Court, in practice they excluded large numbers of Roma children from mainstream schools; over half of the Roma students in the education system were in the special schools and they constituted 70% of the total number of students in the special schools.[139] These numbers were grossly out of proportion with the size of the Roma population in the Czech Republic:

> 193. ... Despite being couched in neutral terms, the relevant statutory provisions therefore had considerably more impact in practice on Roma children than on non-Roma children and resulted in statistically disproportionate numbers of placements of the former in special schools.
>
> 194. Where it has been shown that legislation produces such a discriminatory effect, the Grand Chamber considers that, as with cases

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[134] *Belgian Linguistics Case (No 2)* (1968) 1 EHRR 252.
[135] *DH and Others v Czech Republic* App No 57325/00 (ECHR, 13 November 2007).
[136] See, White and Ovey (n 83) 511-512, 564-565; O'Connell (n 13) 340-341; Mark Bell, *Racism and Equality in the European Union* (OUP 2009) ch 2.
[137] Earlier suggestions relied on by the Court include *Thlimmenos v Greece* Application no. 34369/97 (ECHR, 6 April 2000) and *Stec v United Kingdom* App No 65731/01 and 65900/01 (ECHR, 12 April 2006).
[138] *DH and Others v Czech Republic* App No 57325/00 (ECHR, 13 November 2007), 63-64.
[139] *DH and Others v Czech Republic* App No 57325/00 (ECHR, 13 November 2007), 6, 66-67.

> concerning employment or the provision of services..., it is not necessary in cases in the educational sphere to prove any discriminatory intent on the part of the relevant authorities ...
>
> 195. In these circumstances, the evidence submitted by the applicants can be regarded as sufficiently reliable and significant to give rise to a strong presumption of indirect discrimination.[140]

Having concluded that the presumption of indirect discrimination had not been rebutted by an objective and reasonable justification, the Court found a violation of Article 14 in conjunction with A2P1.[141] The vision of substantive equality in education endorsed in its conclusion is noteworthy:

> 207. The facts of the instant case indicate that the schooling arrangements for Roma children were not attended by safeguards (see paragraph 28 above) that would ensure that, in the exercise of its margin of appreciation in the education sphere, the State took into account their special needs as members of a disadvantaged class ... Furthermore, as a result of the arrangements the applicants were placed in schools for children with mental disabilities where a more basic curriculum was followed than in ordinary schools and where they were isolated from pupils from the wider population. As a result, they received an education which compounded their difficulties and compromised their subsequent personal development instead of tackling their real problems or helping them to integrate into the ordinary schools and develop the skills that would facilitate life among the majority population. Indeed, the Government have implicitly admitted that job opportunities are more limited for pupils from special schools.[142]

Like all public interest litigation,[143] the legal victory in *DH* is only as valuable as the social change it generates. Educational inequality remains for Roma children

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[140] *DH and Others v Czech Republic* App No 57325/00 (ECHR, 13 November 2007), 67, [193]-[195].
[141] *DH and Others v Czech Republic* App No 57325/00 (ECHR, 13 November 2007), 70-71.
[142] *DH and Others v Czech Republic* App No 57325/00 (ECHR, 13 November 2007), 71.
[143] Whyte, Social Inclusion and the Legal System (n 7); Steven Budlender, Gilberty Marcus SC and Nick Ferreira, *Public interest litigation and social change in South Africa:*

across Europe and returned to the Court in 2010 in *Oršuš v Croatia*,[144] in which the Court held that segregation according to language ability in a way that disproportionately disadvantaged Roma children was unjustified indirect discrimination.

These cases are of interest as comparative examples of how a right to equality in education could operate. They are also relevant, with the rest of the Article 14 jurisprudence, as a model of how the right to equality and another right can apply in conjunction. The ECHR does not give a complete version of this model, but the structure provided for in Article 14 does offer a vision of how such an application could operate.[145]

3.2 Equality and Rights Under the Canadian Charter of Rights and Freedoms

Another loose fit with this model of conjoined application is the secondary role of equality under the Canadian Charter of Rights and Freedoms.[146] O'Connell notes the Canadian example of using equality in order to protect socio-economic rights indirectly,[147] and, as noted above, there is some suggestion in Canada that the standard of review could become more intensive when applied in certain contexts, analogous with the US fundamental interests doctrine. The secondary role of relevance here is the influence that Section 15 equality has had on the rest of the Charter and elsewhere in the legal system. Beyond simply being used as an interpretive aid, some of the cases in this field fit under the model proposed here, which is that equality applied in conjunction with other rights can expand the protection offered by both rights.

Strategies, tactics and lessons (Atlantic Philanthropies 2014) 20-24; see also, Martha Minow, *In Brown's Wake* (OUP 2010) ch 1.

[144] *Oršuš v Croatia* App No 15766/ 03 (ECHR, 16 March 2010).

[145] Connolly argues that Article 14 in conjunction with A2P1 could be a basis for challenging social class inequality in British schools: Michael Connolly, 'Social mobility, education and the European Convention on Human Rights' (2013) European Human Rights Law Review 152, 152, 163; A recent decision of the UK Supreme Court perhaps bolster this claim. In *R (Tigere) v Secretary of State for Business* [2015] UKSC 57, a 3:2 majority held that withholding a student loan from a migrant student violated A2P1 in conjunction with Article 14.

[146] The Constitutional Court in South Africa has taken an analogous approach on occasion as well; see, Saras Jagwanth, 'Expanding equality' (2005) Acta Juridica 131; Sandra Liebenberg and Beth Goldblatt, 'The Interrelationship Between Equality and SE Rights under South Africa's Transformative Constitution' (2007) 23(2) S Afr J HR 335.

[147] O'Connell (n 13) 336.

Smith and Black cite a number of sub-constitutional cases in which the value of equality has influenced the interpretation of laws.[148] A number of these cases deal with common law[149] or statutory rights[150] and show the indirect role that constitutional documents can play in influencing the legal system. They also cite cases dealing with the Charter, in which they suggest equality has influenced the interpretation of other substantive rights, such as the freedoms of association,[151] expression or religion,[152] or the fair trial rights in Section 7.[153] Some of these cases have been controversial in the way they have used equality. Hogg, in particular, has been critical of the Supreme Court of Canada's reasoning.[154] In these cases, the Court has found a "Charter value" in equality and used that to influence the interpretation of other rights in the Charter. Hogg's view that this is problematic stems from the limited role for the Charter, which is more confined than a general constitution; in principle it applies only to the government, and the horizontally applicable part of the common law is therefore able to continue unaffected by the Charter. Given the anomalies this would create in the protection of human rights, the courts have developed the principle that "Charter values" exist and that they can influence the development of the common law.[155] These values reflect the Charter rights, but the difference is that they are more general and, as Hogg points out, are not subject to the same formal limitations as are written into the Charter.[156] Hogg's criticism of the cases at issue here is that the Court uses these Charter values, not just to develop the common law

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[148] Smith and Black (n 115) eg, *R v Mills* [1999] SCJ No 68, [1999] 3 SCR 668; *R v Darrach* [2000] SCJ No 46, [2000] 2 SCR 443; *R v Mabior* [2012] SCJ No 47, [2012] 2 SCR 584 (SCC).

[149] *R v Mabior* [2012] SCJ No 47, [2012] 2 SCR 584 (SCC).

[150] *R v Mills* [1999] SCJ No 68, [1999] 3 SCR 668, at [17]; *R v Osolin* [1993] SCJ No 135, [1993] 4 SCR 595, at [166]; *R v Darrach* [2000] SCJ No 46, [2000] 2 SCR 443, at [28], [31], [70] (SCC); and *R v S (N)* [2012] SCJ No 72, 290 CCC (3d) 404 (SCJ), at [70]-[71].

[151] *Health Service and Support – Facilities Subsector Bargaining Association v British Columbia* [2007] SCJ No 27, [2007] 2 SCR 391 (SCC), [84].

[152] *R v Keegstra* [1990] SCJ No 131, [1999] 3 SCR 697 (SCC); *Canada (Human Rights Commission) v Taylor* [1999] SCJ No 129, [1990] 3 SCR 892 (SCC); *R v Butler* [1992] SCJ No 15, [1992] 1 SCR 452 (SCC); *Saskatchewan (Human Rights Commission) v Whatcott* [2013] SCJ No 11, 355 DLR (4th) 383, [66] (SCC); *R v Ewanchuk* [1999] SCJ No 10, [1999] 1 SCR 333, [73] (SCC); *R v Sullivan* [1991] SCJ No 20, [1991] 1 SCR 489 (SCC).

[153] *R v Latimer* [2001] SCJ No 1, [2001] 1 SCR 3 (SCC); *New Brunswick (Minister of Health and Community Services) v G(J)* [1999] SCJ 47, [1999]3 SCR 46 (SCC).

[154] Peter Hogg, 'Equality as a Charter Value in Constitutional Interpretation' (2003) 20 Supreme Court Law Review (2d) 113.

[155] Hogg, 'Equality as a Charter Value in Constitutional Interpretation' (n 154) 116-117.

[156] Hogg, 'Equality as a Charter Value in Constitutional Interpretation' (n 154) 117.

but, particularly with the value of equality, to interpret other parts of the Charter itself.[157] The problem this raises is the spectre of unguided judicial decision-making; Hogg goes so far as to suggest that the true motivation for the judges in these cases is a desire to find redress for sympathetic claimants.[158] To support this claim, Hogg cites two unsuccessful freedom of expression cases that arguably would have succeeded had the Court made use of the Charter value in equality.[159]

Hogg's analysis does indicate a danger that judges can have unfettered choice over the values that arise in individual cases, though this is no different to the problems of constitutional interpretation in Ireland or elsewhere. However, he overstates his argument by concluding that the judges are inappropriately favouring certain claimants over others because many of the cases he criticises for the creative use of Charter values were ultimately unsuccessful for the claimants, either on the substance of the right or on the basis of Section 1 justification.[160]

Rather than improperly motivated judicial decision-making, I suggest these cases could be explained as an incompletely articulated version of the model of conjoined application proposed here. For example, in *Dunmore v Ontario*,[161] agricultural workers successfully challenged Ontario's Labour Relations Act 1995, which had excluded them from a collective bargaining process provided for other industries. The Court held that the total exclusion of agricultural workers from the process violated the right to freedom of association in Section 2(d) of the Charter.[162] This effectively reversed a previous holding of the Court that exclusion from a formal process of labour relations had no impact on the freedom of association because the workers were able to establish a union

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[157] Hogg, 'Equality as a Charter Value in Constitutional Interpretation' (n 154) 117.
[158] Hogg, 'Equality as a Charter Value in Constitutional Interpretation' (n 154) 123-124.
[159] *Haig v Canada* [1993] 2 SCR 995; *Native Women's Association of Canada v R* [1994] 3 SCR 627.
[160] *Reference re Provincial Electoral Boundaries (Saskatchewan)* [1991] 2 SCR 158; *R v Edwards Books & Art Emporium* [1986] 2 SCR 713.
[161] *Dunmore v Ontario* [2001] 3 SCR 1016.
[162] *Dunmore v Ontario* [2001] 3 SCR 1016, [2].

independently.[163] On a traditional understanding of Section 2(d), therefore, the claim would have failed. A Section 15 equality claim would also have been doomed to failure, because the Court had previously held that occupational status was not an analogous ground,[164] and that Section 15 claims could only be brought on the basis of listed or analogous grounds.[165] Bastarache J for the majority, however, applied a version of Section 2(d) imbued with a value of equality:

> 23. ... Where a group is denied a statutory benefit accorded to others, as is the case in this appeal, the normal course is to review this denial under s.15(1) of the Charter, not s.2(d) ... However, it seems to me that apart from any consideration of a claimant's dignity interest, exclusion from a protective regime may in some contexts amount to an affirmative interference with the effective exercise of a protected freedom. In such a case, it is not so much the differential treatment that is at issue, but the fact that the government is creating conditions which in effect substantially interfere with the exercise of a constitutional right ... This does not mean that there is a constitutional right to protective legislation per se; it means legislation that is underinclusive may, in unique contexts, substantially impact the exercise of a constitutional freedom. ...
>
> [Bastarache J held that the state could be implicated in equality created by non-state actors because it is the factual context in which the legislation needs to be reviewed.]
>
> 26. ... If we apply these general principles to s.2(d), it is not a quantum leap to suggest that a failure to include someone in a protective regime may affirmatively permit restraints on the activity the regime is designed to protect. The rationale behind this is that underinclusive state action

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[163] *Delisle v Canada (Deputy Attorney General)* [1999] 2 SCR 989; this case was distinguished, rather than overruled, in *Dunmore v Ontario* [2001] 3 SCR 1016; Hogg, 'Equality as a Charter Value in Constitutional Interpretation' (n 154) 120-122.

[164] *Delisle v Canada (Deputy Attorney General)* [1999] 2 SCR 989; *R v Généreux* [1992] 1 SCR 259, 311; *Canada v Taylor* (1991) 81 DLR (4th) 679 (FCA); *OPSEU v National Citizens' Coalition* (1990) 74 OR (2d) 260 (CA); *Municipal Contracting v IUOE* (1989) 60 OR (4th) 323 (NSAD); *Re Workers' Compensation Act 1983 (Newfoundland)* [1989] 1 SCR 922; see Hogg, Constitutional Law of Canada (n 115) 55-86.

[165] *Andrews v Law Society of British Columbia* [1989] 1 SCR 143.

> falls into suspicion not simply to the extent it discriminates against an unprotected class, but to the extent it substantially orchestrates, encourages or sustains the violation of fundamental freedoms. ...
>
> 28. In sum, while it is generally desirable to confine claims of underinclusion to s.15(1), it will not be appropriate to do so where the underinclusion results in the effective denial of a fundamental freedom such as the right of association itself. This is not to say that such claims will be common: they are constrained by both s.32 of the Charter, which demands a minimum of state action before the Charter can be invoked, as well as by the factors discussed above. However, a claim for inclusion should not, in my view, automatically fail a s.2(d) analysis: depending on the circumstances, freedom of association may, for example, prohibit the selective exclusion of a group from whatever protections are necessary to form and maintain an association, even though there is no constitutional right to such statutory protection per se. In this sense, the burden imposed by s.2(d) of the Charter differs from that imposed by s.15(1): while the latter focuses on the effects of underinclusion on human dignity (*Law v Canada (Minister of Employment and Immigration)* [1999] 1 SCR 497), the former focuses on the effects of underinclusion on the ability to exercise a fundamental freedom. This distinction is contemplated by the wording of the Charter itself and is supported by subsequent jurisprudence of this Court.[166]

The right to freedom of association, augmented by a value of equality, was thus used to find a violation of the Charter. The Court severed the explicit exclusion of agricultural workers from the legislation, so that they were then included, and suspended the declaration for 18 months.[167]

Similar reasoning is present in cases dealing with other rights under the Charter. An interesting example is the *Saskatchewan Electoral Boundaries Reference*,[168] not least because the Court ultimately rejected the challenge, which undermines Hogg's assertion that sympathy for worthy claimants was a relevant motivation in

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[166] *Dunmore v Ontario* [2001] 3 SCR 1016, [19]-[30] (emphasis original).
[167] *Dunmore v Ontario* [2001] 3 SCR 1016, [66].
[168] *Reference re Provincial Electoral Boundaries (Saskatchewan)* [1991] 2 SCR 158.

these cases. This was a case similar to *O'Donovan v Attorney General* in Ireland.[169] The Canadian Supreme Court considered a challenge to electoral district boundaries that gave greater weight to votes in the northern and rural constituencies than in urban constituencies. The majority upheld the impugned law and all of the judges agreed that equality was a relevant value in the Section 3 right to vote. McLachlin J, for the majority, was the least enthusiastic in her statements on equality, which she said was one of the issues to consider when searching for overall "effective representation", but she still saw it as a relevant value:

> What are the conditions of effective representation? The first is relative parity of voting power. A system which dilutes one citizen's vote unduly as compared with another citizen's vote runs the risk of providing inadequate representation to the citizen whose vote is diluted. The legislative power of the citizen whose vote is diluted will be reduced, as may be access to and assistance from his or her representative. The result will be uneven and unfair representation.[170]

Cory J, dissenting, was more forthright:

> It is said that the current map reflects such a minor infringement that it is not worth considering. I cannot accept that argument as correct for two reasons. First, the right to vote is fundamental to a democracy. If the right to vote is to be of true significance to the individual voter, each person's vote should, subject only to reasonable variations for geographic and community interests, be as nearly as possible equal to the vote of any other voter residing in any other constituency. Any significant diminution of the right to relative equality of voting power can only lead to voter frustration and to a lack of confidence in the electoral process. ...
>
> The right to vote is so fundamental that this interference is sufficient to constitute a breach of s.3 of the Charter. To diminish the voting rights of individuals is to violate the democratic system. Such actions are bound to

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[169] *O'Donovan v Attorney General* [1961] IR 114.
[170] *Reference re Provincial Electoral Boundaries (Saskatchewan)* [1991] 2 SCR 158, per McLachlin J.

> incur the frustration of voters and risk bringing the democratic process itself into disrepute. The haunting spectre of "rotten boroughs" is not that far removed as to be forgotten. The right to vote is too important to be diluted in the absence of some valid justification. No such justification exists in this case.[171]

Hogg is dismissive of this reasoning by both judges, suggesting instead that the claim should have been brought under Section 15 equality. He argues that, since no one was denied the ability to vote, there was no violation of the Section 3.[172] This is a formalistic understanding of what is a foundational right in modern democracies. It is surprising for two reasons. First, looking exclusively at Section 3, Hogg gives the right a purely procedural role, without any degree of substantive protection. This seems inconsistent with the project initiated by the Charter, which was to introduce substantive protection of fundamental rights.[173] Secondly, it views the rights of the Charter as discrete protections that are entirely independent of each other and overlooks the constitutionalised and fundamental place they hold in the Canadian legal system. The possibility of a harmonious interpretation of rights is not alien in the Canadian legal system, and a harmonious relationship between the rights to equality and to vote is as comfortable as is likely to be found. None of the judges referred to Section 15. This is unfortunate. A conjoined application would have offered a textual basis for the introduction of equality into the Section 3 analysis.[174]

In these cases,[175] a claim based exclusively on a substantive right, such as freedom of association, would not have succeeded, while similarly, a claim

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[171] *Reference re Provincial Electoral Boundaries (Saskatchewan)* [1991] 2 SCR 158, per Cory J.
[172] Hogg, 'Equality as a Charter Value in Constitutional Interpretation' (n 154) 122.
[173] Hogg, *Constitutional Law of Canada* (n 115) 615.
[174] I have argued elsewhere that equality is implicit in democracy in the Irish context; Ben Mitchell, 'Process equality, substantive equality and recognizing disadvantage in constitutional equality law' (2015) 53 Irish Jurist 36.
[175] Other relevant cases include, *Saskatchewan (Human Rights Commission) v Whatcott* [2013] SCJ No 11, 355 DLR (4th) 383, [66] (SCC); *Health Service and Support – Facilities Subsector Bargaining Association v British Columbia* [2007] SCJ No 27, [2007] 2 SCR 391 (SCC), [84]; *R v Latimer* [2001] SCJ No 1, [2001] 1 SCR 3 (SCC); *New Brunswick (Minister of Health and Community Services) v G(J)* [1999] SCJ 47, [1999] 3 SCR 46 (SCC); *R v Ewanchuk* [1999] SCJ No 10, [1999] 1 SCR 333, [73] (SCC); *Canada (Human Rights Commission) v Taylor* [1999] SCJ No 129, [1999] 3 SCR 892 (SCC); *R v Butler* [1992] SCJ No 15, [1992] 1 SCR 452 (SCC); *R v Sullivan* [1991] SCJ No 20, [1991] 1 SCR

based exclusively on Section 15 equality would not have succeeded, usually because the ground at issue was not listed or analogous. Hogg's conclusion on this issue recognises that, although the Court has not fully articulated the basis for these developments, it could be explained under a coherent doctrine:

> The effect of the decisions is to draw a distinction between laws that regulate the exercise of Charter rights, such as freedom of religion, freedom of expression, freedom of association, and the right to vote, and laws that regulate behaviour that does not implicate Charter rights. The former category is reviewable under the looser Charter value of equality, so that any irrational difference of treatment is likely to lead to invalidity. The latter category is reviewable under the section 15 guidelines, so that differences of treatment lead to invalidity only if they involve listed or analogous grounds and impair human dignity.[176]

In substance, this is no different to the model explored in this chapter that a conjoined application of equality with another right is capable of expanding the realm of protection beyond that which either right is able to offer individually.

3.3 Equality in Conjunction with Other rights Under the Irish Constitution

In Ireland, the potential for rights to apply in conjunction with the right to equality has not received significant attention. In the remainder of this chapter I consider whether the courts could develop such a doctrine.

As noted above in section 1, O'Hanlon J in *O'Donoghue v Minister for Health* offered a vision of the right to education that is influenced by equality. At several points in his judgment, O'Hanlon J relied on a value of equality. For example, he cited the aims and functions of the educational curriculum, which say:

> Each human being is created in God's image. He has a life to lead and a soul to be saved. Education is, therefore, concerned not only with life but with the purpose of life. And, since all men are equal in the eyes of God,

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489 (SCC); *R v Edwards Books & Art Emporium* [1986] 2 SCR 713; *R v Big M Drug Mart* [1985] 1 SCR 295;

[176] Hogg, 'Equality as a Charter Value in Constitutional Interpretation' (n 154) 131.

> each is entitled to an equal chance of obtaining optimum personal fulfilment...[177]

O'Hanlon J also cited the recognition of the equal rights and dignity of all people in the Universal Declaration of Human Rights, and quotes from *Brown v Board of Education*[178]:

> Today, education is perhaps the most important function of state and local governments . . . It is the very foundation of good citizenship . . . a principal instrument in helping [the child] to adjust normally to his environment. Such an opportunity, where the State has undertaken to provide it, is a right which must be made available to all on equal terms.[179]

Finally, O'Hanlon J cited *Mills v Board of Education of District of Columbia*[180] from the US, which applied the equality principles from *Brown* to the provision of education for children of disabilities, requiring the state to provide education even though it came with additional expense.

O'Mahony has also given brief consideration to the possibility of Article 40.1 applying in conjunction with Article 42. Having quoted Walsh J's endorsement of Aristotelian equality in *de Burca v Attorney General*,[181] O'Mahony says:

> This implies that legal provision for the right to education should be tailored to meet the varying needs of individual children; to provide everyone with a right to receive the same type of education without making allowances for differences in educational needs would create a clear inequality, as some children would be unable to derive any benefit from an education which is unsuited to their needs.[182]

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[177] *O'Donoghue v Minister for Health* [1996] 2 IR 20, 48.
[178] *Brown v Board of Education* (1954) 347 US 48.
[179] *Brown v Board of Education* (1954) 347 US 48, 493; *O'Donoghue v Minister for Health* [1996] 2 IR 20, 59.
[180] *Mills v Board of Education of District of Columbia* (1972) 348 F Supp 866; *O'Donoghue v Minister for Health* [1996] 2 IR 20, 59.
[181] *de Burca v Attorney General* [1976] IR 38.
[182] O'Mahony (n 100) 41.

O'Mahony had in mind concern about education for children with disabilities, but the same reasoning would apply to children exposed to educational disadvantage due to their Traveller, working class or ethic minority status.[183]

A number of other cases similarly show a role for equality when applying other rights. Recently, in *DX v Buttimer*,[184] Hogan J considered the right to equality as it applied to court procedures. Without referring to the right of access to court explicitly, Hogan J used Article 40.1 to guarantee substantive equality on the ground of disability in the operation of *in camera* court rules. Hogan J held that equality required an exception to the *in camera* rules so that a friend of one of the litigants could enter the court and help him communicate because of his difficulties in this regard following a largnectomy:

> Mr X.'s largnectomy considerably affected his capacity to speak and he was hugely dependent on Ms. S. for all types of practical assistance. Furthermore, she was familiar with his manner of speaking and she could probably have directly conveyed his instructions to his legal team better than anyone else. Article 40.1 of the Constitution obliges the judicial branch of government to ensure that all persons are "held equal before the law." In practical terms, this means that the courts must see to it that, where this is practical and feasible in the circumstances, litigants suffering a physical disability (such as Mr. X.) are not placed at a disadvantage as compared with their able-bodied opponents by reason of that disability, so that all litigants are truly held equal before the law in the real sense which the Constitution enjoins.[185]

This could be interpreted as a conjoined application of the right to equality in Article 40.1 with the right of access to the courts in Article 40.3.[186] Supporting this argument is Whyte's point that *DX*, and several other cases appearing to

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[183] Lynch has called for an explicit constitutional guarantee of equality in access to, and participation in, education; Kathleen Lynch, 'Equality and Education: argument for a special provision in the Constitution promoting equality of access to, and participation in, education' in *Report of the Constitution Review Group* (Stationary Office, Dublin 1996) 635-636.

[184] *DX v Buttimer* [2012] IEHC 175.

[185] *DX v Buttimer* [2012] IEHC 175, [14].

[186] *Macauley v Minisiter for Posts and Telegraphs* [1966] IR 345; *Blehein v Minister for Health and Children* [2008] IESC 40.

develop a substantive equality interpretation of Article 40.1, dealt with courts and litigation, with which judges are comfortable and are more willing to offer progressive interpretations of constitutional principles than in other more controversial contexts.[187] Consequently, one interpretation of these cases is that it is the confluence of the right to equality and the right of access to the courts that leads to a more expansive protection than either right can offer in isolation.

A number of other constitutional challenges have raised both equality issues as well as other rights. Though they have often not been successful, these cases illustrate a potential for the different parts of the Constitution to work in conjunction. For example, in *Re Philip Clarke*,[188] the Supreme Court had to consider how best to ensure equal protection of the right to liberty for people with mental disabilities, holding that the decision of the Oireachtas to provide for detention was constitutional. Also unsuccessfully, the Supreme Court in *Norris v Attorney General*,[189] considered the interaction of the right to equality with the right to privacy. The recent high profile litigation by Marie Fleming offered an opportunity for equality and the right to autonomy to be applied in conjunction. Both the Divisional High Court and the Supreme Court, however, dealt with each right separately and did not address the possibility of overlap between them.[190]

Cases relating to the right to vote and take part in the political process offer similar potential. In multiple referendum cases, the courts have asserted the significant role played by equality. In *Doherty v Referendum Commission*,[191] Hogan J referred to equality as one of the "three core principles" that make up the constitutional requirements of the referendum process.[192] This echoes precedents affirming the importance of equality when applying the right to vote.[193] A few cases have been unsuccessful, particularly *Draper v Attorney General*,[194] where the Court upheld the failure to extend postal voting to disabled

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[187] Gerry Whyte, 'Constitutional litigation and disability rights' (2012) 48 Irish Jurist 303, 321.
[188] *Re Philip Clarke* [1950] IR 235, 247-248; Hogan and Whyte (n 2) 1367.
[189] *Norris v Attorney General* [1984] IR 36; Hogan and Whyte (n 2) 1371-1372.
[190] *Fleming v Ireland* [2013] 2 ILRM 9 (HC), [2013] 2 ILRM 73 (SC).
[191] *Doherty v Referendum Commission* [2012] 2 IR 594.
[192] *Doherty v Referendum Commission* [2012] 2 IR 594, [23]-[25].
[193] *McKenna v An Taoiseach (No2)* [1995] 2 IR 10; *Coughlan v Broadcasting Complaints Commission* [2000] 3 IR 1; *Kelly v Minister for the Environment* [2002] 4 IR 191.
[194] *Draper v Ireland* [1984] IR 277.

voters, and *Breathnach v Ireland*,[195] upholding restrictions on voting rights for prisoners. These cases, however, did consider the intersection of equality with the right to vote. More successfully, the High Court in *Redmond v Minister for the Environment*[196] applied the right to participate in elections in conjunction with equality and struck down a requirement to pay a significant deposit before standing for election. On the facts, this case was wrongly decided because the Supreme Court in *King v Minister for the Environment*[197] overruled Herbert J's holding in *Redmond*. However, it is crucial to note that the Supreme Court confined its criticism to "the conclusions" reached in *Redmond* about the scope of the State's power to regulate elections.[198] The Court did not reject (or even explicitly engage with) Herbert J's equality reasoning. The Court's equality reasoning in *King* was brief, even by Irish constitutional equality law standards:[199]

> Invidious discrimination may arise where legislation treats persons in the same situation differently, or persons in different situations the same. Accordingly, the Oireachtas being entitled to make a distinction between non-party candidates and the candidates of registered political parties, it cannot be said that the particular measures constitute invidious discrimination against non-party candidates.

This states an incomplete version of Aristotelian equality that negates any role for proportionality. Aristotelian equality requires that people who are different be treated in proportion to that degree of difference; the version offered in *King*, however, holds that the existence of any difference between people gives the State a carte blanche authorisation to treat them differently. The Court's judgment in *King* does include some discussion of proportionality but that discussion was about the impugned law's proportionality to the requirements of Article 16; there was no discussion of a role for proportionality in the identification of what the Court referred to as "invidious discrimination", but which would be better described as *prima facie* discrimination contrary to Article 40.1. This is inconsistent with subsequent Supreme Court cases dealing with

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[195] *Breathnach v Ireland* [2001] 3 IR 230; Hogan and Whyte (n 2) 1373.
[196] *Redmond v Minister for the Environment* [2001] 4 IR 61.
[197] *King v Minister for the Environment (No 2)* [2007] 1 IR 296.
[198] *King v Minister for the Environment (No 2)* [2007] 1 IR 296, 321.
[199] *King v Minister for the Environment (No 2)* [2007] 1 IR 296, 326.

Article 40.1,[200] as well as with previous cases that offered more detailed consideration of the right to equality.[201] I suggest, on the basis of the potential for a strong right to equality considered elsewhere in this thesis,[202] and the fact that the version of the right to equality asserted in *King* is not supported by subsequent Supreme Court cases, that *King* should not be a barrier to considering the *Redmond* reasoning. Herbert J's approach remains significant, to the extent that it used a conjoined application of equality with the right to participate in elections.

There is untapped potential in this model. The courts have been able to make some conjoined applications of the right to equality with other rights, when those rights are binary, such as the right to vote or the right to take part in elections. These rights are binary in the sense that a person either is given a vote or is not. When rights of this nature are at stake, they have been able to find that equality occasionally requires the extension of the privilege to people previously excluded. When the right has a spectrum, however, there has been greater reluctance to address the possibility of a conjoined application. A clear example of this is the right to autonomy; complete autonomy is necessarily restricted in order for society to function but the point at which the line is to be drawn is difficult and for people in different situations, as in *Fleming v Ireland*,[203] it can be difficult to identify what is required by equality of autonomy.

The right to education is a right on a spectrum that also has a binary component. The early education cases, such as *O'Donoghue*, were successful at achieving access to some kind of education for all children. Once this was achieved, and given the near universal uptake of primary education in Ireland,[204] the binary educated/not educated part of the right had been satisfied. In those early cases, the court were more willing to refer to values of equality as a way of bolstering the finding that the State was neglecting its constitutional duty. The more recent cases are concerned with the quality of that education, which involves a

[200] Eg, *Murphy v Ireland* [2014] 1 IR 198, [35].
[201] *de Burca v Attorney General* [1976] IR 38, per Walsh J.
[202] See Part 2.
[203] *Fleming v Ireland* [2013] 2 ILRM 9 (HC), [2013] 2 ILRM 73 (SC).
[204] See ch 5.

spectrum. As a result, the test applied by the courts asks whether the education on offer is "appropriate".[205]

My suggestion, however, is that even if the education is appropriate and therefore satisfies Article 42 on its own terms, the inequality in provision could be so great as nonetheless to breach Article 40.1 in conjunction with Article 42. There has to be some degree of relativity in the assessment of the quality of education; the education provided in primary schools in 1937, even if appropriate then, would not be acceptable if it were offered in some schools today while others offered a modern syllabus. As a result, my suggestion is that a strong right to equality, along the lines outlined in this thesis, could be applied in conjunction with the right to education in order to narrow the range in quality that falls within the limits of "appropriate" education. The stronger the right to equality, the less acceptable it is to sustain a system as unequal as that currently existing in Ireland, as outlined in chapter 5. It is through the mechanism of a conjoined application of Article 40.1 and Article 42 that I suggest the judiciary could begin to tackle this issue.

Conclusion

The right to education and the right to equality under the Irish Constitution have a close relationship, both in the text and in case law. There is notable scope to develop this relationship by applying the rights together. Two different versions of a joint application have the potential to develop, the first based on a change to the standard of review when the right to equality applies in the context of education, and the second a conjoined application that leads to a right to "equality in education".

The courts in Ireland could easily develop the first approach by resurrecting the context of discrimination approach to the human personality doctrine. The second is more novel but some precedents could be interpreted as implementing a conjoined application of the rights. Either of these approaches would lead to

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[205] *O'C v Minister for Education and Science* [2007] IEHC 170; *O'Carolan v Minister for Education* [2005] IEHC 296; Whyte, *Social Inclusion and the Legal System* (n 7) 326-333; Conor O'Mahony, 'The Right to Education and "Constitutionally Appropriate" Provision' (2006) 28 DULJ 422.

greater protection of rights under the Constitution and it is significant that both could be achieved by reinterpreting existing case law.

In chapters 5 and 8, I propose several remedial measures that the State could adopt to tackle inequality on the basis of poverty, socio-economic status and social class. The first group of these, based on equality of opportunity, already exist in the DEIS system and have proven to be helpful but incapable of resolving inequality on their own. The second group are based on achieving substantive equality of condition. These are, first, adopting a policy in favour of inclusive schooling, second, democratising the education system to increase diversity, and, third, guaranteeing universal early childhood education.

As I argue in chapter 6, the State has power to implement most of these measures, but there is uncertainty about the State's power to restrict or prevent schools from charging fees. Consequently, if the courts developed a right to "equality in education" through a conjoined application of Articles 40.1 and 42, the State would be able to use this to argue the existence of such a right justified its restrictions on the ability of schools to charge fees. Dealing also with the obligation on the State to achieve equality, if the courts establish a right to equality in education, the burden on the State is not just to provide for free primary education (as it currently does) but also to ensure that it is available on more equal terms than at present. A court could find that the State is under such an obligation and then leave it to the State to implement specific policies to satisfy the constitutional requirements; at that point, the State could adopt the three policies based on substantive equality of condition outlined in chapter 5.

Ch 8: Public Interest Litigation Strategy

Sections

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4. Response to the Agenda

Introduction

In this thesis I examine a number of constitutional issues, including whether poverty, social class or socio-economic status could be a protected ground under the right to equality, and whether entrenched and pervasive inequalities in the educational system on this basis could be unconstitutional. The three potential constitutional violations considered are based on the right to equality in Article 40.1, the right to education in Article 42, and a conjoined application of both rights. In this chapter, I take these arguments, which are at times theoretical and occasionally speculative, and assess their capacity for achieving real change. This involves analysing whether advocates could use a public interest litigation strategy to seek reform of the education system.

There are four sections to this chapter. In section 1, I adopt a definition of public interest litigation and set out the pre-conditions necessary for litigation. In section 2, I examine some previous efforts to employ public interest litigation strategy in Ireland, focusing in particular on cases that employed the strategy in the education context and cases that tackled disadvantage on the basis of poverty, social class and socio-economic status.

In section 3, I present an agenda for public interest litigation based on the constitutional arguments developed in this thesis. This would begin with a judicial review challenge in the High Court, arguing that that the current education system violates the rights to equality and education, separately and in conjunction, and is therefore unconstitutional. At this stage, the court would be asked whether the State is under an *obligation to equalise* the system. I then consider the alternative outcomes. First, if the challenge were successful, what remedy could be fashioned and how could the court ensure compliance? Second, if the challenge were dismissed, could the strategy nonetheless be successful by putting the issue of educational inequality on the political agenda? On this basis I consider whether a government could pursue reform of the system. If this were to be challenged before a court, a judge would have to decide whether the State has a *power to equalise* the system. The arguments underlying the *obligation to equalise* and the *power to equalise* are reciprocal; they are based on the same constitutional principles but the *obligation* seeks to force the State to do something, while the *power* seeks to allow it to do something. Given the traditional approach to the doctrine of the separation of powers in Ireland, the latter argument is stronger. After analysing this public interest litigation agenda, I conclude that the most likely outcome is that the court would find the State not to be under an *obligation to equalise*, and also not to have a strong *power to equalise* the system against the wishes of stakeholder patron bodies and parents. Instead, the State is likely only to have weak *power to equalise*, according to which it could only achieve reform through cooperation. This may disappoint advocates of reform but it reflects the practice currently employed, which is that educational reform is possible only after careful negotiation between the Department of Education, teachers unions and patron bodies. Given the constitutional pre-eminence of parental choice, such negotiations should also include parent groups.

Finally, in section 4 I reflect on three possible responses to the constitutional position. The most dramatic proposal is to seek a constitutional amendment, to change the dominant principle in Article 42 from one of choice to one of inclusion. This would mandate the State to ban fees and other barriers to equality in education. Second, keeping the same constitutional text with the dominance of choice as a value, the courts could reinterpret Article 42 to foster a substantive rather than a formal understanding of parental choice. Rather than absolute freedom of choice, which effectively is only available to those with large amount of economic, cultural or social capital, Article 42 could be interpreted in a manner that allows the State to administer the system so as to provide choices to as many parents as possible, even if that means limiting the complete freedom of some. This interpretation would allow the State to incentivise the removal of fees by making it a condition of receiving State funding. Thirdly, keeping both the current text and the current interpretation of Article 42, the State could adopt a cooperative approach to reform and identify discrete barriers that prevent some parents exercising choice in the education context. Significant research exists highlighting these barriers and the degree of both political and financial contribution required to achieve progress would be modest. This is the least controversial of the three proposals but it is also the least effective.

1. Definition of Public Interest Litigation

1.1 Nature of Public Interest Litigation

Public interest litigation strategy is the use of the courts by advocates of social change, in an attempt either to change law or circumstances directly through court order or indirectly by provoking the political system to make such a change. In the leading work on this subject in Ireland, Whyte says of public interest litigation:

> I would define a case as constituting litigation strategy in this context if it seeks either (a) to establish authoritatively a new legal principle, or establish the application of an existing one, of which policymakers and/or administrators have to take account; or (b) to highlight the existing state of the law. This covers cases taken on behalf of groups and cases taken on behalf of individuals and also cases taken against groups or

individuals. It also encompasses cases which affect thousands of individuals and cases which affect comparatively small numbers.[1]

O'Connell and Malone articulate the concept in less neutral terms, stating the public interest litigation is an engagement with the legal system in an attempt to reduce poverty.[2] This explicit statement of motivation adds a requirement that the litigation must have some kind of progressive agenda or seek wider social change. That certainly seems to be the intention of the people who exercise a public interest litigation strategy, but it is better not to define public interest law by its progressive agenda, because any reform sought by an individual will be an improvement on the current situation, in that person's eyes at least. Budlender, Marcus and Ferreira, for example, conceive of public interest litigation in ideological terms when they criticise, "the adoption and deployment of the techniques used in progressive public interest litigation by interest groups seeking to prevent or undo social change." [3] This description portrays "conservative public interest litigation" as less legitimate that "progressive" public interest litigation.[4] The problem with doing this is that opponents of "progressive" public interest litigation can then make reciprocal arguments, demonising the litigants who bring cases to advance Traveller rights, for example. An ideologically neutral definition reflects the fact that the courts are open to all and that, like all tools of governance and politics, they can be used for good or ill.

While ideologically explicit definitions of public interest litigation can describe the objectives of the strategy, they do not concern its nature. Given that there will always be debate and controversy about whether an objective or motivation is progressive or regressive, in this chapter I adopt the neutral definition offered by Whyte. As a result, the litigation agenda I propose in section 3 seeks to establish a constitutional position, that the State is obliged to remove inequality in the

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[1] Gerry Whyte, *Social Inclusion and the Legal System: Public Interest Law in Ireland* (2nd edn, IPA 2015) 201.
[2] Paul O'Connell and Deirdre Malone, 'A New Legal Approach to Reducing Social Exclusion' (2003) 6 Trinity College Law Review 5, 6.
[3] Steven Budlender, Gilbert Marcus and Nick Ferreira, *Public Interest Litigation and Social Change in South Africa: Strategies, Tactics and Lessons* (Atlantic Philanthropies 2014) 14; see also, Gary Cazalet, 'Unresolved Issues: Costs in Public Interest Litigation in Australia' (2010) 29(1) Civil Justice Quarterly 108, 120.
[4] Budlender, Marcus and Ferreira (n 3) 15-21.

education system, or alternatively to draw attention to the operation of the existing constitutional order. The ideological motivation, that educational inequality on the basis of poverty, social class and socio-economic status is morally wrong, is important but does not describe the nature of the use of the courts in this way.

Emphasising the objective of the strategy over its nature can also mislead because it creates the impression that courts are primarily concerned in these cases with the wider social or systemic issues. For example, this leads Kong to say that public interest litigation "is a type of legal action in which the claimant has no private interest in the subject matter of the case."[5] That is incorrect, certainly in Ireland where a standing requirement must be satisfied, but also more generally because it fails to recognise that while the court is being used to achieve a wider objective, the normal bipolar court process largely remains unchanged.

1.2 Brief History of Public Interest Litigation

Public interest law has its origins in the US but the greatest developments in litigation strategy have come from India, where the Supreme Court in particular has encouraged use of the courts as a way of seeking social change.[6] The unusual history of the rule of law in India appears to have had an influence on the Court's activist recent history; the Supreme Court received global criticism after it upheld the legitimacy of detention without trial during the state of emergency of 1975-1977, and the move towards an activist and progressive Supreme Court in recent years has been seen by some as something of an atonement for the Court's support of the administration.[7] In Ireland, Whyte charts the increasing use of the courts to pursue social change during the time of the activist O'Dálaigh Supreme Court but also notes that some members of the Supreme

[5] Karen Kong, 'Public Interest Litigation in Hong Kong: A New Hope for Social Transformation?' (2009) 28(3) Civil Justice Quarterly 327, 327.
[6] Whyte, *Social Inclusion and the Legal System* (n 1) 4-6, 69-71.
[7] James Fowkes, 'Civil Procedure in Public Interest Litigation: Tradition, Collaboration and the Managerial Judge' (2012) 1(3) Cambridge Journal of International and Comparative Law 235, 327; Colin Gonsalves, 'The Development of Public Interest Law in India' (2006) 11(5) Bar Review 143.

Court in the 2000s sought to limit this possibility through a rigid interpretation of doctrine of the separation of powers.[8]

1.3 Efficacy of Public Interest Litigation

There is a paradox in seeking to use public interest litigation strategy in order to achieve change,[9] which is particularly stark when dealing with issues of poverty, social class and socio-economic status. The law, including constitutional law, is designed to maintain stability and to preserve the *status quo*. Law can leave areas unregulated and provide latitude, within which society can develop, and secondary legal rules can provide a means of changing laws and thus of allowing society and the *status quo* to change.[10] Thus, law does not freeze indelibly the *status quo*. It is, however, primarily concerned with maintaining stability and social order, which has both good aspects (such as preventing violence) as well as bad by-products (such as preserving social class inequality). The extent to which the legal system can be the driver of radical change is limited, given that its central thrust is in the opposite direction. This is particularly evident with social class and poverty issues both because of the pervasiveness of inequality on these grounds in Ireland and because the law has a long history as a tool of preserving social class inequality.[11]

Social class and socio-economic status are inherently group-based concepts, while poverty in contemporary Ireland is a relative concept based on inequality. These grounds do not fit neatly into the bipolar nature of litigation; while a court is typically concerned with one person's rights or duties against another person, issues of poverty, social class and socio-economic status may require courts to address much broader interests than simply those of the litigants. Chayes' observation that the individualised approach of adversarial common law is in tension with the group-based issues at stake in public interest litigation is thus particularly apposite for the litigation strategy I propose in section 3. Consequently, constitutional litigation cannot provide complete resolution of these issues. Instead of being the architect of change directly, the role of the

[8] Whyte, *Social Inclusion and the Legal System* (n 1) 5-6.
[9] See, O'Connell and Malone (n 2).
[10] HLA Hart, *The Concept of Law* (2nd edn, OUP 1997) 81, 94.
[11] For discussion in the US context, see Stephen Loffredo, 'Poverty, Democracy and Constitutional Law' (1993) 141(4) UPenn LR 1277.

court is as a catalyst, in order to encourage, provoke and mobilise others into making the desired change.

Given that paradigm, Whyte cautions that, while public interest litigation can make a valuable contribution, its effectiveness is limited.[12] Whyte has also identified the preconditions for initiating public interest litigation as well as the characteristics of a case that can increase or decrease its prospects of success. In the remainder of this section I apply the preconditions to the proposed litigation agenda. In section 3 I assess its chances of success in light of Whyte's criteria.

The three preconditions are, first, that relevant legal principles must exist, second, that the case is able to comply with procedural rules, such as standing and limitation time periods, and third, that an appropriate plaintiff can be identified.[13] As demonstrated in chapters 4-7, there are several constitutional norms that could be relevant to social class and poverty-based inequality in schools. Complying with the first precondition is straightforward. The second and third preconditions are closely related and the question of standing could be the most challenging issue.[14]

There are three ways of establishing standing. First, a parent of a child disadvantaged by the system would have a direct interest sufficient to satisfy the standing requirement from *Cahill v Sutton*.[15] There is a danger that such a plaintiff would face mootness objections, however, given that the direct interest persists only while the child is in school, which could be outrun by delays in the court system. Of course, if the child leaves school before the hearing takes place, an action for damages could still be maintained, but O'Mahony has pointed out that damages are not a particularly useful remedy for the right to education.[16]

Another concern is that litigation based on the interests of one child would be tied to the fortunes of that child. For example, if a satisfactory school place

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[12] Whyte, *Social Inclusion and the Legal System* (n 1) 433.
[13] Whyte, *Social Inclusion and the Legal System* (n 1) 201.
[14] The problem of costs is significant issue affecting the efficacy of public interest litigation, see Whyte, *Social Inclusion and the Legal System* (n 1) 202-209.
[15] *Cahill v Sutton* [1980] IR 269.
[16] Conor O'Mahony, *Educational Rights in Irish Law* (Thomson Round Hall 2006) 207-210.

became available for the child, it would be in the child's interests to take the place, even though this would bring the constitutional challenge to an end.[17] This is what happened in 2010, when two parents announced publicly that they were launching a judicial review action against the State for discriminating against their child. The subject of their challenge was the integrated curriculum (which allows religious values to permeate the entire school curriculum). Parents are entitled to object to their children receiving religious instruction in schools, but they are not able to opt-out of the integrated curriculum. The basis of their challenge was that this policy violated their rights under Articles 40.1, 42.3.1°, 42.4 and 44.2.4°. They had begun promoting their case, appearing on *The Late Late Show* on RTÉ, and had retained Ivana Bacik BL as counsel.[18] They had thus begun an interesting piece of public interest litigation but subsequently dropped the case when a desirable school place for their child became available.[19] Similarly, Whyte recounts the termination of a public interest litigation challenge to social welfare payments because, in order to prevent the court establishing an expensive precedent, the State conceded the individual plaintiff's entitlement the night before the trial.[20]

Evidential problems could also arise, because proving that this particular plaintiff was disadvantaged, rather than demonstrating general statistical disadvantage for a sector of society, may be difficult. For example, in the high-profile *Stokes v Christian Brothers School, Clonmel*[21] litigation challenging the practice of reserving school places for the children of past pupils as indirect discrimination against Traveller children, the Supreme Court rejected the claim principally on the basis that the statistical evidence available did not, in its view, prove the existence of indirect discrimination against the applicant in particular.[22] Litigation brought by an individual plaintiff is therefore vulnerable to the inherent tension in

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[17] See discussion of the impact of the doctrine of mootness on public interest litigation by Whyte, *Social Inclusion and the Legal System* (n 1) 178-183.
[18] I am grateful to Professor Bacik for sharing information on this case with me.
[19] There is the potential that the threat of litigation can help individual children to get a better deal. Whyte notes this tactical use of litigation to benefit children with disabilities occurred after *O'Donoghue v Minister for Health* [1996] 2 IR 20, Whyte, *Social Inclusion and the Legal System* (n 1) 438. This use of the courts is both useful and important, but it is not an effective way of encouraging systemic change.
[20] Whyte, *Social Inclusion and the Legal System* (n 1) 179-180.
[21] *Stokes v CBS Clonmel* [2015] IESC 13.
[22] *Stokes v CBS Clonmel* [2015] IESC 13, [11.6].

challenging a systemic problem by relying on a single victim, which is especially common in Ireland where class actions are unavailable.[23]

Secondly, an alternative approach is to seek standing under *Crotty v An Taoiseach*,[24] which involves a private party acting in the public interest. Standing would be based on the idea that the unequal school system has such an influence on society that an individual can bring a challenge on behalf of the entire community. This would allow greater focus on the systemic rather than individual issues at stake. The difficulty for such a plaintiff is establishing that there is no one else who would be in a better position to bring the case, given that inequality in the education system does have a more substantial effect on some children than others. It is unlikely that an individual could prove that this is an issue affecting the entire community and in which no one could provide a particular individual interest.

Thirdly, the potential compromise plaintiff is an interest group, ideally incorporated with the purpose of lobbying for educational reform, with the assistance of a community law centre. Interest groups may be given standing in Irish courts but there is a paucity of decisions on this point and the Supreme Court has not addressed the issue.[25] However, if such a plaintiff were given standing it may help the court acknowledge the systemic issues at stake, rather than searching exclusively for individual loss.

In *Irish Penal Reform Trust, Lennon and Carroll v Governor of Mountjoy Prison*[26] Gilligan J in the High Court granted standing to the Irish Penal Reform Trust (IPRT), which was a plaintiff alongside two psychiatrically ill prisoners challenging

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[23] Whyte, *Social Inclusion and the Legal System* (n 1) 184; Genevieve Coonan, 'Public Interest Law and the Irish Legal System: All Crass and No Class?' (2002) 5 Trinity College Law Review 44, 46.

[24] *Crotty v An Taoiseach* [1987] IR 713; see also *SPUC v Coogan* [1989] IR 734.

[25] Whyte, *Social Inclusion and the Legal System* (n 1) 121-129; the High and Supreme Courts in *Campaign to Separate Church and State Ltd v Minister for Education* [1998] 3 IR 321, 346 did not decide the standing issue because they held that they should deal with the substantive issues first, on which basis they dismissed the challenges. The peculiarity of this reasoning is that standing is a logical precondition to case arising in the first place, so it is unfortunate that the courts adopted this approach.

[26] *Irish Penal Reform Trust, Lennon and Carroll v Governor of Mountjoy Prison* [2005] IEHC 305; Mary Rogan, *Taking Prison Law Cases: A Practical Approach* (IPRT) 9 <http://www.iprt.ie/files/Taking_Prison_Law_Cases.pdf> accessed 14 December 2015.

the condition of their detention.[27] Gilligan J held that standing is a rule of practice "but like all such rules is ... 'subject to expansion, exception or qualification when the justice of the case so requires'."[28] He emphasised that such expansion is possible when the jurisdiction of the court would otherwise be excluded. This is best understood as a question of necessity. Standing was granted to the IPRT because two conditions were met. First, the individuals directly affected were not able to assert their own rights adequately, and second, Gilligan J held that the IPRT is a *bona fide* plaintiff with a defined interest and has expertise in the issue. Translating the first of these issues into other cases is the most difficult. Gilligan J took a substantive approach to question of necessity, under which the mere existence of an individual plaintiff was insufficient to deny standing to the IPRT because their ability to present a case was inadequate:

> Thus, while a psychiatrically ill prisoner may be theoretically capable of asserting his own constitutional rights, I am not satisfied that they are in a position to adequately assert same. This is especially so since the IPRT is on hand and willing to effectively litigate this claim on their behalf.[29]

The Supreme Court quashed the High Court order granting standing to the IPRT and remitted the issue of the organisations standing to the High Court to be decided during the substantive action.[30] The plaintiffs discontinued the action so the issue was not re-addressed in the High Court.

Gilligan J's reasoning was approved and applied subsequently, however, by McKechnie J in *Digital Rights Ireland Ltd v Minister for Communication*,[31] who held that the fact that an individual plaintiff would be unable to present the case adequately allowed for an expansion in standing, and that groups with defined interests acting *bona fide* are able to benefit from the relaxed rule on standing. In applying both of these condition, McKechnie J said that the "nature, extent, importance and application of the asserted right may be of high relevance".[32]

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[27] See also, *Society for the Protection of Unborn Children (Ireland) Ltd v Coogan* [1989] IR 734; *Society for the Protection of Unborn Children (Ireland) Ltd v Grogan* [1989] IR 753.
[28] *IPRT v Governor of Mountjoy Prison* [2005] IEHC 305.
[29] *IPRT v Governor of Mountjoy Prison* [2005] IEHC 305.
[30] FLAC, *PILN Bulletin* (13 May 2008).
[31] *Digital Rights Ireland Ltd v Minister for Communication* [2010] 3 IR 251, [47]-[48].
[32] *Digital Rights Ireland Ltd v Minister for Communication* [2010] 3 IR 251, [47].

Using these cases, an incorporated interest group could argue that it has standing in addition to, or instead of, the families of children disadvantaged by the current system. To obtain standing, the group would have to show that the individual litigants would not be able adequately to present the case themselves. Given the systemic nature of the problems, which can be difficult to analyse when looking at individual students, the necessity condition of the test could be met.

During 2014, the children's charity Barnardos considered bringing a High Court challenge against the cost of attending primary school, and considered seeking standing in its own right as an interest group. On the advice of counsel, however, Barnardos decided instead that a case would have to be brought by an individual litigant. [33] This is the first option discussed above and it is the most straightforward way of obtaining standing but it lacks stability because the personal interests of the litigants have to take precedence over the systemic issues. The Barnardos decision was based on the concern that standing would be refused to the interest group, rather than on the tactical basis that an individual litigant would be able to present the case more persuasively than the charity. This tactical concern should also be borne in mind; it is possible that an individual litigant would be in a stronger position because arguments in the factual context of a real person are more persuasive to courts than abstract facts or statistics. The best approach is to combine both plaintiffs, as in *Campaign to Separate Church and State Ltd v Minister for Education*,[34] where a individual litigant brings a case with the support of an interest group, both of whom are given standing in their own right rather than requiring the interest group to act as an intervener.

The final preliminary question is one of legitimacy. A rigid interpretation of the doctrine of the separation of powers favoured by some Irish judges is the largest obstacle to pursing public interest litigation. This issue is certainly not unique to Ireland, [35] but a definitive interpretation of the doctrine has not yet been established in Irish law and it retains the potential to undermine severely public

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[33] I am grateful to Fergus Finlay, CEO of Barnardos Ireland, for sharing information on this decision with me.
[34] *Campaign to Separate Church and State Ltd v Minister for Education* [1998] 3 IR 321.
[35] See eg Kong (n 5) on Hong Kong and Cazalet (n 3) on Australia.

interest litigation strategies. I deal with the doctrine in chapter 4, on the judicialisation of poverty and social class issues.

2. Relevant Case Studies Using Public Interest Litigation Strategies

In this section, I provide an overview of the public interest law cases in Ireland that have dealt with education and with poverty. Both of these issues have frequently been the subjects of public interest litigation. I do not attempt to review all of the cases relating to these issues but instead highlight the most important ones. Some of these cases are dealt with elsewhere in this thesis, so in this section I do not analyse their contributions to substantive law, but instead I use them to examine the operation of public interest litigation and to note the previous successes and failures.

2.1 Education-Based Public Interest Litigation

There have been three broad strands of public interest cases dealing with education. First, and most famously, there is the string of cases addressing the failure of the State to provide for the education of children with severe and profound learning disabilities. I also address these cases in chapter 6 on the right to education. Second, as part of the wider series of cases in the 1990s dealing with children at risk of neglect and harm, there are a number of cases that concern the educational rights of such children. Third, there are more recent cases that challenge systemic issues in the education system, such as how the State should fund primary education and whether funding of religious schools constitutes endowment of a religion.

2.1.1 Education Cases for Children with Severe or Profound Learning Disabilities

One of the most important constitutional cases dealing with education is *O'Donogue v Minister for Health*.[36] The applicant suffered from a profound mental disability and was also physically disabled, meaning that he was unable to attend ordinary primary schools. The State was not providing for his education so his mother was educating him privately at her own expense. The High Court declared this state of affairs to be a breach of his right to free primary education

[36] *O'Donoghue v Minister for Health* [1996] 2 IR 20; see Whyte, *Social Inclusion and the Legal System* (n 1) 306-311; Mary Ellen Ring, 'A Right to an Education' (1997) 2(6) Bar Review 219.

under Article 42.4. It was in this case that O'Hanlon J, building on O'Dálaigh CJ's statement in *Ryan v Attorney General*,[37] gave his famous definition of primary education as:

> such advice, instruction and teaching as will enable [each child] to make the best possible use of his or her inherent and potential capacities, physical, mental and moral, however limited these capacities may be.[38]

On this basis, O'Hanlon J held that the requirements of primary education can vary depending on the needs of the child in question and rejected the State's argument that children with severe and profound learning disabilities were "ineducable". O'Hanlon J held that the State was constitutionally obliged to provide funding for the education of a group of children who had previously been entirely neglected.

A similar victory was won in the High Court in *Sinnott v Minister for Education*,[39] which Whyte describes as the high-water mark of public interest litigation for children with severe or profound learning disabilities.[40] The applicant was 23 years old, had severe autism and had received very little education from the State. In the High Court, the applicant won on the basis of Article 42.4 and was awarded damages, a declaratory remedy and a mandatory injunction requiring the State to meet his educational needs. The constitutional victory, that the right to free primary education extended to lifelong learning if necessary given the needs of the person at issue, was unwound in the Supreme Court, which held that the right expired at 18.[41] However, the victory of the case as a matter of public interest law remained. Barr J in the High Court held that Jamie Sinnott was entitled to funding to cover the cost of lifelong learning; despite challenging the constitutional principle, the State decided not to appeal the award of damages to Mr Sinnott, with the result that the case was remarkably successful at meeting the needs of the litigant. In addition, the high-profile nature of the

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[37] *Ryan v Attorney General* [1965] IR 294, 350.
[38] *O'Donoghue v Minister for Health* [1996] 2 IR 20, 65.
[39] *Sinnott v Minister for Education* [2001] 2 IR 545; see, Whyte, *Social Inclusion and the Legal System* (n 1) 312-317.
[40] Whyte, *Social Inclusion and the Legal System* (n 1) 317.
[41] *Sinnott v Minister for Education* [2001] 2 IR 545, 653-655, 690-693; Whyte, *Social Inclusion and the Legal System* (n 1) 318-326.

case generated a political response that improved the level of support given to children with severe or profound learning disabilities across the State.[42]

Despite the success of the *Sinnott* litigation for the litigants and others in similar situations, the judgments in the Supreme Court in both *Sinnott* and the later case of *TD v Minister for Education*[43] left public interest litigation as a strategy for achieving social change in a much weaker position.[44] In *TD*, which dealt with the State's failure to provide high-support educational and residential centre for children with extreme behavioural difficulties, the Court said that a mandatory order vindicating constitutional rights, directing the State either to spend money or to implement a certain policy, could only be issued in exceptional cases, most likely including an element of bad faith on the part of the State. Murray J explained:

> [A] mandatory order directing the executive to fulfil a legal obligation (without specifying the means or policy to be used in fulfilling the obligation) in lieu of a declaratory order as to the nature of its obligations could only be granted, if at all, in exceptional circumstances where an organ or agency of the State had disregarded its constitutional obligations in an exemplary fashion. In my view the phrase "clear disregard" can only be understood to mean a conscious and deliberate decision by the organ of state to act in breach of its constitutional obligation to other parties, accompanied by bad faith or recklessness. A court would also have to be satisfied that the absence of good faith or the reckless disregard of rights would impinge on the observance by the State party concerned of any declaratory order made by the court.[45]

Hardiman J added that a mandatory order would only be appropriate in "circumstances of great crisis" threatening "the constitutional order itself",[46]

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[42] Whyte, *Social Inclusion and the Legal System* (n 1) 333-4.
[43] *TD v Minister for Education* [2001] 4 IR 259.
[44] O'Mahony, *Educational Rights in Irish Law* (n 16) 213-242; Mary Meaney, Nessa Kiernan and Karl Monahan, *Special Educational Needs and the Law* (Thomson Round Hall 2005) ch 4.
[45] *TD v Minister for Education* [2001] 4 IR 259, 337.
[46] *TD v Minister for Education* [2001] 4 IR 259, 372.

which as Doyle has pointed out are unlikely to be the circumstances in which the executive pays much heed to a mandatory order from a court.[47]

In addition, in *Sinnott* two members of the Court, Keane CJ and Hardiman J, discouraged the idea that courts could be involved in on-going supervision or review of how the State implemented its policies.[48] I consider the implications of each of these for the public interest litigation agenda I am proposing in section 3 below.

Worth noting, however, are *Nagle v South Western Area Health Board*[49] and *Cronin v Minister for Education and Science*,[50] two cases in which the High Court was willing to issue a mandatory order in the context of education. Whyte explains the distinction between these cases and *Sinnott* and *TD* by suggesting that the courts accept mandatory orders when enforcing statutory but not constitutional duties.[51] Whyte offers this explanation as a description, rather than a justification of the practice. An alternative suggestion, given by O'Mahony, is that mandatory orders are available in order to secure access to existing services but unavailable when seeking to establish new services.[52] As a description of the practice, O'Mahony's theory is less persuasive than that offered by Whyte because there is no indication from the cases that the judges would have granted a mandatory order if a constitutional, rather than a statutory duty, was being partially complied with. As a normative justification, which, like Whyte, O'Mahony does not suggest, it would be unpersuasive. It is unclear why the courts should be more deferential to the legislature and executive in relation to a constitutional duty that is being completely ignored by the State (as in the case where a litigant seeks to establish a new service) than in relation to a constitutional duty that is being complied with imperfectly (as in the case where a litigant seeks access to an existing service). The separation of powers concerns

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[47] Oran Doyle, *Constitutional Law: Text, Cases and Materials* (Clarus Press 2008) 367.
[48] See comments of Keane CJ, with whom Hardiman J agreed, *Sinnott v Minister for Education* [2001] 2 IR 545, 640.
[49] *Nagle v South Western Area Health Board* [2001] 2 IR 599; Whyte, *Social Inclusion and the Legal System* (n 1) 327.
[50] *Cronin v Minister for Education and Science* [2004] 3 IR 205; Whyte, *Social Inclusion and the Legal System* (n 1) 327-328.
[51] Whyte, *Social Inclusion and the Legal System* (n 1) 327-328.
[52] Conor O'Mahony, 'A New Slant on Education Rights and Mandatory Injunctions? (2005) 27(1) DULJ 363; O'Mahony, *Educational Rights in Irish Law* (n 16) 247-248.

would be no greater in the case of establishing a new service, particularly if the court did not specify the exact policy to be followed but instead stated the obligation at a more general level. Furthermore, any separation of powers concern could be offset by the added severity of the violation when the State completely ignores a duty, compared to when it complies imperfectly.

The deferential position in relation to remedies has also influenced the content of the right to education in recent cases. In a number of cases during the 2000s, litigants failed to persuade courts to declare the education provided by the State to be inadequate, for example *O'Carolan v Minister for Education*,[53] *Ó'C v Minister for Education and Science*,[54] and *McD v Minister for Education*.[55] These cases are important in the development of substantive constitutional law, so I consider them in chapter 6. They are briefly included here because they inform O'Mahony's conclusion that the courts were more forceful in the early cases, such as *O'Donoghue*, where the State was neglecting its duty entirely, but were more deferential in the later cases because they were dealing with the quality of education provided, about which there was disagreement amongst experts.[56]

2.1.2 Education Cases for Children at Risk

Two cases, *GL v Minister for Justice*[57] in 1995 and *Comerford v Minister for Education*[58] in 1997, dealt specifically with the rights to education of children in State care due to their being at risk of harm to themselves or others. Discussing these cases here takes them out of the context in which they were decided, which was in the middle of series of cases regarding the State's obligation to provide accommodation for these children and others in a similar position.[59] These cases were some of the most dramatic and tragic brought before the Irish courts and saw many developments for public interest law, ultimately culminating with *TD v Minister for Education*,[60] noted above. The judicial deference and hesitancy in *GL* and *Comerford* is best understood by noting that they arose

[53] *O'Carolan v Minister for Education* [2005] IEHC 296.
[54] *Ó'C v Minister for Education and Science* [2007] IEHC 170
[55] *McD v Minister for Education* [2008] IEHC 265.
[56] Conor O'Mahony, 'The Right to Education and "Constitutionally Appropriate" Provision' (2006) 28 DULJ 422; Whyte, *Social Inclusion and the Legal System* (n 1) 332-333.
[57] *GL v Minister for Justice* (HC, 24 March 1995).
[58] *Comerford v Minister for Education* [1997] 2 ILRM 134.
[59] See, Whyte, *Social Inclusion and the Legal System* (n 1) 290-302.
[60] *TD v Minister for Education* [2001] 4 IR 259.

early in this period when the courts were grappling with the problem of how to respect the separation of powers while simultaneously ensuring the State respected socio-economic rights.

Neither *GL* nor *Comerford* made a dramatic contribution to substantive law on the right to education. In *GL*, Geoghegan J stated that there was a *prima facie* case to say that the State was incapable of meeting the educational needs of GL, who was in protective detention. Having made that statement, Geoghegan J adjourned the case, leaving it to the authorities to resolve the problem without court involvement.[61] *Comerford* included some more detailed consideration of how the right to education applied. The child in question had specific educational needs, such as small classrooms with low pupil:teacher ratios. McGuinness J felt confined by the doctrine of the separation of powers, which she held prevented her from dealing with the distribution of resources. Instead, she was able to clarify the extent of the child's right to education and make a declaration that, once the specific education needs had been diagnosed, the State had failed to vindicate the right to education. McGuinness J also left the resolution of the problem to the authorities without the involvement of the court.

The cases dealing with the education of children at risk demonstrate both confidence and deference on the part of the courts. The two High Court judges in question were comfortable analysing the quality of education provided to the children and to grant a declaration that it was inadequate. This confidence to critique the State's conduct and to assert the strength of the right to education is crucial for the public interest litigation strategy proposed in section 3 below. The courts also demonstrated significant deference in forming the remedy, however. Each judge adopted the approach that would subsequently be favoured by the Supreme Court in *Sinnott* and *TD*, which is that the doctrine of the separation of powers prevents the courts engaging with the substance of how government distributes resources.[62] This deference is a severe restriction both on the

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[61] Whyte, *Social Inclusion and the Legal System* (n 1) 290.

[62] O'Mahony notes an interesting paradox, which is that the separation of powers allows the courts to require the State to spend money on damages, but not on implementing policies; O'Mahony, *Educational Rights in Irish Law* (n 16) 244. These are possibly distinguishable given that the volume of money is likely to be smaller when compensating an individual relative to implementing a policy, and given also the traditional power of the courts to award damages.

enforceability of socio-economic rights, including the explicit right to education in the Constitution, and on the usefulness of public interest litigation as a means for seeking social change.

2.1.3 Cases Addressing Systemic Issues Within Education

In a number of cases, the courts have been asked to clarify the constitutional requirements of the education system. These are important for the public interest litigation agenda proposed below because some of these deal with what the State is allowed to do, such as whether it has permission to pay for religious chaplains in schools, while others look at the demands that parents can make of the State, such as whether it has an obligation to fund all types of primary schools. As outlined in Section 3, the proposed agenda addresses both obligations and powers of the State relating to education. Educational public interest litigation can also be brought based on statutory rather than constitutional law. I consider an important recent example of this, *Stokes v CBS Clonmel*,[63] at the end of this subsection.

Dealing with the permission afforded to the State, in *Campaign to Separate Church and State Ltd v Minister for Education*,[64] the Supreme Court upheld the practice of paying for chaplains to work in State-owned schools. The plaintiff, a good example of an interest group incorporating in an effort to obtain standing (the Supreme Court, however, reserved its position on standing), argued that paying chaplains to have a religious function in schools constituted endowment of religion. The Court rejected this argument by subordinating the non-endowment and non-discrimination clause in Article 44.2.4[65] to the parental choice clause in Article 42.4;[66] the Court held that the purpose of the non-

[63] *Stokes v CBS Clonmel* [2015] IESC 13.
[64] *Campaign to Separate Church and State Ltd v Minister for Education* [1998] 3 IR 321, [1998] 2 ILRM 81; Gerard Hogan and Gerry Whyte, *JM Kelly: The Irish Constitution* (4th edn, Lexis Nexis Butterworths 2003) 1942.
[65] Article 44.2.4°: Legislation providing state aid for schools shall not discriminate between schools under the management of different religious denominations, nor be such as to affect prejudicially the right of any child to attend a school receiving public money without attending religious instruction at that school.
[66] Article 42.4: The state shall provide for free primary education and shall endeavour to supplement and give reasonable aid to private and corporate educational initiative, and, when the public good requires it, provide other educational facilities or institutions with due regard, however, for the rights of parents, especially in the matter of religious and moral formation.

endowment clause is to facilitate the free practice of religion, so if parents want religious education provided by the State, it has constitutional power to provide it. Hogan and Whyte point out the difficulty with this reasoning, which is it takes a textually robust clause prohibiting endowment of religions, and qualifies it by the vague requirement to provide educational facilities giving "due regard" to "the rights of parents, especially in the matter of religious and moral formation" in Article 42.4. The constitutional principle that the case asserts is that the value of parental choice is strong and can even be used to qualify the express wording of other clauses in the Constitution.

An identical principle of parental choice was used by Geoghegan J in the High Court in *Greally v Minister for Education (No 2)*[67] to uphold a recruitment policy for Catholic schools funded by the State that favoured teachers who had previous teaching experience in Catholic schools. This second case may not fit neatly within Whyte's definition of public interest law discussed above, but it is worth mentioning as further evidence of the strong power given to the State when it can rely on the preferences of parents in support. I discuss this issue in chapter 6, but I raise it below to argue that, provided the State has support of parents, it may have constitutional power to push through dramatic reform of the educational system.

The extent of the educational obligations on the State has also been the subject of several public interest law cases. In *O'Shiel v Minister for Education*[68] a group of parents unsuccessfully sought to oblige the State to fund a primary school they had established that operated on the basis of Steiner principles of education. Despite affirming that the parents had the right to establish the school because of the venerated position afforded to parental choice in Article 42, Laffoy J presented a compromise view on the State's duty to provide for free primary education. On the one hand, Laffoy J held that the State cannot provide a single form of education on a take-it-or-leave-it or one-size-fits-all basis, but on the other hand it is not obliged to support financially every parental choice. Instead, the State has to account for the views of parents when administering the system and to choose which schools to fund "based on arrangements which

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[67] *Greally v Minister for Education (No 2)* [1999] 1 IR 1, [1999] 2 ILRM 296.
[68] *O'Shiel v Minister for Education* [1999] 2 IR 321, [1999] 2 ILRM 241; Hogan and Whyte (n 64) 1961-1963.

have a rational foundation".[69] As a result, it is appropriate for the State to account for "need and viability" when administering the funding scheme.[70]

Stokes v CBS, Clonmel[71] is an important recent use of public interest law to tackle inequality in education. This case was a challenge to the practice by popular second level schools of reserving places for the children of past pupils. The plaintiff was a member of the Traveller community and argued that it was indirectly discriminatory on that ground under s.3(1)(c) of the Equal Status Act 2000, given that the vast majority of Travellers of his father's generation did not go on to second level education. The case was unsuccessful in both the High and Supreme Court,[72] because each court dealt with indirect discrimination in a questionable way, but it nonetheless provoked a political response. The former Minister for Education, Ruairí Quinn TD, introduced the Admissions to School Bill 2015, which included a provision limiting the number of school places that could be reserved to 25%. This was then reduced further to 10% when Jan O'Sullivan TD took over the education portfolio. However, the Minister faced sustained political pressure from alumni groups from elite fee-paying school and some rural schools with a strong GAA tradition, who opposed the Bill.[73] As a result, the Minister conceded that the Bill would not be enacted.[74] Public interest law typically relies on provoking political reform in order to achieve change. The *Stokes* case is thus an outlier because if the litigation had been successful, the practice of reserving places for children of past pupils would have been found indirectly discriminatory and would have been effectively prohibited by the courts. In contrast, the best political resolution on offer was a restriction on how

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[69] *O'Shiel v Minister for Education* [1999] 2 IR 321, 348.
[70] *O'Shiel v Minister for Education* [1999] 2 IR 321, 347-348.
[71] *Stokes v CBS Clonmel* [2015] IESC 13.
[72] *Stokes v CBS Clonmel* [2015] IESC 13, per Clarke J, and (HC, 3 February 2012).
[73] Education News, 'Belvedere past pupils join 'Rockmen' in admissions battle' *The Irish Times* (Dublin, 10 October 2014) <http://www.irishtimes.com/news/education/belvedere-past-pupils-join-rockmen-in-admissions-battle-1.1959589> accessed 10 December 2015.
[74] Ben Mitchell, 'Irish Government Abandons Plans to Reduce Elitism in Schools' (OxHRH Blog, 14 December 2015) <http://ohrh.law.ox.ac.uk/irish-government-abandons-plans-to-reduce-elitism-in-schools/> accessed 14 December 2015; Katherine Donnelly, 'Controversial plans to change "old school tie" admissions bite dust' *Irish Independent* (Dublin, 9 December 2015) <http://www.independent.ie/irish-news/education/controversial-plans-to-change-old-school-tie-admissions-bite-dust-34272115.html> accessed 10 December 2015.

many places could be reserved, and in the end the political system failed to resolve the inequality.

2.2 Poverty-Based Public Interest Litigation

An attempt to summarise poverty-based public interest law would largely be an attempt to summarise public interest law in general, given that the strategy is often employed by those without sufficient financial, political or cultural capital to have their rights met by the political system. As a result, in this section I analyse two approaches to poverty-based public interest law, without seeking to be comprehensive in the summary. The first approach is to tackle the poverty-based injustice indirectly, by challenging the law or *status quo* on the basis of other grounds, rights or procedures. Whyte highlights *Dillon v DPP*[75] as a perfect example of this, in which the offence of begging in a public street was held to be unconstitutional, not because it contributed to poverty or inequality, but because it constrained freedom of expression.[76] Other cases using this approach include some of the most successful public interest litigation cases brought in Ireland, challenging the inadequate provision of social welfare.[77] These cases managed to improve both the quality of social welfare payments and widen access to the entitlements. The cases were litigated on various bases, including procedural rules of constitutional justice, such as the right to be heard,[78] administrative law reasonableness,[79] or by invalidating a restriction on entitlements by reference to a higher legal norm such as an EU Directive.[80]

The second approach is more direct and seeks to put the issue of poverty itself before the court. One of the most notable of these cases is *Redmond v Minister for the Environment*.[81] The High Court held unconstitutional a requirement to pay a deposit in order to stand for election because it was discriminatory on the basis of wealth and poverty. In a memorable passage, Herbert J said:

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[75] *Dillon v DPP* [2008] 1 IR 383.
[76] Whyte, *Social Inclusion and the Legal System* (n 1) 3.
[77] Whyte, *Social Inclusion and the Legal System* (n 1) 228, ch 5.
[78] Whyte, *Social Inclusion and the Legal System* (n 1) 215-228.
[79] Whyte, *Social Inclusion and the Legal System* (n 1) 232-234.
[80] Whyte, *Social Inclusion and the Legal System* (n 1) 2229-232, 249-250.
[81] *Redmond v Minister for the Environment* [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... 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 of the Constitution were providing.[82]

Perhaps surprisingly, the State did not appeal the decision in *Redmond* but while the reasoning remains valid, its ultimate conclusion has been reversed by legislation that reintroduced deposits. The Supreme Court also upheld the constitutionality of electoral deposits in *King v Minister for the Environment (No 2)*,[83] which I address in chapter 5.

3. Public Interest Litigation Agenda

In the first two sections of this chapter, I have presented an overview of public interest litigation in Ireland, its theoretical components and some of the notable examples that deal with education and poverty. In this section, I suggest a public interest litigation agenda, applying the constitutional arguments developed in this thesis in order to achieve greater equality in the education system on the basis of poverty, social class and socio-economic status.

3.1 Three Stages of the Agenda

The proposed agenda is a three-stage process. Stage 1 is to lodge a judicial review challenge in the High Court using the arguments developed in chapters 3-7 to ask the court to find a constitutional *obligation to equalise* the education system on the State. Stage 2 is to use the publicity of the High Court litigation to raise public awareness of the issue and to persuade the public that educational inequality on the basis of poverty, social class and socio-economic status is unjust. Stage 3 is to achieve reform though the political process and, if necessary, to defend the reforms in the courts.

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[82] *Redmond v Minister for the Environment* [2001] 4 IR 61, 80.
[83] *King v Minister for the Environment (No 2)* [2007] 1 IR 296.

3.1.1 Stage 1 – Judicial Review for an Obligation to Equalise

Stage 1 relies on four arguments. First, that poverty and social class are presumptively proscribed grounds of discrimination in the Irish Constitution (see chapter 4); second, that inequalities on this ground in the education system are so entrenched and severe as to breach the right to equality in Article 40.1 (see chapter 3); third that the effective denial of school choice to parents without sufficient financial, political, social and cultural capital violates the right to education in Article 42 (see chapters 5-6); and fourth that the State's management of an education system that perpetuates inequality is unconstitutional under a conjoined application of the rights to equality and education (see chapter 7).

As I conclude in each of the chapters on these respective issues, these are difficult arguments to make because of the traditional way in which the Constitution has been interpreted. The chances of success, therefore, are not particularly strong. However, this disappointing conclusion is based on previous experiences and expectations of judicial attitudes; it remains the case, as I argue in the chapters, that the text of the Constitution, and the philosophies upon which it was drafted, are open to a progressive interpretation in the way I propose in the four arguments.

Given the chance that Stage 1 of the agenda ends with the court rejecting the challenges, it is necessary to consider whether the prospects of success are even sufficient to overcome the initial hurdles, such as the danger of a wasted costs order being made against the solicitors and the possibility of a court striking out the claim at an initial stage. Under a wasted costs order, a solicitor can be personally liable to the other side for costs if her or his litigant is unable to pay. One of the three potential plaintiffs for this litigation, considered above in section 1, is a private party, who would logically have to be in such a financial position. Order 99, rule 11 of the Rules of the Superior Courts 1986 provides that the court has discretion to award this remedy against a solicitor if costs have been incurred "improperly or without any reasonable cause". Based on the relatively few Irish cases on the point, Whyte suggests that the simple fact of taking a case *pro bono* on behalf of a client would not be improper or without reasonable cause, once the solicitor acted in good faith, and that an element of

misconduct or gross negligence must exist for a wasted costs order to be made.[84] Other practical problems for the lawyers involved, such as liability in the torts of champerty and maintenance, should also be avoidable provided the litigation is brought in good faith.[85] The danger of a wasted costs order, therefore, can be discounted unless a court were to decide that the arguments developed in this thesis are so weak that it would be gross negligence to use them as the basis for litigation.

Personal liability of the lawyers aside, the litigation would be pointless, failing to win the substantive issues and possibly also failing to raise the public profile of the issue, if the court were to strike out the claim at an initial stage before considering the constitutional arguments. Unlike in England,[86] the summary judgment procedure in Ireland is only available to plaintiffs and not defendants,[87] which means that the State in constitutional challenges cannot avail of this remedy, but it can instead apply for the entire application or individual arguments to be struck out. There are three bases upon which a court could be asked by the State to strike out the constitutional pleadings. First, under Order 19, rule 27 of the Rules of the Superior Courts 1986,[88] the court can strike out individual parts of a pleading that are unnecessary, scandalous or prejudicial.[89] Second, the entire proceedings can be struck out under Order 19, rule 28 where the statement of claim reveals no reasonable cause of action or is frivolous or vexatious.[90] Third, the court has an inherent jurisdiction to strike out proceedings that are frivolous, vexatious or bound to fail.[91]

Striking out on the basis of prejudice, scandal or vexatiousness account mainly for improper or irrelevant motives. Provided the litigation proposed here is conducted in a *bona fide* manner, challenges on these bases ought to be avoidable. The relevant ground for striking out, a version of which exists under all

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[84] Whyte, *Social Inclusion and the Legal System* (n 1) 206-208.
[85] Whyte, *Social Inclusion and the Legal System* (n 1) 202-205.
[86] See Adrian Zuckerman, *Zuckerman on Civil Procedure: Principles of Practice* (3rd edn, Sweet & Maxwell 2013) 378.
[87] Hilary Delany and Declan McGrath, *Civil Procedure in the Superior Courts* (3rd edn, Round Hall 2012) 921-922.
[88] The Rules of the Superior Courts 1986, SI No 15/1986.
[89] Delany and McGrath (n 87) 311-316.
[90] *Aer Rianta v Ryanair* [2004] 1 IR 506 (SC); Delany and McGrath (n 89) 576-578.
[91] Delany and McGrath (n 87) 578-585.

three bases for the jurisdiction, is that the claim is substantively weak and has no prospect of success. The most important feature to note for these grounds is that the courts are slow to exercise them. In *Barry v Buckley*,[92] Costello J in the High Court explained that the jurisdiction is closely related to the need to prevent the court processes being abused, which does not occur regularly, so the jurisdiction is to be "exercised sparingly and only in clear cases".[93] As further evidence of this reluctance to strike out proceedings, it is worth noting that the reformed Civil Procedure Rules (CPRs) in England were designed to encourage greater use of the power to strike out claims. The English system previously employed rules that were very similar to those in Ireland but reformed them to encourage judges to use a "three-dimensional conception of justice" that balances the value of truth finding in an individual case with the realities of resource and time limitations.[94] This is known as the "overriding objective" and it is used to influence the interpretation of the CPRs across the entirety of civil procedure so that greater regard is given to the need for efficiency than under the previous Rules of the Superior Courts. This requires a purposive approach to all the rules of the CPRs,[95] one feature of which is greater confidence on the part of the courts to strike out unmeritorious claims in order to save resources and increase efficiency.[96] The relevant analogous ground for striking out under the CPR is "that the statement of case discloses no reasonable grounds for bringing or defending the claim".[97] The inherent jurisdiction to strike out that exists in Ireland also subsists in England.[98] Comparing this to Ireland leads to an unusual situation where the courts in each jurisdiction use similar phrases when describing the jurisdiction but then exercise it in different ways, with the Irish courts adopting the more traditional and reluctant approach. The standard of no reasonable cause of action or being bound to fail have been described variously in Ireland, as "no reasonable chance of succeeding",[99] "entirely devoid of

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[92] *Barry v Buckley* [1981] IR 306.
[93] *Barry v Buckley* [1981] IR 306, 308.
[94] Overriding objective of the Civil Procedure Rules, CPR 1.1; Zuckerman (n 86) 7-23.
[95] Zuckerman (n 86) 23.
[96] For an analysis of the exercise of this power, which is notably more active than in Ireland, see Zuckerman (n 86) 375-376.
[97] CPR 3.4(2)(a); Zuckerman (n 86) 374.
[98] Zuckerman (n 86) 375.
[99] *Farley v Ireland* (SC, 1 May 1997); Delany and McGrath (n 87) 578.

merit",[100] or "on admitted facts, it cannot succeed".[101] The use of alternative adjectives does not enlighten the analysis significantly, but the practice evident in the case law is that striking out is an extreme remedy and that, when contentious issues exist that could be resolved at trial, the court will not strike out the pleadings.

For the public interest litigation agenda proposed here, each of the arguments is based on a combination of High and Supreme Court precedents, interpretations of the text and of the philosophies that informed the drafting of the Constitution, and on relevant comparative law examples. Though a legal victory is far from certain, the arguments all have proper foundations in constitutional law. As a result, the arguments are strong enough to withstand a challenge at the preliminary stage and a court would be unlikely to strike out the pleadings, given that contentious interpretations of the Constitution are best resolved at trial.

Withstanding a striking out application is, of course, not a great victory. For the litigation stage of the agenda to be successful, the constitutional challenges must be heard at full trial. If the arguments were successful, and the court found the State to be bound by an *obligation to equalise* the education system, it would be a tremendous legal and symbolic victory. The attention would then shift to the remaining challenges of how to fashion a remedy and how to ensure compliance by the State with the court order. Both of these would be contentious and problematic issues, especially since they would raise the problems posed by the doctrine of the separation of powers identified in *Sinnott* and *TD*. Taking the reluctance of the Supreme Court evidenced in these cases at face value, a legal victory would be capped at achieving a declaration that the State's management of the education system is unconstitutional. The court would be unable to issue a mandatory order to reform the system, because it would be difficult to argue that the degree of constitutional violation has risen to the level of bad faith or recklessness as envisaged by Murray and Hardiman JJ in *TD v Minister for Education*. Furthermore, the court would not be authorised to schedule review hearings, in which it could assess the progress of reform on an on-going basis. Of course, the majority judgments in *Sinnott* and *TD* may not have to be taken at

[100] *McCarthy v Bank of Scotland PLC* [2014] IEHC 340, [19].
[101] *Sun Fat Chan v Osseous Ltd* [1992] 1 IR 425, 428; Delany and McGrath (n 87) 580.

face value, and numerous academic criticisms of the reasoning exist.[102] Some of the statements that appear anathema to public interest law are *obiter dicta*, and those passages that do constitute the *ratio* of the cases would be vulnerable to being overruled if the constitutional arguments upon which the Stage 1 litigation is based were successful. This is because those arguments rely on a reinterpretation of the Constitution in a way that focuses on different philosophies to the interpretation that informed the *Sinnott* and *TD* majorities.

On the other hand, if the constitutional arguments were unsuccessful at the full trial, the Stage 1 of the agenda could still be deemed a success if the advocates managed to raise the profile of the social class inequality and made the injustice within the school system into a political issue. At this point, the public interest litigation agenda would shift to Stage 2.

3.1.2 Stage 2 – Raising the Public Profile of the Issue

The litigation launched at Stage 1 of the agenda is an important step in the overall project, but it is important to emphasise that a court victory at that stage is neither sufficient nor even necessary for the overall success of the public interest litigation strategy. This is because, win or lose, the objective of public interest litigation is to provoke a political resolution to the social problem. The litigation itself is often more important for its instrumental value as a means of raising the public profile of the injustice at stake than for its intrinsic value.

In the case of a legal victory in the courts, there remain, as noted above, the significant obstacles of fashioning a remedy and ensuring its implementation, both of which are easier to achieve when the State has the political will to cooperate and resolve the social problem. In the case of a defeat in the court, however, the need to win the political and public relations contest is even more profound. This is because of the central risk associated with the public interest

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[102] Gerry Whyte, 'The Role of the Supreme Court in our Democracy: A Response to Mr Justice Hardiman' (2006) 28 DULJ 1; Alan Keating and Anthony Lowry, 'The Separation of Powers - The Supreme Courts Approach to Affirmative Duties - Part 1 and 2' [2003] 21 ILT 103 and [2003] 21 ILT 118; Conor O'Mahony, 'Education, Remedies and the Separation of Powers' (2002) 24 DULJ 57; Shivaun Quinlivan and Mary Keyes 'Official Indifference and Persistent Procrastination: An Analysis of *Sinnott'* (2002) 2 Judicial Studies Institute Journal 163; Oran Doyle 'The Duration of Primary Education: Judicial Constraint in Constitutional Interpretation' (2002) 10 ISLR 222; Mark De Blacam, 'Children, constitutional rights and the separation of powers' (2002) 37 Irish Jurist 113.

law that losing the litigation would see the court affirming the *status quo* that the litigation sought to challenge.[103] What would in theory just be a constitutional victory for the State can then be converted into an apparent moral or political victory and give impetus to the idea that there is no need to change the *status quo*. Such an outcome would be not just be a failure to succeed through the courts but would actively setback the cause of tackling the injustice.

The consequence of this is that the function of Stage 1 of the agenda is to support the launch of a political campaign. Stage 2 of the agenda is entirely non-litigation based and involves applying political pressure so that a government adopts a policy commitment to achieving equality in the education system on the basis of poverty and social class. Whyte summarises this feature of public interest litigation:

> In the last analysis, therefore, one cannot avoid engaging with the politico-bureaucratic system in order to ensure that gains secured through litigation are properly 'bedded-down'. Contrary to the views of some commentators, litigation strategy does not pre-empt a political response to an issue; it generally provokes such a response. Thus litigation strategy should be seen as one element in an overall campaign for change in which the campaigners also work on shaping an appropriate political response to their demands.
>
> It follows that lawyers working with those seeking social change should not restrict their efforts to the use of litigation only but should also be prepared to help organise their clients as a political force and to engage in political lobbying for change.[104]

One of the crucial assessments that would need to be made before launching public interest litigation on this issue is to determine whether such a political victory is even possible in contemporary Ireland. If public and political opposition

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[103] Whyte, *Social Inclusion and the Legal System* (n 1) 440.

[104] Whyte, *Social Inclusion and the Legal System* (n 1) 443-444 (internal footnotes omitted); see also, Martha Jackman, 'Charter Equality at Twenty: Reflections of a Card-Carrying Member of the Court Party' (2006) 20 National Journal of Constitutional Law 115, 118; for an example of this approach involving reforming the law relating to transgendered people, see Michael Farrell, 'Lydia Foy and the Struggle for Gender Recognition' (2012) 1 Socio-Legal Studies Review 153.

to social class equality in schools are thought to be strong, the advisability of launching Stage 1 of the agenda diminishes accordingly.

There are examples from previous public interest law cases of how Stage 2 can be implemented successfully, though there are potentially significant distinguishing factors between these and the agenda proposed here. First, building on a victory in the courts, the level of State support for children at risk of neglect and harm increased notably after the cases taken during the 1990s. These improvements were achieved through the political process, rather than as a direct result of the litigation because the courts were very slow to issue mandatory orders against the government and ultimately decided not to issue such orders. As a result, the reforms that were achieved were in response to public pressure placed on the government, part of which was attributed to the publicity of the High Court actions. For example, Whyte quotes from Fr Peter McVerry on how these cases provoked a political response:

> After twenty years of political apathy, when it was almost impossible to interest the government or Health Boards in the problem of homeless young people, we have moved into a phase of political panic. Getting the problem away from Justice Peter Kelly in the High Court, who has described the inertia of the Government as a "scandal", and off the front pages of the national newspapers has become an urgent priority. With no shortage of resources any longer, a significant increase in the level of services can be expected.[105]

An analogous success at promoting a political resolution is the increase in educational provision for children with severe or profound learning difficulties.[106]

It is possible to generate a political victory despite a failure to win in court, though as noted above there is an additional hurdle to overcome in the form of the court's legitimisation of the *status quo*. The most striking recent example of this use of public interest law is *Zappone v Revenue Commissioners*.[107] This was a High Court action brought by Katherine Zappone and Ann Louise Gilligan, who

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[105] Whyte, *Social Inclusion and the Legal System* (n 1) 335, quoting Peter McVerry, 'Homelessness' (2001) 52 The Furrow 12, 15.
[106] Whyte, *Social Inclusion and the Legal System* (n 1) 311-312.
[107] *Zappone v Revenue Commissioners* [2008] 2 IR 417 (HC).

married in Canada and were seeking recognition of their civil marriage in Ireland. The High Court dismissed the claim on the basis that the constitutional understanding of marriage was limited to opposite sex couples.[108] This was in December 2006, and though the litigation part of the strategy was not successful, by 2015 the leaders of the political campaign for marriage equality were crediting it as one of the most successful examples of public interest litigation in the history of the State.

On 22 May 2015, the people by referendum approved an amendment to the Constitution to allow for same-sex marriage on equal terms with opposite-sex marriage. The leaders of one of the main campaign groups, Yes Equality, provide a narrative of the campaign that sees the High Court action as a crucial milestone, and that portrays the litigants, Zappone and Gilligan, as fulfilling leadership roles and also acting as figureheads and sources of inspiration for the campaigners.[109] In particular, the narrative told by Healy, Sheehan and Whelan credits the High Court action with placing the issue on the political agenda, which ultimately led to the constitutional reform:

> Standing outside the High Court in Dublin in November 2004, after Justice McKechnie had granted them leave to appeal a decision by the Revenue Commissioners which had refused recognition of their Canadian marriage, Katherine Zappone and Ann Louise Gilligan announced to the media that they were seeking recognition of their lifelong loving lesbian relationship. This declaration of same-sex love was revelatory for the Irish public.
>
> ... When Katherine and Ann Louse, two women with public profiles, broke the silence around their lesbian relationship in this dramatic manner, they awoke public awareness to the injustice of the same-sex marriage ban in Ireland. Their public declaration of their love awoke the same possibility in the imagination of the wider Irish public. The fact that these to middle-aged women, feminist theologians, social justice activists and educators,

[108] *Zappone v Revenue Commissioners* [2008] 2 IR 417 (HC), 505-506.
[109] Gráinne Healy, Brian Sheehan and Noel Whelan, *Ireland Says Yes: The Inside Story of How the Vote for Marriage Equality Was Won* (Merrion 2016) 4, 82, 103.

chose to tell their personal business and speak about their love and commitment ignited a wider movement.[110]

There are two issues to consider in assessing the relevance of this use of public interest litigation to the agenda proposed in this chapter. The first is cautionary; though the narrative that the litigation led ultimately to the referendum is popular and compelling, it is impossible to prove this causatively. The case certainly garnered public attention for this issue but it is possible that a referendum would have been held regardless of the litigation, especially in light of the trend in the last few years among democratic states of introducing same-sex marriage.[111] It would be difficult to maintain the claim that the litigation was necessary for the issue to be put on the political agenda, in the sense that the referendum would not have occurred "but for" the unsuccessful High Court action, and it certainly cannot be argued that it was sufficient, given the huge political effort exerted in the intervening years. It is possible, however, that the litigation was causally relevant, contributing to the heightened profile of the issue and helping to galvanise campaigners. In this context, it is notable that Zappone and Gilligan saw their case as a contribution to a public conversation about same-sex marriage that had been on going in Ireland before the case and at least since 1999.[112]

The second issue is, therefore, to examine how the litigants and the organisation supporting them converted from legal to political actors. In order to support Zappone and Gilligan's legal challenge, a group called KAL Advocacy Initiative was formed in 2004.[113] In 2008, two years after the litigation, the group was renamed and reformed as Marriage Equality, in order to operate as a political entity and not just as a support group.[114] In 2011, Atlantic Philanthropies supported this transition by awarding funding to the group.[115] Then in early 2015,

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[110] Healy, Sheehan and Whelan (n 109) 102.
[111] Pew Research Centre, *Gay Marriage Around the World* (26 July 2015) <http://www.pewforum.org/2015/06/26/gay-marriage-around-the-world-2013/> accessed 4 August 2016.
[112] Una Mullally, *In the Name of Love: The Movement for Marriage Equality in Ireland: An Oral History* (History Press Ireland 2014) 47.
[113] Mullally (n 112) 87; Healy, Sheehan and Whelan (n 109) 16.
[114] Mullally (n 112) 89-91.
[115] Atlantic Philanthropies, *Grant Details: Marriage Equality Ltd* <http://www.atlanticphilanthropies.org/grant/campaign-marriage-equality> accessed 14 December 2015.

Marriage Equality came together with the Gay and Lesbian Equality Network (GLEN) and the Irish Council for Civil Liberties (ICCL) to form Yes Equality, the main non-party group that would lead the referendum campaign for a Yes vote.[116] At the very least, the litigation was a useful way of putting a framework of activists together that would then be prepared for the subsequent political campaign. At the same time, Zappone and Gilligan released a book, also designed to maintain the discussion of marriage equality in the political arena.[117]

This persistent publicity appeared to pay off in 2011 when the Labour Party committed itself to holding a referendum on the issue in its election manifesto, and the compromise programme for government in coalition with Fine Gael included marriage as one of the issues to be put to the Constitutional Convention.[118] As is well known, the Convention recommended that the government hold a referendum on same sex marriage,[119] and, following the vote and a number of unsuccessful attempts to challenge the constitutionality of the result,[120] the amendment was confirmed,[121] legislation introduced[122] and the first same-sex marriages in Ireland took place on 17 November 2015.[123] The popular narrative draws a line directly between the High Court action in 2006 and the ultimate political victory, vindicating the public interest litigation strategy as remarkably successful. As noted above, the case's causative role cannot be proved categorically and it is important to acknowledge both the international trend towards marriage equality and the cross-party political support for LGBT rights in Ireland, which saw near unanimous support for civil partnership in the

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[116] Healy, Sheehan and Whelan (n 109) 14.
[117] Ann Louise Gilligan and Katherine Zappone, *Our Lives Out Loud: In Pursuit of Justice & Equality* (O'Brien 2008).
[118] Healy, Sheehan and Whelan (n 109) 2.
[119] Convention on the Constitution, *Third Report of the Convention on the Constitution: Amending the Constitution to provide for same-sex marriage* (June 2013) <https://www.constitution.ie/AttachmentDownload.ashx?mid=c90ab08b-ece2-e211-a5a0-005056a32ee4> accessed 4 December 2015.
[120] *Walshe v Ireland* [2015] IESC 37; *Lyons v Ireland* [2015] IESC 38.
[121] Thirty-Fourth Amendment of the Constitution (Marriage Equality) Act 2015.
[122] Marriage Act 2015.
[123] Barry Roche, 'Congratulations! First same-sex marriage takes place in Ireland' *The Irish Times* (17 November 2015).

Oireachtas in 2010.[124] Despite that caveat of uncertainty, the case at least offers a model of successful transition between legal and political strategies.

Operating on the assumption that *Zappone v Revenue Commissioners*[125] did have a causative effect on the referendum success, what features of the case made this possible and could those features be present in the public interest litigation agenda proposed here?

Three particular features of the marriage equality campaign are notable. First, the transition from Stage 1 (litigation) to Stages 2 (raising the public profile) and 3 (political reform) was overseen throughout by an impressive organisational structure. There was continuity of people involved and they were prepared for each stage of the process. Such an organisational structure would be available for the agenda proposed here. Multiple NGOs and charities are already involved in campaigning on the issue of inequality in schools and have experience of large-scale campaigns. For example, as discussed in section 1 above, in 2014 Barnardos explored the possibility of initiating litigation based on the high cost of attending primary school.

The second feature is a motivated and vocal grassroots community willing to campaign on the issue, who also have the patience and persistence to continue for several years. In order to build up that grassroots movement, Zappone and Gilligan proved to be effective media operators during Stage 1 and took multiple opportunities to present themselves and their legal argument to the press in a dignified manner.[126] One important example of this is that Zappone and Gilligan facilitated far more media access to their case than occurs in ordinary litigation; they built a personal rapport with journalists and shared the details of their legal arguments, which endeared them positively to the media.[127] This helped them connect with members of the public. A similar tactic was used continuously over the next few years. The campaigners consciously told their personal stories so that the issue of marriage equality could be seen in a less abstract way; this

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[124] Civil Partnership and Certain Rights and Obligations of Cohabitants Act 2010; Only four members of the Oireachtas had voted against the legislation; Mullally (n 112) 189; Healy, Sheehan and Whelan (n 109) 9.
[125] *Zappone v Revenue Commissioners* [2008] 2 IR 417 (HC).
[126] Mullally (n 112) 55-56, 75-76; Gilligan and Zappone (n 117) 258-259, 261-265, 270.
[127] Mullally (n 112) 59, quoting Kathy Sheridan.

proved useful both in pushing for a referendum to be held and in securing a Yes vote.[128]

The third feature of the marriage equality campaign worthy of note is that the right to marry is a traditional civil and political right, which meant that there was not significant extra cost for the State in expanding the right to same-sex couples, and also that it could be done without being at the expense of others who had the right at the time. In contrast, the reforms sought by the agenda proposed here are seeking to improve the provision of a social and economic right and this inevitably involves additional expense on the part of the State. The reforms can also be portrayed as anathema to the interests of the middle classes, which could prevent political change. As demonstrated in chapter 5, the reforms would diminish middle class power and privilege, but there is strong evidence that they would actually improve the quality of education for all children in schools, including middle class children. They would thus be anathema to an illegitimate middle class interest, the unfair concentration of power, but not be harmful to the legitimate interest in the quality of education. However, both of these features, the cost to the State and the weakening of middle class privilege, can distinguish the marriage equality campaign from the public interest litigation agenda proposed here.

The social class dimension to Stage 2 of the agenda is acute; both the media and the political system are dominated by middle class actors and largely reflect middle class attitudes. It is well established that middle class communities are far more politically organised than working class communities,[129] partially caused by weakening in the trade union movement and the poor political participation and representation in many areas of the State most affected by inequality in schools. Unlike the main beneficiaries of equalising the education system on the basis of poverty and social class, many of the leaders of the Yes Equality campaign came from middle class backgrounds and were influential in political and media circles. In reflecting upon Zappone and Gilligan's case, many observers describe them

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[128] Mullally (n 112) 93-95, 117-133, 202-233.

[129] Darly D'Art and Thomas Turner, 'Irish Trade Unions under Social Partnership: A Faustian Bargain? (2011) 42(2) Industrial Relations Journal 157; for analysis of a comparative phenomenon in the UK, Owen Jones, *Chavs: The Demonisation of the Working Class* (Verso 2012).

as the ideal plaintiffs, because they were middle-aged, middle class, well known and respected.[130]

The challenges facing the marriage equality campaigners were significant but one of their great strengths was that the campaigners were drawn from all segments of society; the LGBT communities overlap with every social class group in Irish society. As a result, the campaign was able to make effective use of personal stories in order to show that the beneficiaries of marriage equality would be part of the same communities, families, and friend-groups as the voters being lobbied. It may prove more difficult to generate empathy in the public interest litigation strategy proposed here because class divisions are so stark in Ireland. Social class has a highly segregating effect on society, so many people will often work and socialise almost exclusively with other people from the same social class. Fostering compassion for an unknown member of another social class would likely be more difficult, because the powerful effect of a personal friend or family member "coming out" does not have an equivalent in the social class context. Additional problems with mobilising a grassroots campaign analogous to the Yes Equality movement is that the periods of time can be long in relation to the length of time a child spends in school. It took nearly a decade from the *Zappone* case for the referendum to be held. In Ireland, a full primary and secondary school career is fourteen years, with many children from working class backgrounds finishing early. As a result, the period of time in which parents have a personal connection to the issue is short, compared to the lifelong interest many Yes Equality campaigners had in same-sex marriage.

3.1.3 Stage 3 – Reform through the Political System and Defend in the Courts

The start of Stage 3 of the agenda is political and involves capitalising on the public attention generated in Stage 2 and electing a government committed to reform of the education system. The Constitution does not become irrelevant at this stage, however, because the government would have to anticipate challenges from opponents of reform using public interest litigation strategies to block change in the education system.

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[130] Mullally (n 112) 51-52; Healy, Sheehan and Whelan (n 109) 102.

The primary arguments, which I dealt with in substance in chapters 3, 6 and 7 on the right to equality, right to education and the conjoined application of both rights, would be based on parental autonomy or choice, the autonomy of religious institutions, and whether the State can vindicate the right to equality in how it relates to poverty and social class. While at Stage 1 of the agenda I am seeking to establish a State *obligation to equalise*, at Stage 3 I am exploring whether there is even a *power to equalise*. As in chapter 6, I suggest the current dominant interpretation of the Constitution would not support a strong power to equalise; instead there is at most a weak power to equalise.[131] This means that cooperation between the State, patron bodies, teachers unions and (ideally from a constitutional perspective) parent groups is essential. The best defence that the State can have in a constitutional challenge to reforms is to show that it has respected the constitutional value of subsidiarity. There is some ambiguity about the strength of the State's power to regulate education, which I address in chapter 6, but I suggest it would be consistent with the current interpretations of the Constitution for the State to incentivise schools to equalise their admissions and practices by making it a condition of receiving State funding. The High Court in *O'Sheil v Minister for Education*[132] declared that the State has discretion about which schools it chooses to fund and that it can set reasonable conditions, such as teaching Irish. The conditions to be included in the proposed reforms would be furthering constitutional values of substantive parental choice and substantive equality.

Based on the current interpretations of the Constitution, therefore, I suggest that public interest litigation could be brought to prove a political resolution to inequality in the education system. The reforms achievable would be cautious and limited, in line with the traditionally piecemeal approach to reform of the Irish education system. However, it is also worth of note that the text of the Constitution is sufficiently vague that it could be re-interpreted as a strong power to equalise or even an obligation to equalise.

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[131] The Constitution Review Group recognised the State's power to reduce inequality on the basis of poverty, social class and socio-economic status: The All-Party Oireachtas Committee on the Constitution, *Report of the Constitution Review Group* (Stationary Office 1996) 210.

[132] *O'Sheil v Minister for Education* [1999] 2 IR 321 (HC).

3.2 Reflections on the Proposed Agenda

Having outlined an agenda for public interest litigation directed at poverty, social class and socio-economic inequality in the education system, it is worth reflecting upon the chances of success and examining what the success might look like.

3.2.1 Characteristics of Successful Public Interest Litigation

Whyte has presented a number of characteristics that increase the chances of successful public interest litigation, based on an analysis of previous examples in Ireland.[133] First, he shows that the strategy is stronger when dealing with traditional administrative law principles, such as constitutional justice or legitimate expectations. These principles are non-ideological and allow the courts to dispose of the case in favour of the plaintiff without having to engage with moral or political questions. Secondly, Whyte shows that it is advisable to present the case as a challenge to the validity of the norm used by the decision-maker by reference to a higher norm, rather than by disputing the interpretation of the norm. For example, this could involve invalidating a decision of a statutory body because it was *ultra vires* the parent legislation, rather than arguing that it incorrectly carried out its functions. Thirdly, Whyte has argued that there is an ideological bias amongst the judiciary in favour of tradition liberal democratic values and against socio-economic rights.[134] As a result, he suggests it is safer to base litigation on traditional liberal democratic values, rather than on the more politically controversial social and economic rights.[135]

These are characteristics of successful public interest litigation because they allow the courts to decide in favour of the plaintiff without having to make politically controversial decisions. Unfortunately, it is difficult to find two more politically controversial topics in contemporary Ireland than equality and education. The right to equality does have a traditional liberal democratic pedigree but more modern attempts towards substantive interpretations of the right, which I adopt in this thesis, have eschewed the traditional liberal approach.

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[133] Whyte, *Social Inclusion and the Legal System* (n 1) 435.
[134] Gerry Whyte, 'A Tale of Two Cases – Divergent Approaches of the Irish Supreme Court to Distributive Justice' (2010) 32 DULJ 365.
[135] Whyte, *Social Inclusion and the Legal System* (n 1) 435.

An interpretation based on a substantive conception of equality is open to the courts, as I demonstrate in chapter 3, but for present purposes the fact that it would be a politically controversial development is significant. The right to education is a core socio-economic right and, though Article 42 is imbued with liberal values of parental choice and autonomy, the right includes an obligation on the State to spend money on the education system. The Irish courts have been reticent to critique or even engage with the distribution of resources by the State. In addition, the constitutional arguments proposed in this thesis are not based on traditional administrative law principles, nor are they based on a simple hierarchy of norms. Instead, the core arguments are that the right to equality should be interpreted to apply to poverty, social class and socio-economic status, and that the value of choice in the right to education should be interpreted as a substantive rather than formal choice. The agenda proposed here does not possess any of the characteristics that Whyte suggests can increase the prospects of success in public interest litigation.

Even setting aside the challenges particular to this proposed agenda, the challenges common to all public interest law cases remain, especially relating to procedures and remedies.[136] The doctrine of mootness could undermine the proposed agenda because education is time-sensitive in two ways. First, an ordinary school career only lasts fourteen years, and can often be shorter. As a result, if an individual plaintiff were to seek standing for the case, it would have to be completed within the period of her or his child's school career. Second, the right to free primary education in Article 42, an important element of the more general right to education, expires at the age of 18 in the case of children with learning difficulties and at the age of 12-13 for most children,[137] after which the doctrine of mootness could apply.

The question of costs is also an important practical one,[138] which is magnified by the likelihood that the litigation in Stage 1 of the agenda would be unsuccessful. Public interest litigation is not exempt from the ordinary rules of costs,[139] which

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[136] For discussion of the importance of improving, rather than abandoning, procedural rules, see Fowkes (n 7) 325-327.
[137] *Sinnott v Minister for Education* [2001] 2 IR 545.
[138] Cazalet (n 3) 110-113.
[139] *Dunne v Minister for the Environment* [2008] 2 IR 775; Whyte, *Social Inclusion and the Legal System* (n 1) 166.

means an unsuccessful litigant is potentially liable for the State's costs as well as her or his own. There is precedent, however, to support the claim that the courts are sympathetic towards litigants who bring cases in the public interest, and it is possible for unsuccessful public interest law litigants to be awarded costs.[140] This discretion to award costs does not mitigate the deterrent effect of the costs rules, however, because it cannot be exercised prior to the litigation, which means the case has to be launched with the looming uncertainty of a potential costs liability. Ideally, this problem would be overcome by a protective costs order (PCO), but only one of these has ever been awarded in Ireland,[141] and, they are only available to litigants who have no personal interest in the outcome of the case and are acting purely in the public interest.[142] The possibility of a PCO for the agenda proposed here thus depends on which of the three plaintiffs outlined in section 1 launches the litigation in Stage 1.

The ultimate objective of the agenda proposed here is a fundamental reform of the education system to make it more inclusive and equal. That there are many interests at stake is obvious. A problem common to all public interest law consequently becomes particularly acute in this context, which is how a court can account for those different interests when examining the systemic issues. Whyte has proposed greater use of the *amicus curiae* system to achieve this, both because it can lead to better decisions and because it can legitimise the court's role by helping it to account for a wider range of interests.[143] As discussed in section 2 above, the Supreme Court in *Stokes v CBS Clonmel*[144] dealt with the combined issues of equality and education, though on a statutory rather than constitutional level. The Court allowed the Equality Authority (now replaced by the Irish Human Rights and Equality Commission) to intervene as *amicus* in order to assist it with the interpretation of indirect discrimination in the Equal Status Act 2000. The majority did not agree with the submission of the Equality Authority but the willingness to utilise an *amicus* is welcome and could be useful to the agenda proposed here. *Stokes v CBS Clonmel* builds upon

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[140] *O'Keeffe v Hickey* [2009] 2 IR 302; *Roche v Roche* [2010] 2 IR 321; *Collins v Minister for Finance* [2014] IEHC 79; Whyte, *Social Inclusion and the Legal System* (n 1) 167-171.
[141] *Schrems v Data Protection Commissioner* (No 2) [2014] IEHC 351; Whyte, *Social Inclusion and the Legal System* (n 1) 175-178.
[142] Whyte, *Social Inclusion and the Legal System* (n 1) 178.
[143] Whyte, *Social Inclusion and the Legal System* (n 1) 152-155.
[144] *Stokes v CBS Clonmel* [2015] IESC 13.

previous encouragement of *amicus curiae* briefs[145] and this could help the courts engage with the systemic issues raised by the public interest litigation agenda proposed here.

The weak remedies available in Irish constitutional law are one of the biggest problems with seeking change directly through the courts. The Supreme Court in *TD v Minister for Education*[146] held that mandatory orders enforcing constitutional rights against the executive could only be issued in exceptional cases. As a result, a declaratory remedy is the strongest remedy available to the agenda proposed here.[147] Though a strong remedy could be useful, the weak remedy available is not a significant problem for the agenda. Even if the litigation were successful, a constitutional victory is only a small part of a much larger project[148] because the reforms required to achieve an equal education system are complex and implicate many areas of policy. The ultimate success of the agenda inevitably relies on provoking a political response to the problem, and the Stage 1 litigation can achieve a public profile and influence the political system regardless of the remedy and the outcome.

3.2.2 Reflection

The agenda set out here is ambitious. It is also vulnerable in several places; the constitutional arguments require the reinterpretation of articles and there are procedural obstacles to bringing public interest litigation of this type. It is important to ask whether there is any prospect of success and whether it would be worth launching the proposed agenda.

Success on the back of public interest litigation can either be direct or indirect. Direct successes rely on the court finding in favour of the plaintiff and the State being willing to comply with the court orders. Whyte has recorded that direct

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[145] Whyte, *Social Inclusion and the Legal System* (n 1) 161-163; *HI v Minister for Justice* [2003] 3 IR 197; *O'Brien v PIAB* [2005] 3 IR 328; *Fitzpatrick v FK* [2007] 2 IR 406.
[146] Shutting down earlier optimism that the remedy was available; Gerry Whyte 'Public interest litigation in Ireland – the emergence of the affirmative decree?' (1998) 20 Dublin University Law Journal 198; Bláthna Ruane, 'The Separation of Powers – Grant of Mandatory Orders to enforce Constitutional Rights' (2000) 5 Bar Review 416.
[147] O'Mahony has suggested that, though declaratory orders are the most readily available remedies, they are the least effective; O'Mahony, *Educational Rights in Irish Law* (n 16) 211.
[148] Aideen Collard, 'Public Interest Law and Beyond: An Interview with Robert García' (2006) 11(5) Bar Review 167, 170.

success usually only occurs when administrators do not object to the decision or where they have no real choice in how to respond.[149] The chances of direct success are improved when the class of beneficiaries is reasonably small, and when the order granted by the court is clear and simple.[150] Direct success from the agenda proposed here cannot be expected; the complexity of the required reforms necessitates a political solution, beyond the capacity of the courts to dictate, and the pool of beneficiaries is enormous, given that systemic reform of the school system is the target.

Instead, the proposed agenda is aimed at achieving indirect success, by putting the issue of social class inequality in the school system in the public sphere and provoking a political resolution. This is possible even when the litigation in Stage 1 is unsuccessful.[151] The notable example of this is the influence of *Zappone v Revenue Commissioners* on the marriage referendum. Alternatively, the threat of litigation can be used as a bargaining chip, to encourage the government to implement a policy rather than invest the time and resources required to fight the case.[152] At the most basic level, the litigation can be used as a platform to educate the public about the issue, and judicial engagement can legitimise the sense of injustice by linking it to society's fundamental values in the Constitution.[153]

As a result, victory in Stage 1 is unnecessary for the success of the agenda. Though instinctively desirable, a legal victory on this issue cannot radically change society because the courts are better at restraining the State rather than forcing it to do something positive. Law is at heart a tool of preservation; its function is to provide stability so that society can flourish around it. It is also a product of the distribution of power in society, so law will primarily reflect the interests of the politically dominant groups.[154] Though it can provoke society to evolve, and politicians can use law to achieve social goals, the courts are not typical agents of radical reform. In Whyte's words, litigation "is incapable of

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[149] Whyte, *Social Inclusion and the Legal System* (n 1) 435.
[150] Whyte, *Social Inclusion and the Legal System* (n 1) 436-437.
[151] Whyte, *Social Inclusion and the Legal System* (n 1) 437.
[152] Whyte, *Social Inclusion and the Legal System* (n 1) 438.
[153] Whyte, *Social Inclusion and the Legal System* (n 1) 439.
[154] Comment, 'The New Public Interest Lawyers' (1970) 79 Yale LJ 1069, 1085-1086, 10887-1088; Loffredo (n 11); O'Connell and Malone (n 2).

encapsulating the larger issues inherent in the process of altering the grundnorm of society."[155]

The question of whether it is worthwhile to bring this agenda turns on an estimation of how likely it is to be able to provoke a political response. There is danger with lawyers making such an assessment. In O'Connell and Malone's words:

> For a variety of reasons, 'many lawyers have an inflated sense of self importance'. In the public interest domain this can lead to lawyers perceiving themselves as saviours of the downtrodden, attempting to 'rescue the poor' from their plight. It is essential that they resist this impulse.[156]

Similar doubts can be seen in the debates about whether or not to launch the KAL litigation that lead to *Zappone v Revenue Commissioners*:

> The chances of success were minimal. Lawyers love taking cases – it's the grist to their mill – but if 99 per cent of lawyers are telling you – other than your ones [on] your case – it hasn't a chance in hell, why would you take it? And equally, why would you take it when political change was possible? David Norris took his case when no political change was possible, when Noël Browne was laughed out of the Dáil when he tried to raise gay law reform. Again, it was a kind of high-risk strategy because I think if you want to achieve legislative change, go through the Oireachtas. It's a safer route and the door was open. The door was not shut. Going the judicial route is very high risk because it can end up boomeranging on you. You can go there looking for change and a judgment can be delivered which makes change even more difficult, which in a sense happened.[157]

In this context, the decision on whether to launch the public interest litigation agenda should be made by an interest group or community law centre, using the advice of lawyers as only one factor, because success and the chances of

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[155] Whyte, *Social Inclusion and the Legal System* (n 1) 433.
[156] O'Connell and Malone (n 2) 16 (internal footnotes omitted).
[157] Mullally (n 112) 53-54.

achieving it depend on political considerations far wider than the litigation conducted in State 1.[158] This is crucial because success in the agenda depends, like with the marriage referendum, on having an active and passionate grassroots and political movement. Lawyers can be a part of this but are not necessarily effective leaders.

The need for community and political campaigning is demonstrated by a recent public interest litigation case, *Stokes v CBS Clonmel*, discussed above in section 2. The case used the statutory prohibition on indirect discrimination to challenge the practice of reserving places in schools for children of past pupils. Despite losing in the Circuit, High and Supreme Courts, the case provoked a political response in the form of the Admissions to Schools Bill, which would have allowed schools only to reserve 10% of places in this manner. The Bill, however, faced significant opposition from alumni groups from a number of popular schools and it was not enacted.[159] The public interest litigation strategy following *Stokes* was nearly successful; the litigants used the Stage 1 case to gain public attention and managed in Stage 2 to persuade the Minister for Education to respond to the injustice. It failed in Stage 3, achieving reform through the political system, however, because the campaigners were outperformed by politically more powerful groups. This highlights the need to have a strong grassroots movement that is able to apply political pressure.

The overtly political nature of the agenda is also important as a bulwark against the danger of "levelling down". Levelling down is the removal of an advantage from a privileged group in order to make them equal to a disadvantaged group, rather than improving the lot of the disadvantaged group in order to achieve equality. In Irish constitutional law, the traditionally formalised Aristotelian conception of equality based on neutral treatment is susceptible to levelling down as a response to inequality. This raises the concern that the State could respond to a finding of inequality in the education by levelling down, such as by reducing the amount of money spent on successful schools or limiting the choices of parents with high levels of capital.

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[158] O'Connell and Malone (n 2) 16-17; Collard (n 148) 169.
[159] Mitchell (n 74).

There are several reasons why this risk is merely theoretical and unlikely to arise in response to the agenda proposed. First, the litigation part of the agenda in Stage 1 involves challenging the treatment-based definition of equality in the Irish Constitution. Instead, equality would be based on relative levels of advantage and disadvantage. This means that levelling down becomes much more difficult, and in this context would be politically impossible. In order to level down *treatment*, the State can simply stop acting; it can treat people equally by vacating the field. Levelling down *advantages*, however, is much more difficult because the State has to intervene and remove the advantage possessed by one group. It cannot simply step back from the issue. In practice, this would see the State confront some of the strongest political groups in the country; the experience with the Admissions to Schools Bill 2015 demonstrates that it is politically difficult to remove the advantages of privileged groups.

Second, the right to education in the Constitution immunises the system against levelling down. Article 42 places a number of obligations on the State, such as to endeavour to support private education and to facilitate parental choice. The easiest levelling down exercise would be to remove choice and prohibit private schools. Neither of these is constitutionally permissible so the State is left only with the prospect of levelling up.

4. Response to the Agenda

If the agenda is successful and the State decides to level up advantages in the education system, it has a number of options. These vary in the degree to which they are both ambitious and controversial. Based on the constitutional principle of subsidiarity in Article 42, it is extremely difficult for the State to change the education system without cooperation from stakeholders. As a result, there are three options.

First, since it would be unconstitutional for the State to abolish private schools or to ban fees absolutely, on the current interpretation of Article 42, it could propose a constitutional amendment to Article 42. In the current Article, the values of parental choice and State subsidiarity are preeminent but an amendment could replace these with a value of inclusion and equality.

For example, an amended version of Article 42 could read as follows:

1. Everyone has the right to education. This includes the right to be provided with free early-childhood, primary and secondary education. The State must provide this education directly or ensure that non-state actors provide it. This right only expires when a student would no longer benefit from further primary or secondary education.

2. The State recognises the social, cultural, personal and economic significance of education. In particular, the State recognises that the unequal provision of education contributes to societal inequalities on grounds such as race, gender, religion, disability, migrant status, membership of the Traveller community, poverty and social class. The State commits to the eradication of inequalities from the education system and to the use of the education system to advance equality across society.

3. The State recognises the importance of third and higher-level education and commits to advancing equality in access and outcomes.

4. The State recognises the right of parents to influence the religious and moral, intellectual, physical and social education of their children. Parents shall be free to provide this education in their homes or in private schools or in schools recognised or established by the State.

    4.1° The State may regulate through law the manner in which private schools may be established, maintained and managed. The State must have due regard to the values of inclusion, equality and diversity when establishing regulations.

    4.2° Private schools are entitled to manage their own finances but may not impose fees or other conditions in a manner that disproportionately disadvantages (or would disadvantage) students on the basis of disability, migrant status, membership of the Traveller community, poverty, social class, or similar ground.

    4.3° Private schools may not discriminate in relation to admission of students on the basis of race, religion, sexual orientation, disability, migrant status, membership of the Traveller community,

poverty and social class. Privately run school with an explicit religious ethos may discriminate in admission in favour of students who are members of the relevant religion only when the school is oversubscribed.

4.4° The State must ensure that the education system is sufficiently diverse so that any student who is not admitted to a school on the basis of the foregoing provision is admitted elsewhere within a reasonable distance from her or his home.

This would allow the State to implement the full substantive equality of condition measures, which I outline in chapters 5 and 6, such as the removal of fees. Alternatively, private schools opting out of the State funding system could rely, for example, on means-tested fees or on (truly) voluntary donations.

Second, the current text of Articles 40.1 and 42 could be retained, but the courts could be encouraged to interpret the values contained within these Articles in a substantive rather than formal way. Rather than a formal right to equal treatment, Article 40.1 could give a substantive right to equality based on relative levels of advantage and disadvantage. Rather than a formal value of parental choice in Article 42, which only gives choices to those parents with sufficient capital, a substantive interpretation of parental choice could develop. If the State is obliged to maximise parental choice, this does not necessarily have to mean as free a choice as possible. That is a negative understanding of parental choice. Instead, that value could be served by increasing the amount of parents who are given a choice, even if that comes at the expense of some degree of choice currently exercised by those with the most capital. Rather than allowing some parents to choose fee-paying or elite schools, with the consequence that other parents have *de facto* no choice, the State would be ensuring that as many parents as possible have some choice between schools. That is a positive understanding of parental choice. This would not just be a "freedom" to choose schools, but instead a requirement on the State to ensure that all parents have an adequate range of valuable choices actually available to them. This raises the distinction between autonomy, which is substantive, and freedom, which is formal,

embedded within Raz's liberal philosophy.[160] This interpretation would make it constitutional for the State to incentivise the removal of fees and to remove other barriers to entry and success in school. The policy would tie the provision of funding to the absence of fees; schools that opt into State funding would not be able to charge fees. This preserves school autonomy by allowing them to opt out and charge high levels of fees, but it incentives a non-fees policy. It would be consistent with the State's Article 42 obligation to "endeavour to supplement and give reasonable aid to private and corporate educational initiative" because it would not abandon private education, but would be taking reasonable steps to pursue both objectives, namely allow private education while also levelling up parental choices. The core autonomy of the schools would be protected, but it would be limited by the constitutionally more important autonomy of parents. In order to provide an adequate range of options to parents, a positive understanding of choice, schools would have their autonomy limited to the formal choice of opting into state funding and not charging fees, or foregoing funding and charging fees instead. This proposal is considered in detail in chapter 6.

Third, keeping both the current text and current interpretation of Article 42 with a formal value of parental choice, the State could increase its efforts to improve the quality of education in disadvantaged schools. The DEIS system of funding for disadvantaged schools is constitutional and could be expanded and improved. Under this response, the State could implement many of the equality of opportunity measures that I outline in chapter 5, including reduction in the costs associated with school, such as the price of schoolbooks and uniforms. It could also adopt some of the substantive equality of condition measures, such as providing universal early childhood education and democratising the school system to reflect a wider range of identities.

These three options reflect three philosophical approaches to the State's role in the education system. Under the first, the Constitution would be amended to enshrine a communitarian value, in which the State's role is to bring different groups in society together. In the context of education at least, their common status as a citizen or resident entitled to education would be more important than

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[160] Joseph Raz, *The Morality of Freedom* (OUP 1986) 369-399, 416.

their social class. Under the second approach, a substantive liberal philosophy would be followed. This would emphasise the autonomy of the individual and respect the fact that choice is a good thing, provided it is not allowed to harm others. The challenge with applying liberal philosophies in the Constitution in the past is that the courts have not been careful to prevent harm. A substantive liberal approach would have to recognise that choices made by people with high levels of capital can harm people with low levels of capital by reducing their choices. In the education context, an example of this is that giving the choice to set up a private school and charge fees, thus reducing the number of students looking for diverse education to be provided by the State, means that parents who cannot afford the fees are left with fewer choices and must accept the only other schools on offer. The second approach would recognise this and seek to improve the choices available to parents with low capital, such as by increasing the number of school places in certain areas, or stopping schools from following practices that limit the choices of parents, such as by charging fees, or reserving places for children of past pupils. The third approach is essentially a more enthusiastic approach to equality within the constitutional and philosophical framework. The formal understanding of parental choice would persist and the State would seek to help those with the least capital, not by limiting the choices of some parents, but by improving the quality of education provided in the weakest schools. This preserves the liberal approach that the market should not be interfered with until it produces negative outcomes, and then only the symptoms of inequality should be treated and not the causes.

Conclusion

Public interest litigation only arises when the political system fails to account for the rights and interests of disadvantaged people. When the subject of the litigation is something as complex as the education system, the aim is to provoke the political system to account for the rights and interests of people ordinarily excluded from the political system.

As a tool of reform, public interest litigation has proven to be an unreliable. The history of this type of litigation surveyed in this chapter demonstrates mixed results. A perfect execution of the strategy would involve three stages. In Stage 1, a plaintiff, such as a parent or an interest group, would bring a constitutional

judicial review to the existence of educational inequality on the basis of poverty, social class and socio-economic status. In Stage 2, the litigants, supporters and legal team would use the publicity of the court case to raise public awareness about the problems of inequality in the education system and would use this public awareness to build a political campaign to reform the system. In Stage 3, the political system would respond to this by amending the Constitution and/or making sub-constitutional reforms that lead to greater equality on the basis of poverty, social class and socio-economic status. In this chapter I outline the various challenges to each stage of this process. The prospects of success are not particularly high, though the potential gains to be made are tremendous. Ultimately, the decision whether or not to launch litigation is one best made by litigants, in consultation with law centres and educational NGOs, because these are the bodies that can provide the frameworks that are essential to converting a legal case into a political reform movement.

Conclusion

The years that children spend in school influence, and often determine, the outcomes of a huge number of aspects of their lives, such as employment prospects, cultural and sporting interests, social circles, and personal habits and behaviours. By affecting so many people in profound ways, the education system becomes a core architect of society. There is no hyperbole in saying that schools are of fundamental importance to the development of both individuals and society.

The provision of education to children in Ireland, however, is starkly unequal. There are, of course, countries with even more unequal education systems, as has been highlighted by the recent debate in the UK about the plans to establish new grammar schools. Pointing overseas, however, is no answer to the existence of educational inequality in Ireland. The extent of that inequality is damaging and widespread. It is also obvious, in that the evidence of it is clear and uncontested (which I analyse in chapter 5).

One of the major contributors to this inequality is family background and so full educational equality is only achievable as part of full social equality. The conundrum of educational inequality, therefore, is that it is partially driven by forces outside the education system, while simultaneously the way in which the education system operates sustains that wider societal inequality. However, this feature of the problem does not justify failures to take steps, entirely within the scope of the education system, to reduce the inequality. There are several measures, three in particular, that have the potential to reduce educational inequality, which I outline in chapters 5 and 8. First, the education system could be organised around the principle of inclusion, rather than parental choice. Second, the State could democratise the education system, which involves giving parents and communities greater input into the content of the school curriculum. Thirdly, and most simply, the State could guarantee free, universal pre-school education.

Educational inequality on the basis of poverty and class is not inevitable in Ireland. The persistence of the inequality leads to questions of how to bring about reform. An issue in this thesis is whether the Constitution has a role to

play. To that end, I consider three core constitutional questions, to see whether they could be used to argue that the State has an *obligation* to equalise the education system or alternatively a *power* to do so voluntarily. I consider the right to equality in Article 40.1, the right to education in Article 42, and a conjoined application of the two rights.

To argue for both the obligation and the power under Article 40.1, I suggest that the best understanding of the Article is that it prohibits systemic wrongful inequality under the four dimensions of substantive equality of condition. I also argue that poverty, social class or socio-economic status should be a protected ground, or "presumptively proscribed ground of discrimination", in Irish constitutional equality law. Both of these arguments are consistent with the text, underlying values and some of the precedents of Article 40.1. Notwithstanding these strengths, they are difficult arguments to make because of the deferential way in which the courts have applied the right to equality.

The issue at the heart of whether the power and obligation could exist under Article 42 is the principle of subsidiarity, which subjects the powers of the State to the primacy of parental autonomy. This principle, at least in how the courts have traditionally used it, is a significant barrier to the arguments in the thesis. Short of a re-interpretation of Article 42, the principle would block the existence of an obligation and would restrict the State to a weak power to equalise.

The best hope for establishing a constitutional obligation or power would be a conjoined application of Articles 40.1 and 42. This would create a right to equality in education, which could be used to overcome (or counter-balance) the principle of subsidiarity in order to establish a State power to equalise education. It is also possible that it could be strong enough to impose an obligation on the State not to continue supporting the unequal education system. This would raise interesting questions of remedies and the doctrine of the separation of powers, which have been thorny questions for constitutional lawyers over many decades.

There is significant benefit to developing constitutional equality law along the lines considered here. Article 40.1 has a history of inconsistent and unclear reasoning. Aside from any practical consequences, interpreting the right to

equality as a protection against systemic wrongful inequality would bring overdue coherence to this area of constitutional law.

On each of these three core constitutional questions, I conclude that the positions are at least arguable because they are consistent with the text, can draw on (some) precedents and reflect (some of) the underlying philosophies used by the drafters and the judges who have interpreted the Constitution previously. Their weakness is that they involve reinterpreting some parts of the Constitution and breaking away from some precedents. This is legally and intellectually possible. To manage this, however, the arguments would have to overcome the recent cautious, or conservative, approach of the judiciary to interpretations of the Constitution. Therefore, the greatest challenge to the interpretations I propose in this thesis is that they could be influential; even though they are properly grounded in constitutional law and theory, they could lead the courts to novel conclusions on politically and socially controversial aspects of the rights to education and equality.

In the final chapter of the thesis I move the focus away from constitutional doctrine back to the larger question of whether constitutional litigation could be an effective way of provoking or bringing about reform in the education system. For the public interest litigation agenda to be successful, the plaintiffs do not necessarily have to win in court, though that would obviously be useful. Rather, the activists bringing the case would need to harness the media attention accompanying the litigation and use this to inform the public about the nature and extent of inequality within and between schools, with the aim of developing a political campaign to ensure reform.

Predicting success on the political front is difficult. Experience from previous uses of public interest litigation suggests that it is difficult to succeed when the ultimate objective is to induce the State to spend more money. It is also made more difficult, in the Irish context, when the case relies on socio-economic rather than civil or liberal rights. Both of these factors are present in the litigation proposed here. Caution is also warranted by the fact that public interest litigation works best when the court can dictate the response by the State; given the complexity of educational reform, however, it would be impossible and inappropriate for a court to manage the reform. Instead, State cooperate is

essential, even if the litigation stage of the process is successful. It is an inescapable fact that reform will be a political project. The court's role, therefore, is as a platform to help initiate a political campaign. If the political stage of the agenda succeeded, attention would shift to ensuring that the reforms would withstand constitutional challenge, which is why the analysis of constitutional law in chapters 3, 6 and 7 also considers whether the State has the power to equalise the provision of education.

The decision whether to launch public interest litigation on this issue is a difficult one. While the prospects of success are not excellent, the agenda I propose in this thesis is at the very least plausible. It is also one of the only options available. There is no indication that equalising the education system on the basis of poverty, social class and socio-economic status will ever be a political priority in Ireland. The recent failed attempt by the Labour party, as the minor party in the last government, to reduce the right of schools to reserve places for the children of past pupils is indicative of this. Their proposal was modest (it would have limited schools to reserving 10% of the places) so it would have not made much difference in practice. It was also an attempt to deal with a minor issue; though there is harm associated with the practice of reserving places, its reduction would not dramatically have equalised the education system. The proposal failed, however, simply because of innate political resistance. There was no large-scale public protest and few politicians even spoke publically on this issue. Instead, the reforms simply lapsed with the end of the Oireachtas term. In the face of such entrenched and quietly powerful political opposition to reform, resort to a speculative public interest law campaign does not seem laden with risk. There is little to be lost, given that reform is not even a political discussion topic, and this lack of alternative means that a controversial, and therefore high-profile, use of the Constitution in this way may provoke the interest of the media, public and ultimately the political system.

Whether it is achieved with input from the courts or not, the removal of systemic inequality from the education system ought to be a burning issue in Ireland. Ireland is one of the world's most stable democracies and remains one of the wealthiest countries in the EU. Equality in education is entirely achievable from an economic and legal perspective; all that is missing is the political courage and

social appetite. If society resolved to guarantee equality in education it would have a massive effect on the lives of a very large number of children. It could also have a significant knock-on effect on society itself, helping to reduce some of the structural inequalities that persist on the basis of class and poverty in Ireland. If educational equality were achieved, Ireland could truly claim to be at the vanguard of equality, as many people so proudly proclaimed it to be in the aftermath of the equal marriage referendum in 2015. In researching constitutional equality law and how it could be involved in educational reform, I hope that this PhD thesis can make a contribution to achieving that more equal future.

Bibliography

Books

BELL, Mark, *Racism and Equality in the European Union* (OUP 2009).

BEYTAGH, Francis, *Constitutionalism in Contemporary Ireland: An American Perspective* (Dublin, Round Hall Sweet & Maxwell 1997).

BILCHITZ, David, *Poverty and Fundamental Rights: The Justification and Enforcement of Socio-Economic Rights* (OUP 2007).

BINGHAM, Tom, *The Rule of Law* (Penguin 2010).

BOURDIEU, Pierre, *Distinctions: A Social Critique of the Judgment of Taste* (Routledge 1984).

BOURDIEU, Pierre, *Language and Symbolic Power* (Polity Press 1991).

BUDLENDER, Steven, MARCUS, Gilberty, and FERREIRA, Nick, *Public interest litigation and social change in South Africa: Strategies, tactics and lessons* (Atlantic Philanthropies 2014).

CASEY, James, *Constitutional Law in Ireland* (3rd edn, RoundHall Sweet and Maxwell 2000).

CHOPER, Jesse, FALLON, Richard, KAMISAR, Yale, and SHIFFRIN, Steven, *Constitutional Law: Cases – Comments – Questions* (10th edn, Thomson West 2006).

CLARKE, Desmond, *Church and State: Essays in Political Philosophy* (Cork University Press 1984).

DELANY, Hilary, and MCGRATH, Declan, *Civil Procedure in the Superior Courts* (3rd edn, Round Hall 2012).

DALY, Eoin, *Religion, Law and the Irish State* (Clarus Press 2012).

DOYLE, Oran, *Constitutional Law: Text, Cases and Materials* (Clarus Press 2008).

DOYLE, Oran, *Constitutional Equality Law* (Thomson Round Hall 2004).

DWORKIN, Ronald, *Justice in Robes* (Harvard University Press 2006).

DWORKIN, Ronald, *Freedom's Law* (Oxford University Press 1996).

FARRY, Michael, *Education and the Constitution* (Round Hall Sweet & Maxwell 1996).

FOLEY, Brian, *Deference and the Presumption of Constitutionality* (IPA 2008).

FORDE, Michael, and LEONARD, David, *Constitutional Law of Ireland* (Bloomsbury 2013).

FRASER, Nancy, and HONNETH, Axel, *Redistribution or Recognition* (Verso 2003).

FREDMAN, Sandra, *Discrimination Law* (2nd, OUP 2011).

GILLIGAN, Ann Louise, and ZAPPONE, Katherine, *Our Lives Out Loud: In Pursuit of Justice & Equality* (O'Brien 2008).

GLENDENNING, Dympna, *Education and the Law* (2nd edn, Bloomsbury Professional 2012).

GLENDENNING, Dympna, *Religion, Education and the Law: A Comparative Approach* (Tottel 2008).

GLENDENNING, Dympna, *Education and the Law* (1st edn, Butterworths 1999).

GRIFFIN, Sean, and SHEVLIN, Michael, *Responding to Special Education Needs: An Irish Perspective* (Gill & Macmillan 2011).

HART, HLA, *The Concept of Law* (2nd edn, OUP 1997).

HEALY, Gráinne, SHEEHAN, Brian and WHELAN, Noel, *Ireland Says Yes: The Inside Story of How the Vote for Marriage Equality Was Won* (Merrion 2016).

HEPPLE, Bob, *Equality: The New Legal Framework* (Hart 2011).

HOGAN, Gerard, *Origins of the Irish Constitution, 1928-1941* (RIA 2012).

HOGAN, Gerard, and WHYTE, Gerry, *Kelly: The Irish Constitution* (4th edn, LexisNexis Butterworths 2003).

HOGG, Peter, *Constitutional Law of Canada, Volume 2* (5th edn, Thomson Carswell 2007).

JONES, Owen, *Chavs: The Demonization of the Working Class* (Verso 2012).

KELLY, John, *Fundamental Rights in Irish Law and Constitution* (2nd ed, Allen Figgis & Co 1967).

KYMLICKA, Will, *Multicultural Citizenship* (Clarendon 1995).

LYNCH, Kathleen, and LODGE, Anne, *Equality and Power in Schools: redistribution, recognition and representation* (RoutledgeFalmer 2002).

MACIONIS, John J, and PLUMMER, Ken, *Sociology: A Global Introduction* (5th edn, Pearson 2012).

MACK, Joanna, and LANSLEY, Stewart, *Poor Britain* (George Allen & Unwin 1985).

MCCLOSKEY, Deirdre, *Bourgeois Equality: How Ideas, Not Capital or Institutions, Enriched the World* (University of Chicago Press (forthcoming) 2016) (summary available <http://deirdremccloskey.org/docs/pdf/McCloskey_IdeasEnrichedTheWorld.pdf> accessed 5 February 2016).

MCCLOSKEY, Deirdre, *Bourgeois Dignity: Why Economics Can't Explain the Modern World* (University of Chicago Press 2010).

MCCLOSKEY, Deirdre, *The Bourgeois Virtues: Ethics for an Age of Commerce* (University of Chicago Press 2006).

MCCRUDDEN, Christopher, *Buying Social Justice: Equality, Government Procurement and Legal Change* (OUP 2007).

MEANEY, Mary, KIERNAN, Nessa, and MONAHAN, Karl, *Special Educational Needs and the Law* (Thomson Round Hall 2005).

MENTON, Colin, *An Investigation of the Measurement of Poverty in Ireland* (IPA 2007).

MINOW, Martha, *In Brown's Wake* (OUP 2010).

MORGAN, David Gwynn, *A Judgment Too Far? Judicial Activism and the Constitution* (Cork University Press 2001).

MULLALLY, Una, *In the Name of Love: The Movement for Marriage Equality in Ireland: An Oral History* (History Press Ireland 2014).

NISBET, Robert, *The Sociological Tradition* (8th edn, Transaction Publishers 2007).

OBAMA, Barack, *The Audacity of Hope: Thoughts on Reclaiming the American Dream* (Canongate 2006).

O'MAHONY, Conor, *Educational Rights in Irish Law* (Thomson Round Hall 2006) 41.

O'MALLEY, Thomas, *Sentencing Law and Practice* (2nd edn, Thomson Round Hall 2006).

O'NEILL, Ciaran, *Catholics of Consequence: Transnational Education, Social Mobility, and the Irish Catholic Elite 1850-1900* (OUP 2014).

PERRY, Michael, *Towards a Theory of Human Rights: Religion, Law, Courts* (Cambridge University Press 2007).

PIKETTY, Thomas, *Capital in the Twenty-First Century* (Harvard University Press 2014).

RAZ, Joseph, *The Morality of Freedom* (OUP 1986).

SHARPE, Robert, and ROACH, Kent, *The Charter of Rights and Freedoms* (3rd edn, Irwin Law).

SPICKER, Paul, *The Idea of Poverty* (Policy Press 2007).

STIGLITZ, Joseph, *The Price of Inequality* (Penguin 2013).

TOWNSEND, Peter, *Poverty in the United Kingdom: A Survey of Household Resources and Standards of Living* (Penguin 1979).

WADHAM, John, ROBINSON, Anthony, RUEBAIN, David, and UPPAL, Susie, *Blackstone's Guide to The Equality Act 2010* (2nd edn, OUP 2012).

WHITE, Robin, and OVEY, Clare, *Jacobs, White & Ovey: The European Convention on Human Rights* (5th edn, OUP 2010).

WHYTE, Gerry, *Social Inclusion and the Legal System: Public Interest Law in Ireland* (2nd edn, IPA 2015).

WHYTE, Gerry, *Social Inclusion and the Legal System: Public Interest Law in Ireland* (1st edn, IPA 2002)

WILKINSON, Richard, and PICKETT, Kate, *The Spirit Level: Why Equality is Better for Everyone* (Penguin 2010).

ZUCKERMAN, Adrian, *Zuckerman on Civil Procedure: Principles of Practice* (3rd edn, Sweet & Maxwell 2013).

Journal Articles and Book Chapters

ARDEN, Andrew, and HUNTER, Caroline, 'For Whom is Social Housing?' (2011) 14(11) Journal of Housing Law 95.

AUSTIN, Caroline, 'Inconsistent Sentencing Practice in Ireland: Is There a Way Forward?' (2005) 13 Irish Student Law Review 146.

BACIK, Ivana, and O'CONNELL, Michael, *Crime and Poverty in Ireland* (RoundHall Sweet & Maxwell 1998).

BAMFORTH, Nicholas, 'Conceptions of Anti-Discrimination Law' (2004) 24(4) Oxford Journal of Legal Studies 693.

BARNARD, Catherine, and HEPPLE, Bob, 'Substantive Equality' (2000) 59(3) CLJ 562.

BELL, Mark, 'The Principle of Equal Treatment: Widening and Deepening' in Paul Craig and Gráinne de Búrca (eds), *The Evolution of EU Law* (2nd edn, OUP 2011).

BELL, Mark, 'A Hazy Concept of Equality' (2004) 12(2) Feminist Legal Studies 223.

BELL, Mark, 'Equality and the European Union Constitution' (2004) 33(3) Industrial Law Journal 242.

BEYTAGH, Francis, 'Equality under the Irish and American Constitutions: A Comparative Analysis—1' (1982) 17(1) Irish Jurist 56.

BICKENBACH, Jerome, CHATTERJI, Somnath, BADLEY, EM, and ÜSTÜN, TB, 'Models of disablement, universalism and the international classification of impairments, disabilities and handicaps' (1999) 48 Social Science and Medicine 1173.

BINCHY, William, 'Dignity as a Constitutional Concept' in Oran Doyle and Eoin Carolan (eds), *The Irish Constitution: Governance and Values* (Thomson Round Hall, 2008).

BREEN, Richard, and JONSSON, Jan, 'Inequality of Opportunity in Comparative Perspective: Recent Research on Educational Attainment and Social Mobility' (2005) 31 Annual Review of Sociology 223.

BRODSKY, Gwen, and DAY, Shelagh, 'Denial of the Means of Subsistence as an Equality Violation' (2005) Acta Juridica 149.

CAROLAN, Eoin, 'Recovering the Republic? Democratic Representation and the Theory of Mixed Government' (2012) 48(2) Irish Jurist 173.

CARROLL, Jennifer, 'You Be the Judge A Study of the Backgrounds of Superior Court Judges in Ireland in 2004 Part I' (2005) 10(5) Bar Review 153.

Gary CAZALET, 'Unresolved Issues: Costs in Public Interest Litigation in Australia' (2010) 29(1) Civil Justice Quarterly 108.

CHAPMAN, Audrey, '"A Violations Approach" for monitoring the International Covenant of SEC rights' (1996) 18 Human Rights Quarterly 23.

CLARKE, Desmond, 'Interpreting the Constitution: Essentially Contested Concepts' in Oran Doyle and Eoin Carolan (eds), *The Irish Constitution: Governance and Values* (Thomson Round Hall 2008).

CLARKE, Desmond, 'Education, the State and Sectarian Schools' in Tim Murphy and Patrick Twomey (eds), *Ireland's Evolving Constitution 1937–1997: Collected Essays* (Oxford, 1998).

CLUNE, William, 'The Supreme Court's Treatment of Wealth Discrimination under the Fourteenth Amendment' (1975) Supreme Court Review 289.

COLLARD, Aideen, 'Public Interest Law and Beyond: An Interview with Robert García' (2006) 11(5) Bar Review 167.

COLLINS, Hugh, 'Discrimination, Equality and Social Inclusion' (2003) 66(1) Modern Law Review 16.

COMMENT, 'The New Public Interest Lawyers' (1970) 79 Yale Law Journal 1069.

CONNOLLY, Michael, 'Social Mobility, Education and the European Convention on Human Rights' (2013) European Human Rights Law Review 152.

COOKSON, Peter, 'First Person Plural: Education as Public Property' in Bruce Biddle (ed), *Social Class, Poverty, and Education: Policy and Practice* (RoutledgeFalmer 2001).

COONAN, Genevieve, 'Public Interest Law and the Irish Legal System: All Crass and No Class?' (2002) 5 Trinity College Law Review 44.

COURTOIS, Aline, '"Thousands waiting at our gates": moral character, legitimacy and social justice in Irish elite schools' (2015) 36(1) British Journal of Sociology of Education 53.

COUSINS, Mel, 'The European Convention on Human Rights, non-discrimination and social security: great scope, little depth?' (2009) 16(3) Journal of Social Security Law 120.

CRENSHAW, Kimberlé, 'Race, Reform and Retrenchment: Transformation and Legitimation in Anti-Discrimination Law' (1988) 101 Harvard Law Review 1331.

DAGUERRE, Anne, 'The Unemployed and the Moral Case for Benefit Sanctions' (2015) 22(3) Journal of Social Security Law 154.

DALY, Eoin, 'The Constitution and the Protestant Schools Cuts Controversy: Seeing the Wood for the Trees' (2010) 1 Irish Journal of Legal Studies 84.

DALY, Eoin, 'Religious freedom as a function of power relations: dubious claims on pluralism in the denomination schools debate' (2009) 28(3) Irish Educational Studies 235.

DALY, Eoin, 'Religious Freedom and the Denominational Education Model in the Republic of Ireland: the Shortcomings of 'Accommodationist' Reform' (2008) 9 Education Law Journal 242

DARMODY, Merike, BYRNE, Delma, and MCGINNITY, Frances, 'Cumulative disadvantage? Educational careers of migrant students in Irish secondary schools' (2014) 17(1) Race, Ethnicity and Education 129.

DARMODY, Merike, 'Power, Education and Migration into Ireland' (2011) 3(3) Power and Education 224.

D'ART, Darly, and TURNER, Thomas, 'Irish Trade Unions under Social Partnership: A Faustian Bargain? (2011) 42(2) Industrial Relations Journal 157.

DE BLACAM, Mark, 'Children, constitutional rights and the separation of powers' (2002) 37 Irish Jurist 113.

DEWHURST, Elaine, 'The Development of the Irish Equality Guarantee by the Superior Courts in 2013' (2014) Bar Review 18.

DOYLE, Oran, 'Judicial Scrutiny of Legislative Classifications' (2012) 47 Irish Jurist 175.

DOYLE, Oran, 'Direct Discrimination, Indirect Discrimination and Autonomy' (2007) 27(3) Oxford Journal of Legal Studies 537.

DOYLE, Oran, 'The Duration of Primary Education: Judicial Constraint in Constitutional Interpretation' (2002) 10 Irish Student Law Review 222.

DOYLE, Oran, and FELDMAN, Estelle, 'Constitutional Law' in Raymond Byrne and William Binchy, *Annual Review of Irish Law 2009* (Round Hall 2009).

DOYLE, Oran, and WHYTE, Gerry, 'The Separation of Powers and Constitutional Egalitarianism' in Eoin O'Dell, *Older People in Modern Ireland: Essays on Law and Policy* (First Law 2006).

DRUDY, Sheelagh, 'Quality and Equality at a Time of Austerity' (2011) 100(398) Studies: An Irish Quarterly Review 167.

DUBOIS, David, 'Family Disadvantage, the Self, and Academic Achievement' in Bruce Biddle (ed), *Social Class, Poverty, and Education: Policy and Practice* (RoutledgeFalmer 2001).

DWORKIN, Ronald, 'What is Equality? Part 1: Equality of Welfare' (1981) 10(3) Philosophy and Public Affairs 185.

DWORKIN, Ronald, 'What is Equality? Part 2: Equality of Resources' (1981) 10(4) Philosophy and Public Affairs 283.

DWORKIN, Ronald, 'What is Equality? Part 3: The Place of Liberty' (1987) 73 Iowa Law Review 1.

FARRELL, Michael, 'Lydia Foy and the Struggle for Gender Recognition' (2012) 1 Socio-Legal Studies Review 153.

FISS, Owen, 'Groups and the Equal Protection Clause' (1976) 5 Philosophy and Public Affairs 107.

FLATHMAN, Richard, 'Equality and Generalization: A Formal Analysis' in J Roland Pennock and John Chapman (eds), *Nomos 9: Equality* (Atherton 1967).

FOLEY, Brian, 'Presuming the Legislature Acts Constitutionally: Legislative Process and Constitutional Decision-Making' (2007) 29 Dublin University Law Journal 141.

FORDE, Michael, 'Equality and the Constitution' (1982) 2 Irish Jurist 295.

FOSTER, James, 'Absolute verses Relative Poverty' (1998) 88(2) American Economic Association Papers and Proceedings 335.

FOWKES, James, 'Civil Procedure in Public Interest Litigation: Tradition, Collaboration and the Managerial Judge' (2012) 1(3) Cambridge Journal of International and Comparative Law 235.

FRANCE, Anatole, *Le Lys rouge* (Calmann-Lévy 1927).

FREDMAN, Sandra, 'Equality as a Proactive Duty' (2012) 60 American Journal of Comparative Law 265.

FREDMAN, Sandra, 'Positive duties and socio-economic disadvantage: bringing disadvantage onto the equality agenda' (2010) European Human Rights Law Review 290.

FREDMAN, Sandra, 'Facing the Future: Substantive Equality under the Spotlight' in Ockert Dupper and Christoph Garbers (eds) *Equality in the Workplace: Reflections from*

South Africa and Beyond (Juta 2009); available (2010) Oxford Legal Studies Research Paper 57/2010 <http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1649991> accessed 8 February 2014.

FREDMAN, Sandra, 'Redistribution and Recognition: Reconciling Inequalities' (2007) 23 South African Journal on Human Rights 214.

FREDMAN, Sandra, 'Providing Equality: Substantive Equality and the Positive Duty to Provide' (2005) 21 South African Journal on Human Rights 163.

FREDMAN, Sandra, 'Affirmative Action and the European Court of Justice: A Critical Analysis' in Jo Shaw (ed), *Social Law and Policy in an Evolving European Union* (Hart 2000).

FREYER, Roland, 'Acting White: The Social Price Paid by the Best and Brightest Minority Students' (2006) 6(1) Education Next 53.

FUDGE, Judy, 'Substantive Equality, the Supreme Court of Canada, and the Limits to Redistribution' (2007) 23(2) South African Journal on Human Rights 235.

GARDNER, John, 'On the Ground of Her Sex(uality)' (1998) 18 Oxford Journal of Legal Studies 167.

GARDNER, John, 'Liberals and Unlawful Discrimination' (1989) 9 Oxford Journal of Legal Studies 1.

GONSALVES, Colin, 'The Development of Public Interest Law in India' (2006) 11(5) Bar Review 143.

GORARD, Stephen, and SMITH, Emma, 'An international comparison of equity in education systems' (2004) 40(1) Comparative Education 15.

GUNTHER, Gerald, *In Search of Evolving Doctrine on a Changing Court: A Model for a Newer Equal Protection* (1972) 86(1) Harvard Law Review 1.

HALL, Peter, 'Social Class, Poverty, and Schooling: Social Contests, Educational Practices and Policy Options' in Bruce Biddle (ed), *Social Class, Poverty, and Education: Policy and Practice* (RoutledgeFalmer 2001).

HANAFIN, Joan, and LYNCH, Anne, 'Peripheral Voices: Parental Involvement, Social Class, and Educational Disadvantage' (2002) 23(1) British Journal of Sociology of Education 35.

HARDIMAN, Adrian, 'The Role of the Supreme Court in Our Democracy' in Joe Mulholland (ed), *Political Choice and Democratic Freedom in Ireland: 40 Leading Irish Thinkers* (MacGill Summer School 2004).

HART ELY, John, *Democracy and Distrust: A Theory of Judicial Review* (Harvard University Press 1980).

HELLMAN, Deborah, 'Equality and Unconstitutional Discrimination' in Deborah Hellman and Sophie Moreau (eds), *Philosophical Foundations of Discrimination Law* (OUP 2013).

HELLMAN, Deborah, *When is Discrimination Wrong?* (Harvard University Press 2008).

HEPPLE, Bob, 'The New Single Equality Act in Britain' (2010) 5 Equal Rights Review 11.

HEPPLE, Bob, 'Discrimination and Equality of Opportunity – Northern Ireland Lessons (1990) Oxford Journal of Legal Studies 408.

HEUSTON, Robert, 'Personal Rights Under the Irish Constitution' (1976) 2 Irish Jurist 205.

HOGAN, Gerard, 'Directive Principles, Socio-Economic Rights and the Constitution' (2001) 36 Irish Jurist 174.

HOGAN, Gerard, 'Unenumerated Personal Rights: Ryan's Case Re-evaluated' (1990-1992) 25-27 Irish Jurist 95.

HOGAN, Gerard, 'Interpreting the Constitution' in Litton (ed), *The Constitution of Ireland 1937-1987* (IPA 1988).

HOLMES, Elisa, 'Anti-Discrimination Rights Without Equality' (2005) 68(2) Modern Law Review 175.

HUMPHREYS, Richard, 'Interpreting Natural Rights' (1993-1995) 28-30 Irish Jurist 221.

HUMPHREYS, Richard, 'Constitutional Interpretation' (1993) 15 Dublin University Law Journal 57.

JOST, John, and HUNYADY, Orsolya, 'The Psychology of System Justification and the Palliative Function of Ideology' (2002) 13 European Review of Social Psychology 111.

JACKMAN, Martha, 'Charter Equality at Twenty: Reflections of a Card-Carrying Member of the Court Party' (2006) 20 National Journal of Constitutional Law 115.

JACKMAN, Martha, 'Constitutional Contact with the Disparities in the World: Poverty as a Prohibited Ground of Discrimination Under the Canadian Charter and Human Rights Law' (1994-1995) 2 Review Constitutional Studies 76.

JAGWANTH, Saras, 'Expanding equality' (2005) Acta Juridica 131.

KEATING, Alan, and LOWRY, Anthony, 'The Separation of Powers - The Supreme Courts Approach to Affirmative Duties - Part 1 and 2' (2003) 21 Irish Law Times 103; (2003) 21 Irish Law Times 118.

KELLY, John, 'Equality Before the Law in Three European Jurisdictions' (1983) 2 Irish Jurist 259.

KHAITAN, Tarunabh, 'Prelude to a Theory of Discrimination Law' in Deborah Hellman and Sophie Moreau (eds), *Philosophical Foundations of Discrimination Law* (OUP 2013).

KHAITAN, Tarunabh, 'Dignity as an Expressive Norm: Neither Vacuous Nor a Panacea' (2012) 32 Oxford Journal of Legal Studies 1.

KNAPP, Michael, 'Policy, Poverty, and Capable Teaching: Assumption and Issues in Policy Design' in Bruce Biddle (ed), *Social Class, Poverty, and Education: Policy and Practice* (RoutledgeFalmer 2001).

KONG, Karen, 'Public Interest Litigation in Hong Kong: A New Hope for Social Transformation?' (2009) 28(3) Civil Justice Quarterly 327.

LANGWALLNER, David, 'Separation of Powers, Judicial Deference and the Failure to Protect the Rights of the Individual' in Eoin Carolan and Oran Doyle (eds), *The Irish Constitution: Governance and Values* (Thompson Round Hall 2008).

LAREAU, Annette, 'Linking Bourdieu's Concept of Capital to the Broader Field: The Case of Family-School Relationships' in Bruce Biddle (ed), *Social Class, Poverty, and Education: Policy and Practice* (RoutledgeFalmer 2001).

LIEBENBERG, Sandra, 'Judicially Enforceable Socio-Economic Rights in South Africa: Between Light and Shadow' (2014) 37 Dublin University Law Journal 137.

LIEBENBERG, Sandra, and GOLDBLATT, Beth, 'The Interrelationship Between Equality and SE Rights under South Africa's Transformative Constitution' (2007) 23(2) South African Journal on Human Rights 335.

LOFFREDO, Stephen, 'Poverty, Democracy and Constitutional Law' (1993) 141(4) University of Pennsylvania Law Review 1277.

LYNCH, Kathleen, and BAKER, John, 'Equality in Education: An equality of condition perspective' (2005) 3(2) Theory and Research in Education 131.

LYNCH, Kathleen, and MORAN, Marie, 'Markets, Schools and the Convertibility of Economic Capital: The Complex Dynamics of Class Choice' (2006) 21 British Journal of Sociology of Education 221.

MAC GIOLLA PHÁDRAIG, Brian, 'Towards Partnership: The Development of Parental Involvement in Irish Primary Education Since 1970' (2010) 38 The Irish Journal of Education 73.

MACKINNON, Catherine, 'Reflections on Sex Equality Under Law' (1990–1991) 100 Yale Law Journal 1281.

MACKLEM, Tim, 'Equality and Opportunity: Reconciling the Irreconcilable' (2005) 68(6) Modern Law Review 1016.

MACRUAIRC, Gerry, 'Where words collide: social class, schools and linguistic discontinuity' (2011) 32(4) British Journal of Sociology in Education 541.

MAGUIRE, Niamh, 'Consistency in Sentencing' (2010) 2 Judicial Studies Institute Journal 14.

MCCOLGAN, Aileen, 'Reconfiguring discrimination law' (2007) Public Law 74.

MCCOY, Selina, and SMYTH, Emer, 'Higher education expansion and differentiation in the Republic of Ireland' (2011) 61 Higher Education 243.

MCCRUDDEN, Christopher, 'Equality and Non-Discrimination' in David Feldman (ed), *Oxford Principles of English Law: English Public Law* (2nd edn, OUP 2009).

MCCRUDDEN, Christopher, 'Using Public Procurement to Achieve Social Outcomes' (2004) 28(4) Natural Resources Forum 257.

MCLACHLIN, Beverley, 'Equality: The Most Difficult Right' (2001) 14 Supreme Court Law Review (2d) 17.

MCLAUGHLIN, Eithne, 'From Negative to Positive Equality Duties: The Development and Constitutionalisation of Equality Provisions in the UK' (2007) 6(1) Social Policy and Society 111.

MCVERRY, Peter, 'Homelessness' (2001) 52 The Furrow 12.

MICHELMAN, Frank, 'Welfare Rights in a Constitutional Democracy' (1979) Washington University Law Quarterly 659.

MICHELMAN, Frank, 'Foreword: On Protecting the Poor through the Fourteenth Amendment' (1969-1970) 83 Harvard Law Review 7.

MILLER, Dale, and PORTER, Carol, 'Self-blame in Victims of Violence' (1983) 39 Journal of Social Issues 139.

MITCHELL, Ben, 'Process Equality, Substantive Equality and Recognising Disadvantage in Constitutional Equality Law' (2015) 53 Irish Jurist 36.

MITCHELL, Ben, 'Constitutional Equality Law after *Fleming v Ireland*' (2014) 37 Dublin University Law Journal 252.

MOREAU, Sophie, 'What is Discrimination?' (2010) 38(2) Philosophy & Public Affairs 143.

MOREAU, Sophie, 'Equality Rights and the Relevance of Comparator Groups' (2006) 5 Journal of Law & Equality 81.

MORGAN, Martha, 'Fundamental State Rights: A New Basis for Strict Scrutiny in Federal Equal Protection Review' (1982-1983) 17 Georgia Law Review 77.

MULLALLY, Siobhán, 'Substantive Equality and Positive Duties in Ireland' (2007) 23 South African Journal on Human Rights 291.

MURPHY, Tim, 'Economic Inequality and the Constitution' in Tim Murphy and Patrick Twomey (eds), *Ireland's Evolving Constitution 1937–1997: Collected Essays* (Oxford Uni Press 1998).

NAGEL, Robert, 'Legislative Purpose, Rationality, and Equal Protection' (1972-1973) 82 Yale Law Journal 123.

NOTE, 'Developments in the Law: Equal Protection' (1965) 82 Harvard Law Review 1065.

Ó'CINNÉIDE, Colm, '"The people are the masters". The Paradox of Constitutionalism and the Uncertain Status of Popular Sovereignty within the Irish Constitutional Order' (2012) 48 Irish Jurist 249.

Ó'CINNÉIDE, Colm, 'Aspirations Unfulfilled: The Equality Right in Irish Law' in Donncha O'Connell (ed), *Irish Human Rights Law Review 2010* (Clarus Press 2010).

Ó'CINNÉIDE, Colm, 'Bringing Socio-economic Rights Back into the Mainstream of Human Rights: The Case-law of the European Committee on Social Rights as an Example of Rigorous and Effective Rights Adjudication' (2009) 13(1) Revista Europea de Derechos Fundamentales 259.

Ó'CINNÉIDE, Colm, 'A Modest Proposal: Destitution, State Responsibility and the European Convention on Human Rights' (2008) 5 European Human Rights Law Review 583.

Ó'CINNÉIDE, Colm, 'Fumbling Towards Coherence: The Slow Evolution of Equality and Anti-Discrimination Law in Britain' (2006) 57 Northern Ireland Legal Quarterly 57.

O'CONNELL, Paul, and MALONE, Deirdre, 'A New Legal Approach to Reducing Social Exclusion' (2003) 6 Trinity College Law Review 5.

O'CONNELL, Rory, 'From Equal Before the Law to the Equal Benefit of the Law' in Oran Doyle and Eoin Carolan (eds), *The Irish Constitution: Governance and Values* (Thomson Round Hall 2008).

O'CONNOR, Nat, and STAUNTON, Cormac, *Cherishing All Equally: Economic Inequality in Ireland* (TASC 2015).

O'DELL, Eoin, and WHYTE, Gerry, 'Is this a Country for Old Men and Old Women? – *In Re Article 26 and the Health (Amendment) (No 2) Bill 2004*' (2005) 27 Dublin University Law Journal 368.

John O'DOWD, 'The Principle of Equality in Irish Constitutional and Administrative Law' (1999) 11 European Review of Public Law 769.

John O'DOWD, 'Dignity and Personhood in Irish Constitutional Law' in Gerard Quinn, Attracta Ingram and Stephen Livingstone (eds), *Justice and Legal Theory in Ireland* (Oak Tree Press 1995).

O'MAHONY, Conor, 'Falling Short of Expectations: The 2012 Children Amendment, From Drafting to Referendum' (2016) 31(2) Irish Political Studies 252.

O'MAHONY, Conor, 'There is No Such Thing as a Right to Dignity: A Rejoinder to Emily Kidd White' (2012) 10(2) International Journal of Constitutional Law 585.

O'MAHONY, Conor, 'There is No Such Thing as a Right to Dignity' (2012) 10(2) International Journal of Constitutional Law 551.

O'MAHONY, Conor, 'Constitutional Amendment and Judicial Restraint: How Restrained should an Irish Court be?' in Eoin Carolan (ed), *The Constitution of Ireland: Perspectives and Prospects* (Bloomsbury Professional 2012).

O'MAHONY, Conor, 'The Right to Education and "Constitutionally Appropriate" Provision' (2006) 28 Dublin University Law Journal 422.

O'MAHONY, Conor, 'A New Slant on Education Rights and Mandatory Injunctions? (2005) 27(1) Dublin University Law Journal 363.

O'MAHONY, Conor, 'Education, Remedies and the Separation of Powers' (2002) 24 Dublin University Law Journal 57.

OSBOROUGH, William Nial, and MACNEILL, Eoin, 'Guidelines for an Irish Educational Policy' (1979) 14(2) Irish Jurist 378.

PORTER, Bruce, 'Expectations of Equality' (2006) 33 Supreme Court Law Review (2d) 23 (available on SSRN, <http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2470375> (accessed 20 October 2014)).

POWER, Martin, DEVEREUX, Eoin, HAYNES, Amanda, NEVILLE, Patricia, HANNAN, Carmel, and BARNES, Cliona, *An Introduction to Irish Society: Transitions and Change* (Pearson 2012).

QUINLIVAN, Shivaun, and KEYES, Mary, 'Official Indifference and Persistent Procrastination: An Analysis of Sinnott' (2002) 2 Judicial Studies Institute Journal 163.

QUINN, Gerard, 'Rethinking the Nature of Economic, Social and Cultural Rights in the Irish Legal Order' in Costello (ed), *Fundamental Social Rights: Current European Legal Protection and the Challenge of the EU Charter on Fundamental Rights* (Irish Centre for European Law 2000).

RÉAUME, Denise, 'Discrimination and Dignity' (2003) 63 Louisiana Law Review 645.

RING, Mary Ellen, 'A Right to an Education' (1997) 2(6) Bar Review 219.

RUANE, Bláthna, 'The Separation of Powers and the Grant of Mandatory Orders to Enforce Constitutional Rights' (2000) 5 Bar Review 416.

RYAN, Fergus, 'Disability and the Right to Education: Defining the Constitutional Child' (2002) 24 Dublin University Law Journal 96.

SEGEV, Re'em, 'Making Sense of Discrimination' (2014) 27(1) Modern Law Review 47.

SMITH, Lynn, and BLACK, William, 'The Equality Rights' in Errol Mendes and Stéphane Beaulac (eds), *Canadian Charter of Rights and Freedoms* (5th edn, LexisNexis 2013).

SMYTH, Emer, 'Educational Inequalities Among School Leavers in Ireland 1979-1994 (1999) 30(3) The Economic and Social Review 267.

WALSH, Rachel, 'Property Rights in the Drafting of the Irish Constitution: A Communitarian Compromise' (2011) 1 Dublin University Law Journal 86.

WALSH, Rachel, '"The Principles of Social Justice" The Compulsory Acquisition of Private Property for Redevelopment in the United State and Ireland' (2010) 32(1) Dublin University Law Journal 1.

WESSON, Murray, 'Disagreement and the Constitutionalisation of Social Rights' (2012) 12(2) Human Rights Law Review 221.

WESTEN, Peter, 'The Empty Idea of Equality' (1985) 95 Harvard Law Review 537.

WHYTE, Gerry, 'Judicial Capacity to Enforce Socio-Economic Rights' (2014) 37 Dublin University Law Journal 203.

WHYTE, Gerry, 'Constitutional Litigation and Disability Rights' (2012) Irish Jurist 303.

WHYTE, Gerry, 'A Tale of Two Cases – Divergent Approaches of the Irish Supreme Court to Distributive Justice' (2010) 32 DULJ 365.

WHYTE, Gerry, 'The Role of the Supreme Court in Our Democracy: A Response to Mr Justice Hardiman' (2006) 28 Dublin University Law Journal 1.

WHYTE, Gerry, 'Socio-Economic Rights in Ireland: Judicial and Non-Judicial Enforcement' (2006) 11(2) Bar Review 27.

WHYTE, Gerry, 'Protecting religious ethos in employment law: a clash of cultures' (2005) 27 Dublin University Law Journal 169.

WHYTE, Gerry, 'Discerning the Philosophical Premises of the Report of the Constitution Review Group: An Analysis of the Recommendations on Fundamental Rights' (1998) 2 Contemporary Issues in Irish Law and Politics 216.

WHYTE, Gerry, 'Public Interest Litigation in Ireland: The Emergence of the Affirmative Decree?' (1998) Dublin University Law Journal 198.

WHYTE, Gerry, 'A Comment on the Constitution Review Group's Proposals on Equality' in Rosemary Byrne and William Duncan (eds), *Developments in Discrimination Law in Ireland and Europe* (ICEL 1997).

WHYTE, Gerry, 'Education and the Constitution: Convergence of Paradigm and Praxis' (1990–2) 25–27 Irish Jurist 69.

WHYTE, Gerry, 'Law and Poverty in Ireland' in William Duncan (ed), *Law and Social Policy* (DULJ 1987).

WILLS, Joe, 'The world turned upside down? Neo-liberalism, socioeconomic rights, and hegemony' (2014) 27(1) Leiden Journal of International Law 11.

WINTEMUTE, Robert, 'Sexual Orientation and the Charter: The Achievement of Formal Legal Equality and Its Limits' (2003–2004) 49 McGill Law Journal 1143.

WINTER, Ralph, 'Poverty, Economic Equality, and the Equal Protection Clause' (1972) Supreme Court Review 41.

WISEMAN, David, 'Competence Concerns in Charter Adjudication: Countering the Anti-Poverty Incompetence Argument' (2006) 51 McGill Law Journal 503.

YOUNG, Katharine, 'The Minimum Core of Economic and Social Rights: A Concept in Search of Content' (2008) 33 Yale Journal of International Law 113.

ZOLA, Irving, 'Toward the necessary universalizing of a disability policy' (1989) 67 The Milbank Quarterly 401.

Newspapers, Websites, Reports and Other Papers

ABDULKADIROGLU, Atila, PATHAK, Parag, and WALTERS, Christopher, 'School Vouchers and Student Achievement: Evidence from the Louisiana Scholarship Program' (2015) National Bureau of Economic Research Working Paper 21839.

ALL-PARTY OIREACHTAS COMMITTEE ON THE CONSTITUTION, *Report of the Constitution Review Group* (Stationary Office 1996).

ATLANTIC PHILANTHROPIES, *Grant Details: Marriage Equality Ltd* <http://www.atlanticphilanthropies.org/grant/campaign-marriage-equality> accessed 14 December 2015.

BARNARDOS, *School Costs Survey 2016: Briefing Paper* (3 August 2016).

BARNARDOS, *Rise Up for Children Report* (25 November 2015).

BOFFEY, Daniel, 'Oxbridge Colleges Named and Shamed for Failing to Admit Poorer Students' *The Guardian* (London, 12 December 2015).

BRUUN JENSEN, Bjarne, CURRIE, Candace, DYSON, Alan, EISENSTADT, Naomi, and MELHUISH, Edward, *Early Years, Family and Education Task Group: Report* (World Health Organisation European Region 2013).

CANADIAN HUMAN RIGHTS ACT REVIEW PANEL, *Promoting Equality: A New Vision* (Department of Justice 2000) <http://publications.gc.ca/collections/Collection/J2-168-2000E.pdf> (accessed 20 October 2014).

CENTRAL STATISTICS OFFICE, *This is Ireland: Highlights from Census 2011, Part 2* (Stationary Office, Dublin 2012).

CENTRAL STATISTICS OFFICE, 'Men and Women in Ireland' (Stationary Office, Dublin 2012)

<http://www.cso.ie/en/media/csoie/releasespublications/documents/otherreleases/2011/Women%20and%20Men%20in%20Ireland%202011.pdf> accessed 17 November 2014.

COMBAT POVERTY AGENCY, *Educational Disadvantage in Ireland* (Summer 2003).

COMMITTEE ON ECONOMIC, SOCIAL AND CULTURAL RIGHTS, 'General Comment No. 20 Non-Discrimination in Economic, Social and Cultural Rights' E/C 12/GC/20 (2009).

CONVENTION ON THE CONSTITUTION, *Third Report of the Convention on the Constitution: Amending the Constitution to provide for same-sex marriage* (June 2013) <https://www.constitution.ie/AttachmentDownload.ashx?mid=c90ab08b-ece2-e211-a5a0-005056a32ee4> accessed 4 December 2015.

DEPARTMENT OF EDUCATION AND SCIENCE, *DEIS (Delivering Equality of Opportunity in Schools): An Action Plan for Educational Inclusion* (May 2005).

DEPARTMENT OF EDUCATION AND SKILLS, *Education at a Glance 2015: OECD Indicators: A Country Profile for Ireland: Statistics Section* (November 2015).

DEPARTMENT OF EDUCATION AND SKILLS, *Main Estimate Features* (2015) <http://www.education.ie/en/Press-Events/Press-Releases/2014-Press-Releases/Budget-Main-Features-2015.pdf> accessed 4 August 2016.

DEPARTMENT OF EDUCATION AND SKILLS, *Retention Rates of Pupils in Second Level Schools: 2008 Entry Cohort* (February 2015).

DEPARTMENT OF EDUCATION AND SKILLS, *DEIS: Delivering Equality of Opportunity in Schools* (May 2005) <http://www.education.ie/en/Schools-Colleges/Services/DEIS-Delivering-Equality-of-Opportunity-in-Schools-/> accessed 19 May 2016.

DONNELLY, Katherine, 'Enrolments on rise as country's fee-paying schools begin to enjoy the fruits of recovery' Irish Independent (Dublin, 2 January 2016).

DONNELLY, Katherine, 'Controversial plans to change "old school tie" admissions bite dust' *Irish Independent* (Dublin, 9 December 2015) <http://www.independent.ie/irish-news/education/controversial-plans-to-change-old-school-tie-admissions-bite-dust-34272115.html> accessed 10 December 2015.

DONNELLY, Katherine, 'Renowned School to be Fee-Paying from Autumn' Irish Independent (Dublin, 25 May 2013).

EDUCATION NEWS, 'Belvedere past pupils join 'Rockmen' in admissions battle' *The Irish Times* (Dublin, 10 October 2014) <http://www.irishtimes.com/news/education/belvedere-past-pupils-join-rockmen-in-admissions-battle-1.1959589> accessed 10 December 2015.

FULTON, Lionel, 'Worker Representation in Europe: Ireland – Trade Unions' (European Trade Union Institute, 2015) <http://www.worker-participation.eu/National-Industrial-Relations/Countries/Ireland/Trade-Unions> (accessed 10 February 2015).

EQUAL RIGHTS TRUST, *Declaration on Principles of Equality – Principle 1* (2008).

EQUATE, *Opinion Poll* (October 2015) <http://www.equateireland.ie/#!opinion-poll/lktsn> accessed 3 August 2016.

FLAC, *PILN Bulletin* (13 May 2008).

FANJUL, Gonzalo, *Children of the Recession: The Impact of the Economic Crisis on Child Well-Being in Rich Countries* (UNICEF 2014).

GAY AND LESBIAN EQUALITY NETWORK, 'Poverty: Lesbians and Gay Men' (Combat Poverty Agency 1995) <http://www.combatpoverty.ie/publications/PovertyLesbiansAndGayMen_1995.pdf> accessed 17 November 2014.

GLENDENNING, Dympna, *The Irish Constitution: Education and Human Rights in Recognised Schools* (IHREC 2012).

HARVEY, Brian, 'Working for Change: A Guide to Influencing Policy in Ireland' (Combat Poverty Agency 2008) <http://www.combatpoverty.ie/publications/WorkingForChange_2008.pdf> accessed 17 November 2014.

HARVEY, Brian, *Travelling with Austerity: Impact of Cuts on Travellers, Traveller Projects and Services* (Pavee Point 2013).

HEARNE, Rory, and MCMAHON, Cian, *Towards Cherishing all Equally 2016* (TASC 2016).

HIGHER EDUCATION AUTHORITY, *National Plan for Equality of Access to Higher Education 2015-2019* (HEA, December 2015) 40;

HOOD, John, 'What influence do unions have on inequality?' (The Equality Trust, 9 September 2015) <https://www.equalitytrust.org.uk/what-influence-do-unions-have-inequality> (accessed 10 February 2016).

HUMPHREYS, Joe, 'Fee-paying schools step up campaign against admissions bill' The Irish Times (Dublin, 24 November 2014).

IRISH COMMISSION FOR JUSTICE AND PEACE, *Re-Righting the Constitution: The Case for New Social and Economic Rights: Housing, Health, Nutrition, Adequate Standard of Living* (Genprint 1998).

IRISH HUMAN RIGHTS COMMISSION, *European Convention on Human Rights Guide for the Civil & Public Service* (IHRC 2012).

IRISH HUMAN RIGHTS COMMISSION, *Economic Social and Cultural Rights Discussion Document* (IHRC, 2006) <http://www.ihrec.ie/download/pdf/escrdiscussiondocument.pdf> accessed 25 June 2015.

IRISH PENAL REFORM TRUST, *The Vicious Circle of Social Exclusion and Crime: Ireland's Disproportionate Punishment of the Poor* (IPRT Position Paper, January 2012).

KELLY, Elish, MCGUINNESS, Seamus, and WALSH, John, *An Evaluation of the Back to Education Allowance* (ESRI Research Series No 47, October 2015).

LAW REFORM COMMISSION, *Consultation Paper on the Court Poor Box* (LRC CP 31–2004).

MCGUIRE, Peter, 'How to read the feeder school list and some of its peculiarities' *The Irish Times* (Dublin, 3 December 2015).

MCCOY, Selina, SMYTH, Emer, WATSON, Dorothy, and DARMODY, Merike, *Leaving School in Ireland: A Longitudinal Study of Post-School Transitions* (ESRI Research Series 36, August 2014).

MITCHELL, Ben, 'Irish Government Abandons Plans to Reduce Elitism in Schools' OxHRH Blog (14 December 2015) <http://ohrh.law.ox.ac.uk/irish-government-abandons-plans-to-reduce-elitism-in-schools/> accessed 16 May 2016.

MOONEY, Brian, 'Analysis: What the feeder tables tell us' *The Irish Times* (Dublin, 3 December 2015).

NATIONAL COUNCIL FOR SPECIAL EDUCATION, *Inclusive Education Framework: A Guide for Schools on the Inclusion of Pupils with Special Educational Needs* (NCSE 2011).

O'BRIEN, Carl, 'A Teaching Revolution that 'Makes the Classes Come Alive'' *The Irish Times* (Dublin, 12 January 2016).

O'BRIEN, Carl, and FALVEY, Deirdre, 'Feeder schools: Social class still drives school league tables' *The Irish Times* (Dublin, 3 December 2015).

CITIZENS INFORMATION, 'Teaching Your Child at Home' (Citizens Information Board, 2 January 2014) <http://www.citizensinformation.ie/en/education/the_irish_education_system/home_education.html> accessed 14 June 2016.

OIREACHTAS JOINT COMMITTEE ON EDUCATION AND SOCIAL PROTECTION, *Report on Tackling Back to School Costs* (June 2013).

ORGANISATION FOR ECONOMIC CO-OPERATION AND DEVELOPMENT, *Income Distribution and Poverty* (OECD 2012) <http://stats.oecd.org/Index.aspx?DataSetCode=IDD> accessed 20 May 2016.

PEW RESEARCH CENTRE, *Gay Marriage Around the World* (26 July 2015) <http://www.pewforum.org/2015/06/26/gay-marriage-around-the-world-2013/> accessed 4 August 2016.

PAVEE POINT, *Submission to the Oireachtas Joint Committee on Education and Social Protection on the Draft General Scheme of an Education (Admission to Schools) Bill 2013* (31 October 2013).

ROCHE, Barry, 'Congratulations! First same-sex marriage takes place in Ireland' *The Irish Times* (17 November 2015).

ROGAN, Mary, *Taking Prison Law Cases: A Practical Approach* (IPRT) 9 <http://www.iprt.ie/files/Taking_Prison_Law_Cases.pdf> accessed 14 December 2015.

SEN, Amartya, 'Poor, Relatively Speaking' (1983) 35 Oxford Economic Papers 153.

SEN, Amartya, 'Equality of What?: The Tanner Lecture on Human Values at Stanford University' (22 May 1979).

SMYTH, Emer, and MCCOY, Selina, 'Improving Second-Level Education: Using Evidence for Policy Development' (ESRI Renewal Series Paper 5, December 2011).

SMYTH, Emer, and MCCOY, Selina, 'Investing in Education: Combating Educational Disadvantage' (Research Series Number 6, Barnardos and the Economic and Social Research Institute 2009).

THORNHILL, Don, Secretary, *Circular letter M51/93: Selection Procedure for the Enrolment of Pupils in Second-Level Schools* (Department of Education, 2 December 1993).

VASQUEZ DEL AGUILA, Ernesto, and CANTILLON, Sara, *The labour market and LGBT discrimination in Ireland* (2010) 10(5) UCD Social Justice Series 88.