

A Theory of Constitutional Horizontality in Ireland
Volume 1

Daniel Gilligan
Trinity College, Dublin

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DECLARATION

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Daniel Gilligan

ABSTRACT

In modern legal systems, constitutional rights' core domain of legal operation is the "vertical" relation between the State and private persons. "Constitutional horizontality" names that phenomenon whereby constitutional rights acquire legal significance for the "horizontal" legal relations between private persons *inter se*. The topic of this thesis is the Irish law of constitutional horizontality. Its central research question is: is that law justified? Its answer is a longwinded, qualified, and (in a sense to be explained) *detached* "yes".

When viewed in comparative relief, the Irish law of horizontality appears radical and idiosyncratic. At the same time, domestic scholarship on the topic has often resigned itself to the law's incoherence. In this context, this thesis reconsiders the normative underpinnings of this area of law, searching for a standpoint from which its basic shape can be seen to make sense. The argument proceeds from a simple, familiar, and powerful moral principle, the details of which I work up over the course of the thesis: no one is anyone else's subordinate. I argue that taking this moral principle seriously as a basic *constitutional* one can make the courts' key doctrinal choices in this area seem natural rather than awkward, perceptive rather than arbitrary, and (on the whole) justified. That is, the principle can be seen to undergird and unify the horizontal significance(s) constitutional rights have had in Irish law. It can account for the sharp limits to that significance. And it vindicates the sense in which certain aspects of private persons' legal relations with one another are, indeed, properly constitutional in character.

SUMMARY

In modern legal systems, constitutional rights' core domain of legal operation is the "vertical" relation between the State and private persons. "Constitutional horizontality" names that phenomenon whereby constitutional rights acquire legal significance for the "horizontal" legal relations between private persons *inter se*. The topic of this thesis is the Irish law of constitutional horizontality. Its central research question is: is that law justified? Its answer is a longwinded, qualified, and (in a sense to be explained) *detached* "yes".

When viewed in comparative relief, the Irish law of horizontality appears radical and idiosyncratic. At the same time, domestic scholarship on the topic has often resigned itself to the law's incoherence. In this context, this thesis reconsiders the normative underpinnings of this area of law, searching for a standpoint from which its basic shape can be seen to make sense. The argument proceeds from a simple, familiar, and powerful moral principle, the details of which I work up over the course of the thesis: no one is anyone else's subordinate. I argue that taking this moral principle seriously as a basic *constitutional* one can make the courts' key doctrinal choices in this area seem natural rather than awkward, perceptive rather than arbitrary, and (on the whole) justified. That is, the principle can be seen to undergird and unify the horizontal significance(s) constitutional rights have had in Irish law. It can account for the sharp limits to that significance. And it vindicates the sense in which certain aspects of private persons' legal relations with one another are, indeed, properly constitutional in character.

Following an introduction outlining its topic, question, and methodology (Chapter 1), this thesis has 5 substantive chapters.

Chapter 2 ("Non-Subordination") draws on recent work in Kantian political philosophy to sketch a principle of rightful interpersonal interaction that I call the non-subordination principle.

Chapter 3 (“Continuity”) begins to put that principle to work in making normative sense of the Irish law of horizontality; inquiring into the possibility of reconciling that body of law’s two most striking general features: first, its embrace of a *structurally* radical species of horizontal effect; second, the overwhelming continuity of our private law’s *substance* in the face of that structural radicalism. Although these two features of our law might seem strange bedfellows, I argue that the non-subordination principle furnishes a standpoint from which they can instead be seen as complementary parts of a coherent whole.

Chapter 4 (“Change”) extends the argument to cases where constitutional rights *have* grounded a change in horizontal legal relations. The argument divides into four sections, each analysing a different set of changes. The first three sections concern “pure” constitutional torts actionable against private persons: torts variously grounded in the right to privacy (§4.2), the right to earn a livelihood (§4.3), and the rights to inviolability of the dwelling and person (§4.4). The final section concerns an instance of *indirect* horizontality – a modification to the common law of loss of consortium. In each instance, I contend that the results (and often the reasoning) of the decided cases turn on the thought that persons are to meet one another each of them separate sovereign agents, never one another’s things.

The topic of Chapter 5 (“Waiver”) is the phenomenon of *waiver* of constitutional rights in Irish law. After some conceptual clarification and doctrinal exposition, I argue for that phenomenon’s place as part of a broader pattern of constitutional rights’ susceptibility to voluntary control by their holders. Rather than being a mark of their weakness, I suggest, that susceptibility reflects those rights’ tight justificatory connection to the self-determining will of free agents; a connection that the analysis in other chapters seeks to draw out.

Chapter 6 (*Meskeil*) is concerned, in the first instance, with the Supreme Court’s decision in *Meskeil v CIE*. It argues that the holding there is best understood in terms of a problem of *systemic* (as distinct from bipolar) subordination. Armed with this insight, together with the previous chapter’s analysis of waiver, the discussion moves to examine horizontality’s operation in the world of work more generally. Here, again, I suggest that the non-subordination principle can be seen to undergird and colour our courts’ particular conclusions on horizontal effect.

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¹ Cf. Herbert L.A. Hart, *The Concept of Law* (2nd edn, Oxford University Press 1994) 168.

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Parts of Chapter 3 have been published as ‘Constitutional Torts as Private Wrongs’ (2024) 6 Irish Supreme Court Review 181 and ‘Damages and the “Essence” of False Imprisonment: *GE v Commissioner of An Garda Síochána* [2022] IESC 51’ 44(3) Legal Studies 560.

Part of Chapter 4 has been published as ‘Privacy and Personal Standing: The Wrongful Disclosure of Private Information after *McGee v Attorney General*’ (2024) 44(1) Dublin University Law Journal 137.

Part of Chapter 5 has been published in the Irish Jurist as ‘Waiver and the Constitution’ (2023) 69 Irish Jurist 80.

Part of Chapter 6 was presented as ‘Revisiting *Meskeel v CIE*’, at the New and Emerging Voices in Constitutional Law Symposium, University College Dublin, 23 March 2023.

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 Dublin Waterworld v National Sports Campus Development Authority [2019] IECA 214

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 Dunne v Mahon [2012] IEHC 412; [2014] IESC 24
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 Germaine v Day [2024] IEHC 420.
 Glencar Exploration plc v Mayo County Council (No. 2) [2002] 1 IR 84
 Glover v BLN [1973] IR 388
 GMcG v DW (Divorce: Recognition) [2000] 1 IR 96

Goode Concrete v CRH Plc [2015] IESC 70
 Goodman International v Hamilton (No. 1) [1992] 2 IR 542
 Gordon v Irish Racehorse Trainers Association (No. 2) [2020] IEHC 425
 Gorman v Minister for the Environment [2001] 2 IR 414
 Gorry v Minister for Justice [2017] IECA 282; [2020] IESC 55
 Governor of A Prison v GDC [2020] IEHC 354
 Graham v Minister for the Environment [1996] WJSC-HC 1172
 Grant v County Registrar from Laois [2019] IEHC 185
 Grant v Roche Products [2008] IESC 35
 Gray v Minister for Justice [2007] IEHC 52
 Greally v Minister for Education (No 2) [1999] IEHC 212
 Greene v Minister for Agriculture [1990] 2 IR 17
 Gulyas v Minister for Justice [2001] EHC 100
 Gunn v Bord an Cholaíste Ealaíne is Deartha [1990] 2 IR 168
 H v H [2015] IESC 7
 H v Health Service Executive [2011] IEHC 297
 HAH v SAA [2017] IESC 40
 Hamilton v Hamilton [1982] IR 466
 Hanahoe v Hussey [1998] 3 IR 69
 Hand v Dublin Corporation [1991] 1 IR 409
 Hanrahan v Merck Sharpe & Dohme [1988] ILRM 629
 Hanrahan v Minister for Agriculture, Fisheries and Food [2010] IEHC 442
 Hanrahan v The Commissioner of An Garda Síochána [2020] IEHC 180
 Harford v ESB [2021] IECA 112
 Haughey v Moriarty [1999] 3 IR 1
 Hayes v Ireland [1987] ILRM 651
 Healy v Stepstone Mortgage Funding [2014] IEHC 134
 Heaney v Ireland [1994] 3 IR 593
 Heaney v Minister for Finance [1986] ILRM 64
 Heeney v Dublin Corporation (SC, 17 August 1998)
 Hegarty v Mercy University Hospital Cork [2011] IEHC 435
 Hempenstall v Minister for the Environment [1994] 2 IR 20
 Heneghan v Minister for Housing, Planning and Local Government [2023] IESC 7
 Hennessy v Ladbrokes Payments [2022] IEHC 60
 Herrity v Associated Newspapers [2008] IEHC 249
 Hickey v Agnew v Sunday Newspapers [2010] IEHC 349
 Hickey v The Eastern Health Board [1990] ELR 177
 Higgins v Bank of Ireland [2013] IEHC 6
 Higgins v Irish Aviation Authority [2022] IESC 13
 HSE v Laya Healthcare [2021] IEHC 737
 HSE v O’Sullivan [2023] IESC 11
 Humphries v Connor (1864) 17 Ir CLR 1 (QB)
 Hunter v Gerald Duckworth [2003] IEHC 81
 Hyegia Chemicals Ltd v Irish Medicines Board [2010] IESC 4
 Hyland v Dundalk Racing [2014] IEHC 60.
 Hynes v Conlon [1939] Ir Jur Rep 49
 Hynes-O’Sullivan v O’Driscoll [1988] IR 436
 I (EP) v Minister for Justice [2008] IEHC 358
 Iannróid Éireann v Holbrooke [2000] ELR 109
 Iannróid Éireann v Ireland [1996] 3 IR 321

ICS Building Society v Grant [2010] IEHC 17
 In re Article 26 and the Employment Equality Bill 1996 [1997] 2 IR 321
 In re Baby AB, Children's University Hospital, Temple St v D [2011] IEHC 1
 In re Eylewood Ltd [2010] IEHC 57
 Incorporated Law Society of Ireland v Carroll [1995] 3 IR 145
 Independent Newspapers (Ireland) Ltd v Murphy [2006] 3 IR 566
 Independent Star Ltd v O'Connor [2002] 4 IR 166
 Inspector of Taxes v Minister of Public Services (HC, 24 March 1983)
 Irish Bank Resolution Corporation Ltd v Purcell [2014] IEHC 525
 Irish Life and Permanent v Duff [2013] IEHC 43
 Irish Permanent Building Society v Caldwell (No. 1) [1979] ILRM 273
 Irish Permanent Building Society v Caldwell (No. 2) [1981] ILRM 242
 Irish Times Ltd v Ireland [1998] 1 IR 359
 J & J Haire & Co v Minister for Health [2009] IEHC 562
 Jacob v Irish Amateur Rowing Union Ltd [2008] IEHC 196
 JG v Judge Kevin Staunton [2013] IEHC 533
 Jones v Coolmore Stud [2017] IECA 164
 Jordan v Minister for Children and Youth Affairs [2014] IEHC 327
 Kane v Governor of Mountjoy Prison [1988] IR 757
 Kearney v Minister for Justice [1986] IR 116
 Keating v Judge Crowley [2010] IESC 29
 Keelings Distribution v SIPTU [2013] LCR 20526
 Kelleher v O'Connor [2010] IEHC 313
 Kelly v Hennessy [1995] 3 IR 253
 Kemmy v Ireland [2009] IEHC 178
 Kennedy and Arnold v Ireland [1987] IR 587
 Kennedy v Hearne [1987] IR 120
 Kenny v The Minister for Agriculture [2013] IEHC 520
 Kerins v McGuinness [2019] IESC
 Kinlen v Ulster Bank Ltd [1928] IR 171
 Kinsella v Governor of Mountjoy Prison [2011] IEHC 235
 Kinsella v Kenmare Resources [2019] IECA 54
 KL (A Minor) v Independent Star Ltd [2010] IEHC 500
 KRA v Minister for Justice and Equality [2016] IEHC 289
 Larkin v Dublin City Council [2008] 1 IR 391
 Lattimore v Dublin City Council [2014] IEHC 233
 Launceston Property Finance Ltd v Burke [2017] IESC 62
 Laurentiu v Minister for Justice [1999] 4 IR 26
 Lawlor v District Judge Desmond Hogan [1993] ILRM 606
 Leathem v Craig [1899] 2 IR 667
 Leech v Independent Newspapers (No. 2) [2014] IESC 79
 Lennon v Talbot Ireland Ltd (HC, 20 December 1985)
 Listowel Livestock Mart Ltd v William Bird & Sons Ltd [2009] 4 IR 631
 Loftus v Attorney General [1979] IR 211
 Lovett v Gogan [1995] 3 IR 132
 Lyons v Longford Westmeath Education and Training Board [2017] IEHC 272
 M v An Bord Uchtála [1977] IR 287
 M v Drury [1994] 2 IR 8
 M(C) v M (T) [1988] ILRM 456
 Macauley v Minister for Posts and Telegraphs [1966] IR 345

Maha Lingham v Health Service Executive [2005] IESC 89
 Maher v Minister for Agriculture [2001] 2 IR 139
 Mahon v Post Publications [2007] 3 IR 338
 Malahide Community School v Conaty [2019] IEHC 486
 Manorcastle Ltd v Commission for Aviation Regulation [2008] IEHC 386
 Marine Terminals v Loughman [2009] IEHC 620
 Marine Terminals v Loughman [2009] IEHC 620
 Mayo-Perrott v Mayo-Perrott [1958] IR 336
 McC v Bord Uchtála (HC, 28 July 1981)
 McCann v Halpin [2013] IEHC 495
 McCarthy v Kavanagh [2020] IECA 344
 McConnon v President of Ireland [2012] IEHC 184
 McCord v ESB [1980] ILRM 153
 McCrystal v Minister for Children and Youth Affairs [2012] IESC 53
 McD v L [2009] IESC 81
 McDonagh v Kilkenny County Council [2007] IEHC 350
 McDonagh v Sunday Newspapers [2015] IECA 225; [2017] IESC 46
 McDonagh v Sunday Newspapers (No. 2) [2017] IESC 59
 McDonald v Bord na gCon (No. 2) [1965] IR 217
 McDonnell v Ireland [1998] IR 134
 McEvoy v Prison Officers' Association [1998] IEHC 201
 McG v F [2001] IESC 2
 McGee v Attorney General [1973] IR 284
 McGee v Governor of Portlaoise Prison [2023] IESC 14
 McGlinchey v Ryan [2010] IEHC 536
 McGowan v Murphy [1965] WJSC-SC 5607
 McGrath and O'Ruairc v Maynooth College [1979] ILRM 166
 McGrath v Stewart [2016] 2 IR 704
 McGrory v ESB [2003] IESC 24
 McHugh v Commissioner of An Garda Síochána [1986] IR 228
 McIntyre v Lewis [1991] 1 IR 121
 McKelvey v Iarnród Éireann [2018] IECA 346; [2019] IESC 79
 McKinley v Minister for Defence [1992] 2 IR 333
 McMahan v AG [1972] IR 69
 McMahan v Irish Road Haulage [2009] IEHC 145
 McMahan v The Irish Aviation Authority [2014] IEHC 431
 McNulty v Commissioner of An Garda Síochána [2016] IEHC 632
 McNulty v Garda Commissioner [2016] IEHC 632
 MC v Clinical Director of the Central Mental Hospital [2020] IESC 28
 Meadows v Minister for Justice, Equality and Law Reform [2010] 2 IR 701
 Meagher v Dublin City Council [2013] IEHC 474
 Meagher v O'Leary [1998] 4 IR 33
 Meskell v Córas Iompair Éireann [1973] IR 121
 Mhic Mhathúna v Ireland [1995] 1 IR 484
 Michael Hoey v Waterways Ireland [2022] IEHC 628; [2024] IECA 210
 Minister for Communications, Marine and Natural Resources v Figary Water Sports Development Company [2015] IESC 74
 Minister for Finance v Civil and Public Service Union [2006] IEHC 14
 Minister for Justice v Dorian Szamota [2016] IECA 209
 Minister for Justice v Wang Zhu Jie [1991] ILRM 823

MK (Albania) v Minister for Justice and Equality [2022] IESC 48
 MM v PM [1986] ILRM 515
 Mohan v Ireland [2019] IESC 18
 Molumby v Kearns (HC, 19 January 1999)
 Mongan v Mongan and MIBI [2020] IEHC 262
 Mooney v An Post [1998] 4 IR 288
 Moore v Attorney General [1930] IR 471
 Moore v Dun Laoghaire Rathdown County Council [2016] IESC 70
 Morgan v Trinity College Dublin [2003] 3 IR 157
 Morrissey v Health Service Executive [2019] IEHC 268; [2020] IESC 6
 Moyne v Londonderry Port and Harbour Commissioners [1986] IR 299
 Moynihan v Greensmyth [1977] IR 55
 MS v DPP [2015] IECA 309
 Muldoon v Minister for the Environment [2015] IEHC 649; [2023] IECA 611
 Mullally v Bus Éireann [1992] ILRM 722
 Mulligan v Governor of Portlaoise Prison [2010] IEHC 269
 Murphy v Attorney General [1982] IR 241
 Murphy v Greene [1990] 2 IR 566
 Murphy v Independent Radio and Television Commission [1997] IEHC 71
 Murphy v Ireland [1996] 3 IR 307
 Murphy v Stewart [1973] IR 97
 Murray v Budds [2017] IESC 4
 Murray v Ireland [1985] IR 532
 Murray v Meath County Council [2017] IESC 25
 Murray v Newsgroup Newspapers [2010] IEHC 248
 Murtagh Properties v Cleary [1972] IR 330
 Murtagh v Cooke [2022] IEHC 436
 Muwema v Facebook Ireland Ltd [2018] IECA 104
 N v Health Service Executive [2006] 4 IR 374
 N v N [1992] 2 IR 116
 Nash v DPP [2017] IESC 51
 National Irish Bank (No. 1) [1999] 3 IR 145
 National Irish Bank v RTE [1998] 2 IR 465
 National Union of Journalists v Sisk [1992] 2 IR 171
 Nerney v Thomas Crosbie Holdings Ltd [2013] IEHC 127
 Neurendale Ltd v Dublin City Council [2009] IEHC 588
 NHV v Minister for Justice & Equality [2016] IECA 86; [2017] IESC 35
 NK v SK [2017] IECA 1
 Nolan Transport (Oaklands) Ltd v Halligan [1998] IESC 5
 Nolan v Emo Oil Services [2009] IEHC 15
 Nolan v Science Foundation Ireland [2024] IEHC 368
 Nolan v Sunday Newspapers [2020] IEHC 367; [2020] IECA 141
 Norris v Attorney General [1984] IR 36
 North Western Health Board v HW [2001] 3 IR 622
 NUR v Sullivan [1947] IR 77
 Ó Monachain v An Taoiseach [1986] ILRM 660
 O'Brien v Clerk of Dáil Éireann [2019] IESC 12
 O'Brien v Judge Coughlan [2016] IESC 4
 O'Brien v Keogh [1972] IR 144
 O'Brien v Manufacturing Engineering [1973] IR 344

O'Brien v Mirror Group Newspapers Ltd [2000] IESC 70
 O'Brien v RTÉ [2015] 2 IR 130
 O'C v Sacred Heart Adoption Society [1996] 1 ILRM 297
 O'Connell v BATU [2014] IEHC 360; [2016] IECA 388
 O'Connor v Lenihan [2005] IEHC 176
 O'Connor v Williams [2001] 1 IR 248
 O'Doherty v Minister for Health [2022] IESC 32
 O'Donohoe v O'Baróid and Quirke [1999] IEHC 148
 O'Donovan v Over-C Technology Limited [2021] IECA 37
 O'Driscoll v Limerick City Council [2012] IEHC 594
 O'Farrell v Governor of Portlaoise Prison [2016] IESC 37
 O'Hanlon v ESB [1969] IR 75
 O'Haran v Divine [1964] 100 ILTR 53
 O'Malley v Breen [2019] IEHC 645 [2021] IECA 148
 O'Meara v Minister for Social Protection [2024] IESC 1
 O'Neil v Unite the Union [2024] IESC 8
 O'R v EH [1996] 2 IR 248
 O'Reilly v Limerick Corporation [1989] ILRM 81
 O'S v Doyle [2013] IESC 60
 O'Sullivan v DPP [2007] IEHC 248
 O'Toole v Palmer [1945] Ir.Jur.Rep 59
 Oblique Financial Services v The Promise Production Co [1994] 1 ILRM 74
 Ogieriakhi v Minister for Justice (No. 2) [2014] IEHC 582; [2016] IECA 46; [2017] IESC 52
 Omar v Governor of the Dóchas Centre [2014] IEHC 215
 Ooi v Ireland [2024] IEHC 663
 Orr v Zomax [2004] IEHC 47
 Parsons v Kavanagh [1990] ILRM 560
 PC v Minister for Social Protection [2018] IESC 57
 People (Director of Public Prosecutions) v JT (1988) 3 Frewen 141
 Pepper Finance Corporation (Ireland) dac v Persons Unknown [2022] IECA 170
 Persona Digital Telephony v Minister for Public Enterprise [2017] IESC 27
 PH v John Murphy & Sons Ltd [1987] IR 621
 Phonographic Performance (Ireland) Ltd v Cody [1998] 4 IR 504
 Pigs Marketing Board v Donnelly [1939] IR 413
 Pine Valley Developments v Minister for the Environment [1987] IR 23
 PMPS v Attorney General [1983] 1 IR 339
 PR v KC [2014] IEHC 126; [2014] IESC 72
 Quigley v Minister for Education [2012] IEHC 414
 Quinn v Irish Bank Resolution Corporation Ltd [2012] IEHC 36
 Quinn's Supermarket v Attorney General [1972] IR 1
 Quirke v Bord Luthchleas na hÉireann [1988] IR 83
 R v An tÁrd Chláraitheoir [2014] IESC 60
 R v R (SC, 2 April 2004)
 Raducan v Minister for Justice, Equality, and Law Reform [2011] IEHC 224
 Rajpal v HSE [2024] IEHC 70
 RDS v Yates [1997] IEHC 144
 Re a Ward of Court (withholding medical treatment) (No.2) [1996] 2 IR 79
 Re Article 26 and the Employment Equality Bill 1996 [1997] 2 IR 321
 Re Article 26 and the Health Amendment Bill (No. 2) 2004 [2005] 1 IR 205

Re Article 26 and the Matrimonial Home Bill, 1993 [1994] 1 IR 305
 Re Article 26 and the Regulation of Information (Services Outside the State for Termination of Pregnancies) Bill [1995] 1 IR 1
 Re Blake [1955] IR 89
 Re D and Midland Health Board [1987] IR 449
 Re DG, an infant [1991] 1 IR 491
 Re Doyle (HC, 15 February 1973)
 Re Flightlease [2012] IESC 12
 Re Green Dale Building Co [1977] IR 256
 Re Haughey [1971] IR 217
 Re JH, an infant [1985] IR 375
 Re KH Kitty Hall Holdings [2017] IECA 247
 Re McKenna [1944] IR 277
 Re O'Brien, an Infant [1954] IR 1
 Re Ranks Ltd [1988] ILRM 751
 Re SW an infant, K v W [1990] 2 IR 437
 Re Tilson, infants [1951] IR 1
 Redmond v Minister for Environment (No. 2) [2004] IEHC 24
 Reynolds v Malocco [1999] 2 IR 203
 Riordan v Butler [1940] IR 347
 RK v MK (HC, 20 November 1978)
 Rock v Ireland [1997] 3 IR 484
 Rodgers v ITGWU [1978] ILRM 51
 Rooney v Shell E&P Ireland [2017] IEHC 63
 Rothwell v Arrowdale Ltd [2007] IEHC 395
 Rowland v An Post [2017] IESC 20
 Royal Dublin Society v Yates (HC, 31 July 1997)
 Ruffley v Board of Management of St Anne's School [2017] IESC 33
 Ryan v Attorney General [1965] IR 294
 Ryan v Danske Bank A/S t/a Danske Bank [2014] IEHC 236
 Ryan v O'Callaghan (HC, 22 July 1987)
 Ryanair v Channel 4 Television [2017] IEHC 651
 Ryanair v Labour Court [2007] IESC 6
 S v Eastern Health Board [1978] WJSC-HC 2000
 S v Minister for Justice [2011] IEHC 31
 S v S [1983] IR 68
 Savickis v Governor of Castlerea Prison (No. 1) [2016] IECA 310
 Savickis v Governor of Castlerea Prison (No. 2) [2016] IECA 372
 Scally v Minister for the Environment [1996] 1 IR 367
 Schlegel v Corcoran and Gross [1942] IR 19
 Schmidt v Home Secretary of the Government of the United Kingdom [1995] 103 ILR 322
 Schrems v Data Protection Commissioner [2014] IEHC 310
 SF (A Minor) v Director of Oberstown Children Detention Centre [2017] IEHC 829
 Sharkey v Dunnes Stores [2004] IEHC 163
 Shatter v Guerin [2019] IESC 9
 Shaughnessy v Nohily [2016] IEHC 767
 Sheehan v Bus Éireann [2022] IECA 28
 Sheehy v Ryan [2008] IESC 14
 Shortt v Commissioner of An Garda Síochána [2007] IESC 9
 Simmonds v Ennis Town Council (No. 2) [2012] IEHC 281

Simpson v Governor of Moutjoy Prison [2017] IEHC 561; [2019] IESC 81
 Sinclair v Gogarty [1937] IR 377
 Siney v Dublin Corporation [1980] IR 400 (SC) 412
 Sinnott v Carlow Nationalist (HC 2008, unreported)
 Sinnott v Minister for Education [2001] IESC 63
 Sinnott v Quinnsworth [1984] ILRM 523
 Slattery v Friends First Life Assurance [2013] IEHC 136
 Smith v Cunningham [2023] IESC 13
 Smith v Custom House Dock (HC, 20 March 1997)
 Smyth v Railway Procurement Agency [2010] IEHC 290
 Society for the Protection of Unborn Children (Ireland) Ltd v Grogan [1989] IR 753
 Society for the Protection of Unborn Children (Ireland) Ltd v Grogan (No. 4) [1994] 1 IR 46
 Somjee v Minister for Justice [1981] ILRM 324
 Sony Music Entertainment (Ireland) Ltd v UPC Ireland Ltd (No. 1) [2015] IEHC 317
 Spaight v Dundon [1961] IR 201
 State (Healy) v Donoghue [1976] IR 325
 Stoskus v Goode Concrete [2007] IEHC 432
 Sullivan v Boylan (No. 1) [2012] IEHC 389
 Sullivan v Boylan (No. 2) [2013] IEHC 104
 Sweeney v Duggan [1991] 2 IR 274; [1997] 2 IR 531
 Taite v Beades [2019] IESC 92
 Talbot (Ireland) Ltd v Merrigan (SC, 30 April 1981)
 Tanat Ltd v The Medical Council [2013] IEHC 223
 Tate v Minister for Social Welfare [1995] 1 IR 418
 Taylor v Smyth [1991] IR 142
 TD v Minister for Education [2001] 4 IR 259
 The Board of Management of Wilson's Hospital School v Burke [2023] IEHC 288
 The Governor of A Prison v GDC [2020] IEHC 354
 The People (Attorney General) v Cummins [1972] IR 312
 The People (DPP) v Aylmer [1995] 2 ILRM 624
 The People (DPP) v T (1988) 3 Frewen 141
 The State (Burke) v Lennon [1940] IR 136
 The State (DPP) v Walsh [1981] IR 412
 The State (Healy) v Donoghue [1976] IR 325
 The State (Kennedy) v Little [1932] IR 39
 The State (Lynch) v Cooney [1982] IR 337
 The State (Murphy) v Johnston [1983] IR 235
 The State (Nicolaou) v An Bord Uchtála [1966] IR 567
 The State (O'Connell) v Fawsitt [1986] IR 362
 The State (O'Flaherty) v Ó Floinn [1954] IR 295
 The State (Pheasantry) v District Judge Donnelly [1982] ILRM 512
 The State (Sheerin) v Kennedy [1966] IR 379
 The State (Vozza) v O'Floinn [1957] IR 227
 Tierney v Amalgamated Society of Woodworkers [1959] IR 254
 Tierney v An Post [1999] IESC 91
 Tolan v An Bord Pleanála [2008] IEHC 275
 Tradax (Ireland) Ltd v Irish Grain Board Ltd [1984] IR 1
 Treasury Holdings v NAMA [2012] IEHC 297
 Tuffy Ltd v O'Neill [2013] IEHC 231

Tuohy v Courtney [1994] 3 IR 1
 UCC v ESB [2020] IESC 38
 UF v JC [1991] 2 IR 330
 Ulster Bank (Ireland) Ltd v De Kretser [2016] IECA 371
 UPM v BWG (HC, 11 June 1999)
 Verwey v Hogan [2023] IEHC 574
 Vone Securities v Cooke [1979] IR 59
 W v Ireland (No.2) [1997] 2 IR 141
 W v W [1993] 2 IR 476
 Wallace v Irish Aviation Authority [2012] IEHC 178
 Walsh v Family Planning Services [1992] IESC 3
 Walsh v Ireland [1994] WJSC-SC 4279
 Walsh v Kilkenny County Council [1978] ILRM 1
 Walsh v Sligo County Council [2013] IESC 48
 Watson v Campos [2016] IEHC 18
 White v Bar Council [2016] IEHC 406
 White v Dublin City Council [2004] 1 IR 545
 Wicklow County Council v Fortune [2012] IEHC 406
 Wicklow County Council v Fortune (No. 2) [2013] IEHC 255
 Wicklow County Council v Fortune (No. 3) [2013] IEHC 397
 Wicklow County Council v Kinsella [2015] IEHC 229
 Wright v Board of Management of Gorey Community School [2000] IEHC 37
 X v Flynn (HC, 19 May 1994)
 X v Sunday Newspapers [2014] IEHC 696
 Yeates v Minister for Posts and Telegraphs [1978] ILRM 22
 ZS v DPP [2011] IESC 49

England and Wales

AAA v Associated Newspapers Ltd [2013] EMLR 2
 Abrahams v Herbert Reiach Ltd [1922] 1 KB 477
 Abu Dhabi National Tanker Co v Product Star Shipping Ltd (The Product Star) [1993] 1
 Lloyds Rep 397
 Addis v Gramophone [1909] AC 488
 AG v Chaudry [1971] 1 WLR 1612
 Albany Home Loans Ltd v Massey [1997] 2 All ER 609
 Alcock v Chief Constable of South Yorkshire Police [1992] 1 AC 310
 Allen v Flood [1898] AC 1
 Ashby v White (1703) 2 Ld Raym 938
 Autoclenz Ltd v Belcher [2011] UKSC 41
 Bamford v Turnley (1862) 3 B & S 66
 Barber v Manchester Regional Hospital Board [1958] 1 WLR 181
 Best v Samuel Fox & Co Ltd [1952] AC 716
 Bici v Ministry of Defence [2004] EWHC 786
 Blathwayt v Cawley [1976] AC 397
 Bonnard v Perryman [1891] 2 Ch 269
 Bradford v Pickles [1895] AC 587
 Bradley v Jockey Club [2004] EWHC 2164
 Braganza v BP Shipping [2015] UKSC 17
 British Guiana Credit Corporation v Da Silva [1965] 1 WLR 248

British Telecommunications Plc v Telefónica O2 UK Ltd [2014] UKSC 42
 Burn v Alder Hey Children's NHS Foundation Trust [2021] EWCA Civ 1791
 Cambridge Water Co v Eastern Counties Leather plc [1994] 2 AC 264
 Campbell v MGN Ltd [2004] UKHL 22
 Carter v Boehm (1766) 3 Burr 1905
 Champan v Honig [1963] 2 QB 502
 Cockburn v Alexander (1848) 6 CB 791
 Coco v AN Clarke (Engineers) Ltd [1969] RPC 41
 Crofter Hand Woven Harris Tweed Co v Veitch [1942] AC 435
 Cutler v Wandsworth Stadium [1949] AC 398
 Dodwell v Burford (1670) 1 Mod 24, 86 ER 703
 Doe d. Murray v Bridges (1831) 1 B&Ad 847
 Doherty v South Dublin County Council (No. 2) [2007] IEHC 4
 Dunk v Waller [1970] 2 QB 163
 Durham Tees Valley Airport Ltd v BMI Baby Ltd [2010] EWCA Civ 485
 Dymoke v Association for Dance Movement Psychotherapy UK Ltd [2019] EWHC 94
 Eastwood v Magnox Electric plc [2004] UKHL 35
 Edwards v Chesterfield [2011] UKSC 48.
 Ex parte Island Records Ltd [1978] Ch 122
 Fearn v Tate Gallery [2023] UKSC 4
 Ghaidan v Godin-Mendoza [2004] UKHL 30
 Gouriet v Union of Post Office Workers [1978] AC 435
 Grainger v Hill (1838) 132 ER 769
 Groves v Lord Wimborne (1898) 2 QB 402
 Gulati v MGN [2015] EWCA Civ 1291
 Gunton v Richmond-Upon-Thames London Borough Council [1981] Ch 448
 Hamilton v Open Window Bakery Ltd (2004) 235 DLR (4th) 193
 Hill v Parsons Ltd [1972] 1 Ch 305
 Hooper v Reeve (1817) 7 Taunt 698
 Huckle v Money (1763) 2 Wills 205
 Hunter v Canary Wharf [1997] AC 655
 In re Borwick [1933] 1 Ch 657
 In re Boulter [1922] 1 Ch 75
 In re Sandbrook [1912] 2 Ch 471
 Iqbal v Prison Officers Association [2010] QB 732
 Janvier v Sweeney [1919] 2 KB 316
 Johnson v Unisys Ltd [2001] UKHL 13
 Khorasandjian v Bush [1993] 3 WLR 476
 Lavarack v Woods of Colchester [1967] 1 QB 278
 Law v Law [1905] 1 Ch 140
 Lee v Showmen's Guild of Great Britain [1952] 2 QB 329
 Letang v Cooper [1965] QB 232
 Livingstone v Raywards Coal (1880) 5 App Case 25
 Lloyd v Google LLC [2021] UKSC 50
 Lonrho Ltd v Shell Petroleum Co Ltd (No. 2) [1982] AC 173
 Lumba v Secretary of State for the Home Department [2011] UKSC 12
 Lumley v Gye (1853) 2 E and B 216
 Lymington Marina v Nash [2007] EWCA Civ 151
 Lynch v Knight (1861) 9 HLC 577
 Mahmud v Bank of Credit and Commerce International SA [1998] AC 20;

Malik v BCCI [1998] AC 20
 Malloch v Aberdeen Corporation [1971] 1 WLR 1578
 McDonald v McDonald [2016] UKSC 28
 McLoughlin v O'Brian [1983] 1 AC 520
 Meering v Graham-White Aviation (1919) 122 LT 44.
 Meering v Graham-White Aviation Co Ltd (1919) 122 LT 44
 Mid Essex Hospital Services NHS Trust v Compass Group UK and Ireland Ltd (t/a Medirest) [2013] EWCA Civ 200
 Mogul Steamship Co Ltd v McGregor [1889] 23 QBD 598
 Morpeth Corporation v Northumberland Farmers Auction Mart Co Ltd [1921] 2 Ch 154
 Morrison Sports Ltd v Scottish Power [2010] 1 WLR 1934
 Mullins v McFarlane [2006] EWHC 986
 Nagle v Feilden [1966] 2 QB 633
 National Provincial Bank v Ainsworth [1965] AC 1175
 OBG v Allan [2007] UKHL 21
 OPO v Rhodes [2015] UKSC 32
 Paragon Finance v Nash [2001] EWCA Civ 1466
 Phillips Electronique Grand Public SA v British Sky Broadcasting [1995] EMLR 472
 Quinn v Leathem (1901) AC 495
 R v Central Independent Television PLC [1994] 3 WLR 20
 R v Disciplinary Committee of the Jockey Club, ex p Aga Khan [1993] 1 WLR 909
 R v Panel on Take-overs and Mergers, Ex p. Datafin [1987] QB 815
 RCA Corporation v Pollard [1983] Ch 135
 Re Piper [1946] 2 All ER 503
 Re Tegg [1936] 2 All ER 878
 Reynolds v Times Newspapers [2001] 2 AC 127
 Ridge v Baldwin [1964] AC 40
 Robinson v Harman (1848) 1 Ex 850
 Sevenoaks District Council v Pattullo & Vinson Ltd [1984] Ch 211
 Shirlaw v Southern Foundries (1926) Ltd [1939] 2 KB 206
 Smith v Trafford Housing Trust [2010] EWHC 3221 (Ch)
 Socimer v Standard Bank London [2008] EWCA Civ 116
 Sorrel v Smith [1925] AC 700
 Southwark London Borough Council v Tanner [2001] 1 AC 1
 Spring v Guardian Assurance Plc [1995] 2 AC 296
 Stoke-On-Trent City Council v W & J Wass Ltd [1988] 1 WLR 1406
 Stubbings v Webb [1993] AC 498
 Swinney v Chief Constable of Northumbria Police Force [1997] QB 464
 Tailors of Ipswich (1614) 11 Co Rep 53a
 Tesco Stores Ltd v Union of Shop, Distributive and Allied Workers [2024] UKSC 28
 The Moorcock (1889) 14 PD 64
 Wagon Mound (No. 1) [1961] AC 388
 Wainwright v Home Office [2003] UKHL 53
 Watson, Laidlaw & Co Ltd v Pott, Cassels and Williamson (1914) 31 RPC 104
 Weller v Associated Newspapers Ltd [2014] EMLR 7
 Wilson v Lombank [1963] 1 WLR 1294.
 Wilson v Pringle [1987] 1 QB 237
 Wolverhampton City Council v London Gypsies and Travellers [2023] UKSC 47
 X v Bedfordshire County Council [1995] 2 AC 633

Canada

Air Canada v Toronto Port Authority [2011] FCA 347
City of Vancouver v Ward [2010] 2 SCR 28
De Klerk v Du Plessis [1994] (6) BCLR 124
Dickason v University of Alberta [1992] 2 SCR 1103
Dobson v Dobson [1999] 2 SCR 753
Douglas/Kwantien Faculty Association v Douglas College [1990] 3 SCR 570
Grant v Torstar Corp [2009] 3 SCR 640
Grant v Torstar Corp [2009] SCC 61
Hill v Church of Scientology of Toronto [1995] 2 SCR 1130
Jane Doe 464533 v ND [2016] ONSC 541
Jones v Tsige [2012] ONCA 32
M. (A.) v. Ryan [1997] 1 SCR 157
Machtiger v Hoj Industries (1992) 91 DLR (4th) 491
McKinney v Guelph [1990] 3 SCR 229
Merritt v Tigercat Industries Inc (2016) ONSC 1214
Milton v Savinkoff (1993) 18 CCLT (2d) 288 (BCSC)
Motherwell v Motherwell [1977] 73 DLR (3d) 62
Mounted Police Association of Ontario v Canada [2015] 1 SCR 3
Pecore v Pecore (2007) 279 DLR (4th) 513
Philco Products Ltd v Thermionics Ltd [1940] 4 DLR 1 (SCC)
R v Salituro [1991] 3 SCR 654
Reibl v Hughes [1980] 2 SCR 880
Retail, Wholesale and Department Store Union, Local 580 v Dolphin Delivery [1986] 2 SCR 573
RWDSU Local 558 v Pepsi-Cola Canada Beverages (West) Ltd [2002] 1 SCR 156
Saulnier v Royal Bank of Canada [2008] 3 SCR 166
Wallace v United Grain Growers Ltd (1997) 152 DLR (4th) 1

United States

American Federation of Labour v Swing 312 US 321
Bell v Maryland 378 US 22
Bivens v Six Unknown Names Agents 403 US 388
CBS v Democratic National Committee 412 US 94
Denver Area Ed. Telecommunications Consortium, Inc v FCC 518 US 727
Egbert v Boule 596 US 482
Evans v Newton 382 US 296 299
Fisher v Carrousel Motor Hotel, Inc 424 SW 2d 627 (Tex, 1967)
Flagg Brothers v Brooks 436 US 149
Frisby v Schultz 487 US 474
Garcetti v Ceballos 547 US 410
Hudgens v NLRB 424 US 507
Hudgens v NLRB 424 US 507
Hurley v Irish-American Gay, Lesbian and Bisexual Group of Boston Inc 515 US 557
Jackson v Metropolitan Edison Co 419 US 345
Kerry Co-Operative Creameries Ltd v An Bord Bainne Co-Operative Ltd [1990] ILRM 664
Lebron v National Railroad Passenger Corporation 513 US 374

Logan 590 v Logan Valley 391 US 308
 Lugar v Edmondson Oil Co 457 US 922
 Macca v General Telephone Company of Northwest Inc. 495 P.2D 1193 (1972)
 Manhattan Community Access Corporation v Halleck 587 US (2019)
 Marsh v Alabama 326 US 501
 Marsh v Alabama 326 US 501
 Memphis Community School v Stachura 477 US 299
 Moose Lodge No 107 v Irvis 407 US 163
 NAACP v Claiborne Hardware Co 458 US 886
 New York State Rifle & Pistol Association Inc v City of New York, New York (2020) 590 US
 New York Times v Sullivan 376 US 254
 Palsgraf v Long Island Railroad Company (1928) 248 NY 339
 Pickering v Board of Education 391 US 563
 Public Utilities Comm'n v Pollak 343 US 451
 Scoendorff v Society of New York Hospital 211 NY 125
 Shelley v Kraemer 334 US 1
 Snyder v Phelps 562 US 433
 The Civil Rights Cases 109 US 3
 Tuttle v Buck 119 NW 946 (1909)
 Uniformed Sanitation Men Association v Commissioner of Sanitation of the City of New York 392 US 80
 West Virginia State Board of Education v Barnette 319 US 624

European Court of Human Rights

Appleby v UK. App No 44306/98 (ECHR, 6 May 2003)
 Barbalescu v Romania App No 61496/08 (ECHR, 5 September 2017)
 Buckley v United Kingdom App No 20348/92 (ECHR, 29 September 1996)
 DH v Czech Republic (2008) 47 EHRR 3
 Eweida and others v UK App No 48420/10 (ECHR, 15 January 2013)
 Halford v United Kingdom (1997) 24 EHRR 523
 McCann v United Kingdom App No 19009/04 (ECHR, 21 July 2009)
 Obst v Germany App No 425/03 (ECHR, 23 September 2010)
 Open Door Counselling Ltd v Ireland (1993) 15 EHRR 244
 Orlić v Croatia App No 48833/07 (ECHR, 21 June 2011)
 Prokopovitch v Russia App No 58255/00 (ECHR, 18 November 2004)
 Redfearn v United Kingdom App No 47335/06 (ECHR, 6 November 2012)
 Rommefganger v Germany App No 12242/86 (ECHR, 6 September 1989)
 Schüth v Germany App No 1620/03 (ECHR, 23 September 2010)
 Sibson v UK App No 14327/88 (ECHR, 30 June 1993)
 Sigurjonsson v Iceland App No 16130/90 (ECHR, 30 June 1993)
 Sørensen and Rasmussen v Denmark [2008] 46 EHRR 572
 Van der Heijden v the Netherlands App No 11002/84 (ECHR, 3 April 2012)
 Winterstein v France App No 27013/07 (ECHR, 17 October 2013)
 Young, James and Webster v UK App No 7601/76, 7806/77 (ECHR, 13 August 1981)

Germany

BVerfGE 30, 173 (Mephisto)

BVerfGE 34, 269 (Princess Soraya)
BVerfGE 35, 202 (Lebach)
BVerfGE 42, 143 (Deutschland-Magazin)
BVerfGE 7, 198 (Lüth)
BVerfGE 81, 242 (Handelsvertreter)
BVerfGE 89, 214 (Bürgschaftsfall)
BVerfGE 9, 90 (Parabolantenne)

South Africa

AAA Investments (Proprietary) Ltd v Micro Finance Regulatory Council (2006) (11)
BCLR 1255 (CC)
Barkhuizen v Napier [2007] ZACC 5
Daniels v Scribante [2017] ZACC 13
Du Plessis v De Clerk [1996] (3) SA 850
Fose v Minister for Safety and Security [1997] (3) SA 786 (CC)
Governing Body of the Juma Musjid Primary School v Essay No [2011] ZACC 13
In re Certification of the Constitution of South Africa (1996) (4) SA 744
Khumalo v Holomisa [2002] ZACC 12

Australia

Australian Broadcasting Corporation v Lenah Game Meats Pty Ltd (2001) 208 CLR 199
Bosonac v Commissioner of Taxation [2022] HCAASP 23
Bostick Pty Ltd v Gorgevski (No. 1) [1992] FCA 271
Lewis v ACT [2020] HCA 26

New Zealand

Hosking v Runting [2003] NZLR 385
Russel v Wanganui City College [1998] 3 ERNZ 1076
Simpson v AG [1994] 3 LRC 202
Stuart v Armourguard Security [1996] 1 NZLR 484
Taunoa v Attorney General [2008] 1 NZLR 429
Taylor v AG [2016] 1 LRC 220

India

Basu v State of West Bengal [1997] 2 LRC 1
Kaushal Kishore v State of Uttar Pradesh [2023] 4 SCC 1
Pradeep Kumar Biwas v Institute of Chemical Biology (2002) 4 SCC 111

European Court of Justice

Foster v British Gas plc (1990) C-188/89.
Francovich v Italy (1991) Joint Cases C-6/90 and C-9/90

Privy Council

Attorney General of Trinidad and Tobago v Ramanoop [2005] UKPC 15

Malaysia

Shamala a/p Sathiyaseelan v Dr. Jeyaganesh a/l C Mogarajah [2011] 2 MLJ

Namibia

Visagie v The Government of the Republic of Namibia [2022] NAHCMD 81

BIBLIOGRAPHY

- Alexander L ‘What are Constitutions, and What Should (and Can) They Do?’ (2011) 28(1) *Social Philosophy and Policy* 1
- Alexy R, *A Theory of Constitutional Rights* (trans Julian Rivers, Oxford University Press 2002)
- Anderson E, *Private Government: How Employers Rule Our Lives and Why We Don’t Talk About It* (Princeton University Press 2017)
- Bagshaw R, ‘Inducing Breach of Contract’ in Jeremy Horder (ed), *Oxford Essays in Jurisprudence: 4th Series* (Oxford University Press 2000)
- – ‘Tort Law, Concepts, and What Really Matters’ in Andrew Robertson and Hang Wu (eds), *The Goals of Private Law* (Hart 2009)
- Balkin JM, ‘The Constitution of Status’ (1997) 106 *Yale Law Journal* 2313
- Bambrick C, ‘A Republican Vein in Liberal Constitutionalism’ (2020) 52(3) *Polity* 401
- Bamforth N, ‘The Application of the Human Rights Act 1998 to Public Authorities and Private Bodies’ (1999) 58(1) *Cambridge Law Journal* 159
- Banda S, ‘Taking Indirect Horizontality Seriously in Ireland: A Time to Magnify the Nuance’ (2009) 31 *Dublin University Law Journal* 263
- Barak A, ‘Constitutional Human Rights and Private Law’ (1996) 3 *Review of Constitutional Studies* 218
- – ‘Constitutional Human Rights and Private Law’ in Daniel Friedmann and Daphne Barak-Erez (eds), *Human Rights in Private Law* (Hart Publishing 2001)
- Barber N, *The Constitutional State* (Oxford University Press 2010)
- Beatty D, ‘Constitutional Conceits: The Coercive Authority of Courts’ (1987) 37 *University of Toronto Law Journal* 83
- Beever A, *Rediscovering the Law of Negligence* (Hart Publishing 2007)
- – *The Law of Private Nuisance* (Hart 2013)
- Beever A and Rickett C, ‘Interpretive Legal Theory and the Academic Lawyers’ (2005) 68 *Modern Law Review* 320
- Bell J, *The Anatomy of Administrative Law* (Hart 2020) 230-7

- Bennett T, 'Privacy, Corrective Justice, and Incrementalism: Legal Imagination and the Recognition of a Privacy Tort in Ontario' (2013) 59(1) McGill Law Journal 49
- Benson P, 'Misfeasance as an Organizing Normative Idea in Private Law' (2010) 60(3) University of Toronto Law Journal 731
- — *Justice in Transactions* (Harvard University Press 2019)
- Bewsick S and Fotherby W, 'The Divergent Paths of Commonwealth Privacy Torts' (2018) 84 Supreme Court Law Review 225
- Bhatia G, *Horizontal Rights: An Institutional Approach* (Bloomsbury 2023)
- Biehler H, *Equity and the Law of Trusts* (7th edn, Round Hall 2020)
- Binchy W, 'Constitutional Remedies and the Law of Torts' in James O'Reilly (ed), *Human Rights and Constitutional Law: Essays in Honour of Brian Walsh* (Round Hall 1992)
- — 'Dignity as a Constitutional Concept' in Eoin Carolan and Oran Doyle (eds), *The Irish Constitution: Governance and Values* (Thomson Round Hall 2008)
- — 'Meskell, The Constitution and Tort Law' (2011) Dublin University Law Journal 339
- — 'Tort Law in Ireland: A Half-Century Review' (2016) 56 Irish Jurist 199
- Birks P, 'Harassment and Hubris' (1997) 32 Irish Jurist 1
- Black CL, 'The Supreme Court, 1966 Term – Foreword: "State Action," Equal Protection, and California's Proposition 14' (1967) 81 Harvard Law Review 69
- Blackstone W, *Commentaries on the Laws of England* (Clarendon, 1765-1769)
- Bloustein EJ, 'Privacy as an Aspect of Human Dignity: An Answer to Dean Prosser' (1964) 39 New York University Law Review 962
- Böckenförde, EW, *Constitutional and Political Theory: Selected Writings* (Oxford University Press 2017)
- Bogg A and Freedland M, 'The Wrongful Termination of the Contract of Employment' in Mark Freedland (ed), *The Contract of Employment* (Oxford University Press 2016)
- Bogg A, 'Common Law and Statute in the Law of Employment' 69(1) Current Legal Problems 67
- Brudner A, *The Unity of the Common Law* (University of California Press 1995)

- Burke W and Reber D, 'State Action, Congressional Power and Creditors' Rights: An Essay on the 14th Amendment' (1973) 46 Southern California Law Review 1003
- Burrows A, *Remedies for Torts, Breach of Contract and Equitable Wrongs* (4th edn, Oxford University Press 2019)
- Butler AS, 'Constitutional Rights in Private Litigation: A Critique and Comparative Analysis' (1993) 22 Anglo-American Law Review 1
- — 'Private Litigation and Constitutional Rights under Sections 8 and 9 of the 1996 Constitution—Assistance from Ireland' (1999) 116 South African Law Journal 77
- Buxton R, 'The Human Rights Act and Private Law' (2000) 116 Law Quarterly Review 48
- Byers M, 'Abuse of Rights: An Old Principle, A New Age' (2002) 47 McGill Law Journal 389
- Calabresi G and Melamed AD, 'Property Rules, Liability Rules, and Inalienability: One View of the Cathedral' (1972) 85 Harvard Law Review 1089
- Cannon R, 'The Bigoted Landlord: A Re-Examination of *Schlegel v Corcoran and Gross*' (2005) 12 Dublin University Law Journal 248
- Carolan E and O'Neill A, *Media Law in Ireland* (2nd edn, Bloomsbury Professional 2019)
- Carolan M, 'Court Increases Payout to GAA Player Over Photo' *The Irish Times* (Dublin, 31 July 2008)
- — 'Former Minister Pat Carey Receives Apology from Garda Commissioner and Damages over Newspaper Articles' *The Irish Times* (Dublin, 16 June 2023)
- Casey C and Doyle O, 'Foreword: The Constitution under the New Supreme Court' (2024) 44(1) Dublin University Law Journal 5
- Casey J, *Irish Constitutional Law* (3rd edn, Thomson Round Hall 2000)
- Casey JP, 'Some Implications of Freedom of Association in Labour Law: A Comparative Survey with Special Reference to Ireland' (1972) 21(4) the International and Comparative Law Quarterly 699
- Chemerinsky E, 'Rethinking State Action' (1985) 80(3) Northwestern University Law Review 503
- Cherednychenko O O, 'Fundamental Rights and Private Law: A Relationship of Subordination or Complementarity?' (2007) 3(2) Utrecht Law Review 1
- Cicero, *De Officiis* (translated in Walter Miller (tr) *On Duties* (Harvard University Press 1913))

- Clapham A, *Human Rights Obligations of Non-State Actors* (Oxford University Press 2006)
- Coleman J, *The Practice of Principle* (Oxford University Press 2001)
- Collins AM and O'Reilly J, *Civil Proceedings and the State* (3rd edn, Round Hall 2019)
- Collins H, 'On the (In)compatibility of Human Rights Discourse and Private Law' in Hans-W Micklitz (ed), *Constitutionalization of European Private Law* (Oxford University Press 2014)
- — 'The Challenged Presented by Fundamental Rights to Private Law' in Kit Barker, Karen Fairweather, and Ross Grantham (eds), *Private Law in the 21st Century* (Hart Publishing 2017)
- — 'Interpersonal Justice as Partial Justice' (2022) 1(2) *European Law Open* 413
- Collins P and Golding G, 'An Implied Term of Procedural Fairness During Disciplinary Processes: Into Contracts of Employment and Beyond?' (2024) 53(2) *Industrial Law Journal* 125
- Conaghan J, 'McKinley v Minister for Defence' in Máiréad Enright, Julie McCandless and Aoife Donoghue (eds) *Northern/Irish Feminist Judgments: Judges' Troubles and the Gendered Politics of Identity* (Bloomsbury 2017)
- Conroy BF, 'Constitutionalising the Tort of Defamation – Bunreacht na hÉireann as a Framework for the Reform of Ireland's Libel Laws' (2002) 5 *Trinity College Law Review* 1
- Cooney TAM and Kerr T, 'Constitutional Aspects of Irish Tort Law' (1981) 3 *Dublin University Law Journal* 1
- Corbin A, 'Conditions in the Law of Contract' (1918-1919) 28 *Yale Law Journal* 739
- Cornell N, 'Wrongs, Rights, and Third Parties' (2015) 43(2) *Philosophy & Public Affairs* 109
- — 'Competition Wrongs' (2020) 129 *Yale Law Journal* 2030
- — 'The Possibility of Preemptive Forgiving' (2017) 126(2) *The Philosophical Review* 241
- Costello R, *Privacy Law in Ireland* (Bloomsbury 2023)
- Cox N, Corbett V, and Connaughton M, *Employment Law in Ireland* (2nd edn, Clarus Press 2022)
- Crummey C, 'Unconstitutional Evictions' (2023) 7(3) *Irish Judicial Studies Journal* 1

- D'Art D, 'Freedom of Association and Statutory Union Recognition: A Constitutional Impossibility' (2020) 63 *Irish Jurist* 82
- Da Silva M, 'Correlativity and the Case Against a Common Presumption About the Structure of Rights' (2020) 54 *Journal of Value Inquiry* 289
- Daly E, '*Flynn v Power* – Judgment' in Máiréad Enright, Julie McCandless and Aoife Donoghue (eds) *Northern/Irish Feminist Judgments: Judges' Troubles and the Gendered Politics of Identity* (Bloomsbury 2017)
- Daly E, 'Freedom of Association through the Prism of Gender Quotas in Politics' (2012) 47 *Irish Jurist* 76
- – and Tom Hickey, *The Political Theory of the Irish Constitution: Republicanism and the Basic Law* (Manchester University Press 2015)
- Daly P, '"Political Questions" and Judicial Review in Ireland' (2008) 2 *Judicial Studies Institute Journal* 116
- Davidov G, 'Non-Waivability in Labour Law' (2020) 40(3) *Oxford Journal of Legal Studies* 482
- Delany H, 'Prior Restraint Orders and Freedom of Expression' (2005) *Irish Jurist* 138
- – and Carolan E, *The Right to Privacy* (Thomson Round Hall 2008)
- Dennett DC, 'Philosophy According to Nozick' (1982) 7 *New Boston Review* 9
- Domes A, 'The Courts, the Common Law, and the Constitutional Imperative: Beyond Dolphin Delivery' (1989) 27(3) *Alberta Law Review* 430
- Doyle O, *The Constitution of Ireland: A Contextual Analysis* (Hart 2018)
- – and Feldman E, 'Constitutional Law' in Raymond Byrne and William Binchy, *Annual Review of Irish Law* (2012)
- – and Hickey T, *Constitutional Law: Texts, Cases, and Materials* (2nd edn, Clarus Press 2019)
- du Bois, F, 'Social Purposes, Fundamental Rights and the Judicial Development of Private Law' in Donal Nolan and Andrew Robertson, *Rights in Private Law* (Hart Publishing 2011)
- Duarte d'Almeida L, 'Fundamental Legal Concepts: The Hohfeldian Framework' (2016) 11(10) *Philosophy Compass* 554
- Dworkin R, 'Liberalism' in Stuart Hampshire (ed), *Public & Private Morality* (Cambridge University Press 1978)
- – 'Law's Ambitions for Itself' (1985) 71(2) *Virginia Law Review* 173

- *Law's Empire* (Harvard University Press 1986)
- *Justice for Hedgehogs* (Harvard University Press 2011)
- Dyzenhaus D, 'The New Positivists' (1989) 39(4) *University of Toronto Law Journal* 361
- Ebbinghaus JA, 'The Law of Humanity and the Limits of State Power' (1953) 3(10) *The Philosophical Quarterly* 14
- Ebels-Duggan K, 'Critical Notice: Arthur Ripstein's *Force and Freedom*' (2011) 41(4) *Canadian Journal of Philosophy* 549
- Eldridge E, 'Rights That' (2024) 44(4) *Oxford Journal of Legal Studies* 808
- Eleftheriadis, P *Legal Rights* (Oxford University Press 2008)
- Eleftheriadis P, 'In Defence of Constitutional Law' (2018) 81(1) *Modern Law Review* 154
- Endicott T, *Administrative Law* (2nd edn, Oxford University Press)
- Enoch D, 'Autonomy as Non-Alienation, Autonomy as Sovereignty, and Politics' (2022) 30(2) *The Journal of Political Philosophy* 143
- Epstein RA, 'In Defense of the Contract at Will' (1984) 51 *University of Chicago Law Review* 947
- 'Inducement of Breach of Contract as a Problem of Ostensible Ownership' (1987) 16 *Journal of Legal Studies* 1
- Essert C, 'Property in Licenses and the Law of Things' (2014) 59(3) *McGill Law Journal* 560
- 'Property and Homelessness' (2016) 44(4) *Philosophy & Public Affairs* 266
- 'Nuisance and the Normative Boundaries of Ownership' (2016) 52 *Tulsa Law Review* 85
- Eustace A, 'If It Walks Like Misconduct and Quacks Like Misconduct...It's "Poor Performance"? *O'Donovan v Over-C Technology Ltd*' (2021) 18(2) *Irish Employment Law Journal* 31
- 'All Work and No Fair Play? The Right to Fair Procedures in Employment Disciplinary Proceedings' (2023) 42(3) *Dublin University Law Journal*
- Ewing KD, 'The Function of Trade Unions' 34(1) *Industrial Law Journal* 1

- Feinberg J, 'Voluntary Euthanasia and the Inalienable Right to Life' (1978) 7(2) *Philosophy and Public Affairs* 93
- — *Harm to Others* (Oxford University Press 1986) 33
- Finnis J, 'Intention in Tort Law' in David G. Owen (ed), *Philosophical Foundations of Tort Law* (Oxford University Press 1995)
- Finnis J, 'Some Professorial Fallacies About Rights' (1972) 4 *Adelaide Law Review* 377
- Fiss OM, 'Groups and the Equal Protection Clause' (1976) 5 *Philosophy and Public Affairs* 107
- Forde M, 'The Closed Shop Case' (1982) 11(1) *Industrial Law Journal* 1
- — 'Who Can Remedy Human Rights Abuses? The State Action Question' in Keith D. Ewing, Conor A. Gearty, and Bob A. Hepple (eds), *Human Rights and Labour Law: Essays for Paul O'Higgins* (Mansell 1994)
- Forst R, 'A Kantian Republican Conception of Justice as Nondomination' in Andreas Niederberger and Philipp Schink (eds) *Republican Democracy: Liberty, Law and Politics* (Edinburgh University Press 2013)
- Frantziou E, 'The Horizontal Effect of the Charter of Fundamental Rights of the EU: Rediscovering the Reasons for Horizontality' (2015) 21(5) *European Law Journal* 657
- — *The Horizontal Effect of Fundamental Rights in the European Union: A Constitutional Analysis* (Oxford University Press 2019)
- Fried C, 'Privacy' (1968) 77(3) *Yale Law Journal* 475
- Friedman N, 'Human Rights and the South African Common Law: Revisiting Horizontality' (2014) 30 *South African Journal on Human Rights* 63
- Gamillscheg F, 'Die Grundrechte in Arbeitsrecht' (1964) 164 *Archiv für die civilistische Praxis* 385
- Gardbaum S, 'The "Horizontal Effect" of Constitutional Rights' (2003) 102(3) *Michigan Law Review* 387
- Gardner J, 'The Purity and Priority of Private Law' (1996) 46(3) *The University of Toronto Law Journal* 459
- — 'Justifications and Reasons' in *Offences and Defences: Selected Essays in the Philosophy of Criminal Law* (Oxford University Press 2008)
- — 'Can There be a Written Constitution?' in Leslie Green and Brian Leiter (eds), *Oxford Studies in Philosophy of Law: Volume 1* (Oxford University Press 2011)

- ‘What is Tort Law For? Part 1. The Place of Corrective Justice’ (2011) 30(1) *Law and Philosophy* 1
- ‘Damages Without Duty’ (2019) 69 *University of Toronto Law Journal* 412
- and Shute S, ‘The Wrongness of Rape’ in Jeremy Horder (ed.), *Oxford Essays in Jurisprudence, Fourth Series* (Clarendon Press 2000)
- Gavin P, ‘Newcomer Injunctions: Equitable Innovation or Constitutional Challenge?’ (2024) 72 *Irish Jurist* 50
- Gerstenberg Oliver, ‘Private Law and the New European Constitutional Settlement’ (2004) 10(6) *European Law Journal* 766
- Gilligan D, ‘Constitutional Torts as Private Wrongs’ (2024) 6 *Irish Supreme Court Review* 181
- ‘Damages and the “Essence” of False Imprisonment: *GE v Commissioner of An Garda Síochána* [2022] IESC 51’ (2024) 44(3) *Legal Studies* 560
- Goldberg JCP and Zipursky BC, ‘Torts as Wrongs’ (2010) 88 *Texas Law Review* 917
- *Recognizing Wrongs* (Harvard University Press 2020)
- Goode R, ‘What is Property’ (2023) 139 *Law Quarterly Review* 1
- Gourevitch A, ‘Are Human Rights Liberal’ (2009) 8(4) *Journal of Human Rights* 301
- Hart HLA, ‘Are There Natural Rights?’ (1955) 64 *Philosophical Review* 175
- *Essays on Bentham: Jurisprudence and Political Philosophy* (Oxford University Press 1982)
- *Essays on Bentham: Studies in Jurisprudence and Political Theory* (Clarendon Press, Oxford, 1982)
- Hedley S, ‘The Shock of the Old: Interpretivism in Obligations’ in Charles Rickett and Ross Grantham (eds), *Structure and Justification in Private Law* (Hart Publishing 2008)
- Hurd H, ‘The Moral Magic of Consent’ (1996) 2 *Legal Theory* 121
- Herman B, *The Moral Habitat* (Oxford University Press 2022)
- Hershovitz S, ‘Integrity and Stare Decisis’ in Scott Hershovitz (ed), *Exploring Law’s Empire* (Oxford University Press 2008)
- ‘Treating Wrongs as Wrongs: An Expressive Argument for Tort Law’ (2017) *Journal of Tort Law* 1

- ‘The Search for a Grand Unified Theory of Tort Law’ (2017) 130(3) *Harvard Law Review* 942
- *Law Is A Moral Practice* (Harvard University Press 2023)
- Heuston RVF, ‘Personal Rights Under the Irish Constitution’ (1976) 11(2) *Irish Jurist* 205
- Hodgson L, ‘Kant on the Right to Freedom: A Defense’ (2010) 120 *Ethics* 791
- Hogan G, ‘Irish Nationalism As A Legal Ideology’ (1986) 75(300) *Studies: An Irish Quarterly Review* 528
- ‘Law and Religion: Church-State Relations in Ireland from Independence to the Present Day’ (1987) 35 *American Journal of Comparative Law* 47
- ‘Constitutional Law – Remedies for Inequality’ (1992) 14 *Dublin University Law Journal* 115
- *Origins of the Irish Constitution 1928-41* (Royal Irish Academy 2012)
- ‘Mr Justice Brian Walsh – The Legacy of Experiment and the Triumph of Judicial Imagination’ (2017) 57 *Irish Jurist* 1
- ‘Harkening to the Tristan Chords: the Constitution at 80’ (2017) 40 *Dublin University Law Journal* 71
- ‘Unenumerated Personal Rights: The Legacy of *Ryan v Attorney General*’ in Laura Cahillane, Thomas Gallen, and Thomas Hickey (eds), *Judges, Politics and the Irish Constitution* (Manchester University Press 2017)
- ‘The Farthest – December 1972’ (2019) 62 *Irish Jurist* 1
- Gwynn Morgan D, and Daly P, *Administrative Law in Ireland* (5th edn, Bloomsbury 2019)
- Whyte G, Kenny D and Walsh R, *Kelly: The Irish Constitution* (Bloomsbury Professional 2018)
- Hogg P, ‘Case Comment on Dolphin Delivery’ (1987) 51 *Saskatchewan Law Review* 273
- ‘The Dolphin Delivery Case: The Application of the Charter to Private Action’ (1987) 51(2) *Saskatchewan Law Review* 273
- Hohfeld WN, ‘Some Fundamental Legal Conceptions as Applied in Judicial Reasoning’ (1913) 23 *Yale Law Journal* 16
- ‘Fundamental Legal Conceptions as Applied in Judicial Reasoning’ (1917) 26(8) *Yale Law Journal* 710.

- Holmes OW, *The Common Law* (Dover Publications 1881)
- ‘Privilege, Malice, and Intent’ (1894) 8 Harvard Law Review 3
- ‘The Path of the Law’ (1897) 10 Harvard Law Review 457
- Horner M, ‘Charter Values: The Uncanny Valley of Canadian Constitutionalism’ (2014), 67 Supreme Court Law Review 361
- Howell J, ‘The Human Rights Act 1998: Land, Private Citizens, and the Common Law’ (2007) 123 Law Quarterly Review 618
- Howlin N and Fitzpatrick R, ‘The Feasibility of Mandatory Trade Union Recognition in Ireland’ (2007) 29 Dublin University Law Review 178
- Hunt M, ‘The “Horizontal Effect” of the Human Rights Act’ (1998) Public Law 423
- Hutchinson A and Petter A, ‘Private Rights/Public Wrongs: The Liberal Lie of the Charter’ (1988) 38 University of Toronto Law Journal 278
- Hutchinson B, ‘Concerted Practices and Abuse of Dominant Position’ (1994) 1(7) Commercial Law Practitioner 197
- Jarvis Thomson J, ‘The Right to Privacy’ (1975) 4(4) Philosophy and Public Affairs 295
- *The Realm of Rights* (Harvard University Press 1990)
- Jenkins D and Brownlee K, ‘What a Home Does’ (2022) 41 Law and Philosophy 441
- Jiménez F, ‘Justifying Private Law’ in Paul B. Miller and John Oberdiek (eds), *Oxford Studies in Private Law Theory: Volume II* (Oxford University Press 2023)
- Jones P, *Rights* (Macmillan 1994)
- Kant I, *On The Common Saying: That May Be Correct In Theory, But It Is Of No Use In Practice*, in Mary Gregor, (trans and ed) *Practical Philosophy* (Cambridge University Press 1996)
- *The Metaphysics of Morals* in Mary Gregor, (trans and ed) *Practical Philosophy* (Cambridge University Press 1996)
- Katz L, ‘Spite and Extortion: A Jurisdictional Principle of Abuse of Property Right’ (2012) 122 Yale Law Journal 1444
- Keane R, *Equity and the Law of Trusts in Ireland* (3rd edn, Bloomsbury 2017)
- Keefe R, *Theories of Vagueness* (Cambridge University Press 2000)
- Kelly J, *The Irish Constitution* (Jurist Publishing Company 1980)

- 'Equality Before the Law in Three European Jurisdictions' (1983) 18(2) Irish Jurist 259
- Kelsen H, *General Theory of Law and State* (Oxford University Press 1949)
- Kenny D, 'Recent Developments in the Right of the Person in Article 40.3: *Fleming v Ireland* and the Spectre of Unenumerated Rights' (2013) 36(1) Dublin University Law Journal 322
- 'Merit, Judicial Diversity, Interpretative Communities: the (non-)party Politics of Judicial Appointments and Constitutional Adjudication' in Laura Cahillane, James Gallen, and Tom Hickey (eds) *Judges, Politics, and the Irish Constitution* (Manchester University Press 2017)
- 'Embracing Difference, Divergence, and Diversity: The Case for Pragmatic Constitutionalism in the 21st Century' (unpublished manuscript, 2022)
- Kerr A, 'Tort – Conspiracy Untangled' (1990) 12 Dublin University Law Journal 166
- and Whyte G, 'Labour Law – Trade Disputes and the Constitution' (1984) 6 Dublin University Law Journal 187
- *Irish Trade Union Law McGee* (Abingdon Professional 1985)
- Khaitan T, *A Theory of Discrimination Law* (Oxford University Press 2015)
- and Steel S, 'Theorizing Areas of Law: A Taxonomy of Special Jurisprudence' (2022) 28 Legal Theory 325
- Kisilevsky S and Stone MJ, *Freedom and Force: Essays on Kant's Legal Philosophy* (Hart Publishing 2017)
- Kolodny N, *The Pecking Order: Social Hierarchy as a Philosophical Problem* (Harvard University Press 2023)
- Korsgaard C, 'Creating the Kingdom of Ends: Reciprocity and Responsibility in Personal Relations' (1992) 6 Philosophical Perspectives 305
- Kramer M 'Rights Without Trimmings' in Matthew Kramer, Nigel Simmonds and Hillel Steiner (eds) *A Debate Over Rights* (Oxford University Press 2000)
- Kumm M, 'Who is Afraid of the Total Constitution? Constitutional Rights as Principles and the Constitutionalization of Private Law' (2006) 7(4) German Law Journal 341
- Lee PW, 'Inducing Breach of Contract, Conversion and Contract as Property' (2009) 29(3) Oxford Journal of Legal Studies 511
- Leigh I, 'Horizontal Rights, the Human Rights Act and Privacy: Lessons from the Commonwealth?' (1999) 48 International and Comparative Law Quarterly 57

- Lester A and Pannick D, 'The Impact of the Human Rights Act on Private Law: the Kinght's Move' (2000) 116 Law Quarterly Review 380
- Lewan KM, 'The Significance of Constitutional Rights for Private Law: Theory and Practice in West Germany' (1968) 17 International and Comparative Law Quarterly 571
- Lippman J, 'The Breakdown of Consortium' (1930) 30(5) Columbia Law Review 651
- Locke J, *Two Treatises of Government* (1689)
- Love SM, 'Material Conditions of Freedom' (unpublished manuscript, available at <<https://lovephilosophy.net/wp-content/uploads/2017/09/Love-Writing-Sample-9-1-17.pdf>> accessed 19 January 2025).
- Lowenthal T, 'AB v Pridwin Preparatory School: Progress and Problems in Horizontal Human Rights Law' (2020) 36(2) South African Journal on Human Rights 261
- Lyons D, 'The Constitutionality of Extending the Right to Identity Provisions in the Children and Family Relationships Act 2015 to Donor-Conceived Children' (2017) 16 Hibernian Law Journal 63
- MacCormick N 'Rights in Legislation' in Peter M.S. Hacker and Joseph Raz (eds) *Law, Morality, and Society: Essays in Honour of HLA Hart* (Clarendon Press 1977)
- 'Coherence in Legal Justification' in Aleksander Peczenik, Lars Lindahl, and Bert van Roermund (eds), *Theory of Legal Science* (Reidel 1984)
- 'Reconstruction After Deconstruction: A Response to CLS' (1990) 10(4) Oxford Journal of Legal Studies 539
- MacKinnon CA, 'Sexual Harassment of Working Women' (Yale University Press 1979)
- Manion Young I, *Responsibility for Justice* (Oxford University Press 2011)
- Mantouvalou V, 'Is There a Human Right Not to be a Trade Union Member? Labour Rights Under the European Convention on Human Rights' (2007) LSE Law, Society and Economy Working Papers 8/2007.
- *Structural Injustice and Workers' Rights* (Oxford University Press 2023)
- and Wolff J (eds), *Structural Injustice and the Law* (University College London Press 2024)
- Margulies M, 'Standards of Review and State Action Under the Irish Constitution' (2002) 37 Irish Jurist 23
- Markesinis B, 'Privacy, Freedom of Expression, and the Horizontal Effect of the Human Rights Bill: Lessons from Germany' (1999) 115 Law Quarterly Review 47

- Marshall W, 'Diluting Constitutional Rights: Rethinking State Action' (1985) 80 Northwestern University Law Review 558
- Marx K, *Capital: A Critique of Political Economy: Volume 1* (Lawrence and Wishart 1970)
- Mathews M, 'The Tort of Conspiracy in Irish Labour Law' (1973) 8(2) Irish Jurist 252
- Matthews Jud, *Extending Rights' Reach* (Oxford University Press 2018)
- Mazzone J, 'The Waiver Paradox' (2003) 97(2) Northwestern University Law Review 801
- McBride, N, *The Humanity of Private Law – Part I: Explanation* (Hart 2019)
- McCormack G, 'Contractual Entitlements and the Constitution' (1982) 17(2) Irish Jurist 340
- McDermott PA, 'The Separation of Powers and the Doctrine of Non-Justiciability' (2000) 35 Irish Jurist 280;
- McDonagh-Forde P, 'If Mum is the Word, is it the Law? Irish Privacy Law: A Comparative Perspective' (2017) 20 Trinity College Law Review 64
- McDonald R, 'Postscript and Prelude: The Jurisprudence of the Charter – Eight Theses' (1982) 4 Supreme Court Law Review 321
- McFarlane B and Douglas S, 'Property, Analogy, and Variety' (2022) 42(1) Oxford Journal of Legal Studies 161
- McLoughlin J, 'The Guarantee of the Inviolability of the "Dwelling" in Article 40.5 of the Irish Constitution: A 'Defensive Social Right'?' (2024) 8(2) Irish Judicial Studies Journal 1
- McMahon B and Binchy W, *Law of Torts* (4th edn, Bloomsbury Professional 2013)
- McMullen J, 'Enforcing Contracts of Employment – "Going Back to Basics" in the Resolution of Employment Rights Disputes' (1995) 24 Industrial Law Journal 353
- Mee J, 'Trusts of the Family Home: The Irish Experience' (1993) Conveyancer and Property Lawyer 351
- Möller K *The Global Model of Constitutional Rights* (Oxford University Press 2012)
- – 'Lüth and the "Objective System of Values": From "Limited Government" towards an Autonomy-based Conception of Constitutional Rights' in Sujit Choudhry, Michaela Hailbronner, and Matthias Kumm (eds), *Global Canons in an Age of Contestation: Debating Foundational Texts of Constitutional Democracy and Human Rights* (Oxford University Press 2024)

- Moran M, 'Authority, Influence, and Persuasion: *Baker*, Charter Values, and the Puzzle of Method' in David Dyzenhaus (ed), *The Unity of Public Law* (Cambridge University Press 2004)
- Moreham N, 'Privacy in the Common Law: A Doctrinal and Theoretical Analysis' (2005) 121 *Law Quarterly Review* 628
- Mullally S, 'The Myth of Constitutionalism and the "Neutral State"' in Tim Murphy and Patrick Twomey (eds.), *Ireland's Evolving Constitution 1937-1997* (Hart Publishing 1998)
- – 'Substantive Equality and Positive Duties in Ireland' (2007) 23(2) *South African Journal on Human Rights* 291
- Newark FH, 'The Boundaries of Nuisance' (1949) 65 *Law Quarterly Review* 480
- Neyers J, 'The Economic Torts as Corrective Justice' (2009) 17 *Torts Law Journal* 162
- – 'Rights-based Justifications for the Tort of Unlawful Interference with Economic Relations' (2008) 28(2) *Legal Studies* 215
- Niezna M and Davidov G, 'Consent in Contracts of Employment' (2023) 86(5) *Modern Law Review* 1134
- Nipperdey HC, *Grundrechte und Privatrecht* (Scherpe, 1961)
- Nolan A, 'Holding Non-State Actors to Account for Constitutional Economic and Social Rights Violations: Experiences and Lessons from South Africa and Ireland' (2014) 12(1) *International Journal of Constitutional Law* 61
- Nolan D, 'Rights, Damage and Loss' (2017) 37 *Oxford Journal of Legal Studies* 255
- O'Cinneide C, 'Irish Constitutional Law and Direct Horizontal Effect - A Successful Experiment?' in Dawn Oliver and Jörg Fedtke (eds), *Human Rights in the Private Sphere: A Comparative Study* (Routledge-Cavendish 2007)
- – 'Taking Horizontal Effect Seriously: Private Law, Constitutional Rights, and the European Convention of Human Rights' (2003) 4 *Hibernian Law Journal* 77
- O'Dell E, 'Does Defamation Value Free Expression?' (1990) 12 *Dublin University Law Journal* 50
- O'Donnell D, 'A Comparison of Article 6 of the European Convention on Human Rights and the Due Process Requirements of the Constitution of Ireland' (2004) 4(2) *Judicial Studies Institute Journal* 37
- – 'The Sleep of Reason' (2017) 40 *Dublin University Law Journal* 191

- Oeter S, 'Fundamental Rights and Their Impact on Private Law – Doctrine and Practice Under the German Constitution' (1994) 12 Tel Aviv University Studies in Law 7
- Osborough WN, 'Irish Law and the Rights of the National Schoolteacher – II' (1979) 14(2) Irish Jurist 304
- Paine T, *The Rights of Man* (1791)
- Pallikkathayil J, 'Deriving Morality from Politics: Rethinking the Formula of Humanity' (2010) 121 Ethics 116
- – 'Neither Perfectionism nor Political Liberalism' (2016) 44(3) Philosophy & Public Affairs 171
- – 'What is External Freedom?', forthcoming in Philipp-Alexander Hirsch and Martin Brecher (eds), *Law and Morality in Kant* (Cambridge University Press)
- Paolucci V and Roche WK, 'Social Partnership, Company-level Collective Bargaining and Union Re-vitalization in Ireland' (2024) 45(4) Economic and Industrial Democracy 961
- Parfit D, *On What Matters: Volume I* (Oxford University Press 2011)
- Pettit P, *Republicanism: A Theory of Freedom and Government* (Oxford University Press 1997)
- – *On the People's Terms: A Republican Theory and Model of Democracy* (2013 Cambridge University Press)
- Phillipson G, 'The Human Rights Act, "Horizontal Effect" and the Common Law: a Bang or a Whimper?' (1999) 62 Modern Law Review 824
- Pogge T, 'Is Kant's Rechtslehre a "Comprehensive Liberalism"?' in Mark Timmons (ed), *Kant's Metaphysics of Morals* (Oxford University Press 2002)
- Posner R, 'The Rise and Fall of Judicial Self-Restraint' (2012) 100(3) California Law Review 519
- Prosser WL, 'Privacy' (1960) 48 California Law Review 383
- Psarras H, 'Private Law Rights and Powers of Waiver' in Harris Psarras and Sandy Steel (eds), *Private Law and Practical Reason: Essays on John Gardner's Private Law Theory* (Oxford University Press 2023)
- Raday F, 'Privatising Human Rights and the Abuse of Power' 13(1) Canadian Journal of Law and Jurisprudence 103
- Rawls J, 'Legal Obligation and the Duty of Fair Play' in Sidney Hook (ed), *Law and Philosophy* (New York University Press 1964)

-- *A Theory of Justice* (Harvard University Press 1971)

-- *Political Liberalism* (Columbia University Press 1993)

-- *Justice as Fairness: A Restatement* (Harvard University Press 2001)

Raz J, *The Authority of Law: Essays on Law and Morality* (Oxford University Press 1979)

-- 'On the Nature of Rights' (1984) 93(370) *Mind* 194

-- *The Morality of Freedom* (Oxford University Press 1988)

-- 'The Law's Own Virtue' (2019) 39(1) *Oxford Journal of Legal Studies* 1

-- *The Roots of Normativity* (Oxford University Press 2022)

Redmond M, 'Constitutional Rights – Waiver' (1979-80) 2 *Dublin University Law Journal* 104

-- 'Towards an Hohfeldian View of the Rights and Freedoms in the Irish Constitution' (1980) 2 *Dublin University Law Journal* 52

-- 'The Implied Obligation of Mutual Trust and Confidence – A Common Law Action for "Unfair" Dismissal' (2009) 6(2) *Irish Employment Law Journal* 36

-- and Mallon T, *Strikes: An Essential Guide to Industrial Action and the Law* (Bloomsbury Profession 2010)

Reichman A, 'Professional Status and the Freedom to Contract: Toward a Common Law Duty of Non-Discrimination' (2001) 14 *Canadian Journal of Law and Jurisprudence* 79

Reiman JH, 'Privacy, Intimacy, and Personhood' (1976) 6(1) *Philosophy & Public Affairs* 26

Reynold F, 'Bad Behaviour and the Implied Term of Mutual Trust and Confidence: Is There a Problem?' (2015) 44(2) *Industrial Law Journal* 262

Ripstein A, 'Three Duties to Rescue: Moral, Civil, and Criminal' (2000) 19 *Law and Philosophy* 751

-- 'Authority and Coercion' (2004) 32 *Philosophy and Public Affairs* 2

-- 'Beyond the Harm Principle' (2006) 34(3) *Philosophy and Public Affairs* 215

-- 'Private Order and Public Justice: Kant and Rawls' (2006) 92(7) *Virginia Law Review* 1391

- ‘As If It Had Never Happened’ (2007) 48 William & Mary Law Review 1957, 1984
- *Force and Freedom* (Harvard University Press 2009)
- ‘Means and Ends’ (2015) Jurisprudence
- *Private Wrongs* (Harvard University Press 2016)
- ‘Reclaiming Proportionality’ (2017) 34(1) Journal of Applied Philosophy 1
- *Kant and the Law of War* (Oxford University Press 2021)
- ‘Mandatory Co-operation’ (2022) 96(1) Aristotelian Society Supplementary 23

- Rivera-Perez W, ‘What’s the Constitution Got to Do With It? Expanding the Scope of Constitutional Rights into the Private Sphere’ (2012) 3(1) Creighton International and Comparative Law Journal 177

- Robinson M and Temple Lang J, ‘The Constitution and the Right to Reinstatement After Wrongful Dismissal’ (1977) 71 The Gazette 78

- Roche J, ‘The Relevance of Constitutional Rights to the Granting of an Interlocutory Injunction’ (2013) 12 Hibernian Law Journal 64

- Romeo G, ‘The Conceptualization of Constitutional Supremacy: Global Discourse and Legal Tradition’ (2020) 21 German Law Journal 904

- Rösler H, ‘Dignitarian Posthumous Personality Rights – An Analysis of US and German Constitutional and Tort Law’ (2008) 26 Berkeley Journal of International Law 153

- Rostbøll CF, ‘Kant, Freedom as Independence, and Democracy’ (2016) 78(3) The Journal of Politics 792

- Rousseau JJ, *The Social Contract* (1762)

- Ryan D, *Redmond on Dismissal* (3rd edn, Bloomsbury 2017)

- Sales P, ‘Constitutional Values in the Common Law of Obligations’ (2024) 83(1) Cambridge Law Journal 132

- and Davies P, ‘Controlling Contract Discretions: Wednesbury Reasonableness, Good Faith and Proper Purposes’ (2024) 140 Law Quarterly Review 106

- Sartori G, ‘Constitutionalism: A Preliminary Discussion’ (1962) American Political Science Review 853

- Scanlon T ‘Adjusting Rights and Balancing Values’ (2004) 72(5) Fordham Law Review 1477

- Schauer F, 'Second-Order Vagueness in the Law' in Geert Keil and Ralf Poscher (eds), *Vagueness and Law: Philosophical and Legal Perspectives* (Oxford University Press 2016)
- Schaus S, 'Wrongs to Us' (2023) 121(7) *Michigan Law Review* 1185
- Schlag P, 'How to Do Things With Hohfeld' (2015) 78 *Law and Contemporary Problems* 185
- Schroeder M, 'What Makes Reasons Sufficient' 52(2) (2015) *American Philosophical Quarterly* 159
- Sherwin E, 'Interpreting Tort Law' (2011) *Florida State University Law Review* 227
- Siegel RB, 'Equality Talk: Antisubordination and Anti-classification Values in Constitutional Struggles Over *Brown*' (2004) 117(5) *Harvard Law Review* 1470
- Simmonds NE, 'Rights at the Cutting Edge' in Matthew H. Kramer, Nigel E. Simmonds, and Hillel Steiner (eds), *A Debate over Rights: Philosophical Enquiries* (Oxford University Press 1998)
- Simmons AJ, 'Justification and Legitimacy' (1999) 109 *Ethics* 739
- Sinclair T, 'The Power of Public Positions: Official Roles in Kantian Legitimacy' in David Sobel, Peter Vallentyne, and Steven Wall (eds) *Oxford Studies in Political Philosophy*, vol. 4 (Oxford: Oxford University Press, 2018).
- Sinel Z, 'Consortium as a Right in the Law of Torts' (2019) 93 *Supreme Court Law Review* 227
- Slattery B, 'The Charter's Relevance to Private Litigation: Does Dolphin Deliver?' (1987) 32 *McGill Law Journal* 905
- Smith SA, *Contract Theory* (Oxford University Press 2004)
- — 'Duties, Liabilities, and Damages' (2011) 125 *Harvard Law Review* 1727
- — *Rights, Wrongs, and Injustices* (Oxford University Press 2019)
- Smits J, 'Private Law and Fundamental Rights – A Sceptical View' in Tom Barkhuysen and Siewert D. Lindenberg (eds), *Constitutionalisation of Private Law* (Martinus Nijhoff 2006)
- Starck C, 'Human Rights in German Constitutional Development and in the Jurisdiction of the Federal Constitutional Court' in D Friedmann and D Barak-Erez (eds), *Human Rights in Private Law* (Hart Publishing 2002)

- Stone Sweet A and Palmer E, ‘A Kantian System of Constitutional Justice’ (2017) 6(3) *Global Constitutionalism* 377
- Steel S, ‘Saving Private Wrongs’ (2016) 14(1) *Jerusalem Review of Legal Studies* 1
- – ‘Compensation and Continuity’ (2020) 26 *Legal Theory* 250
- – ‘Damages Without Loss’ (2023) 139 *Law Quarterly Review* 219
- – and Stevens R, ‘The Secondary Legal Duty to Pay Damages’ (2020) 136 *Law Quarterly Review* 283
- Stevens R, *Torts and Rights* (Oxford University Press 2007)
- – ‘Private Rights and Public Wrongs’ in Matthew Dyson (ed), *Unravelling Tort and Crime* (Cambridge University Press 2014)
- – ‘Private Rights and Public Wrongs’ in Matthew Dyson (ed), *Unravelling Tort and Crime* (Cambridge University Press 2014)
- – ‘Not Waiving but Drowning’, in Andrew Dyson, James Goudkamp, and Frederick Wilmot-Smith (eds), *Defences in Contract* (Hart Publishing 2017)
- – ‘Crypto is not Property’ (2023) 139 *Law Quarterly Review* 615
- – ‘The Supreme Court and the Ability to Reason’ (2024) 140 *Law Quarterly Review* 346
- Sullivan KM, ‘Unconstitutional Conditions’ (1989) 102(7) *Harvard Law Review* 1413
- Sun K, ‘Corrective Justice and the Unlawful Means Tort: Is There A Right to Trade?’ (2019) 28 *Dalhousie Journal of Legal Studies* 1
- Sunstein C, *The Partial Constitution* (Harvard University Press 1993)
- – ‘State Action is Always Present’ (2002) 3(2) *Chicago Journal of International Law* 465
- – *How To Interpret the Constitution* (Princeton University Press 2023)
- Tadros V, ‘What Might Have Been’ in John Oberdiek (ed), *Philosophical Foundations of the Law of Torts* (Oxford University Press 2014)
- Tan Z, ‘The ‘Property’ Paradigm in Torts Protecting Contractual Interests’ in John Eldridge, Michael Douglas, and Claudia Carr (eds), *Economic Torts and Economic Wrongs* (Hart 2021)
- Temple Lang J, ‘Private Law Aspects of the Irish Constitution’ (1971) 6(2) *Irish Jurist* 237
- Tennyson A, *Aylmer’s Field* (1793)

- Thayer JB, 'The Origin and Scope of the American Doctrine of Constitutional Law' (1893) 7 Harvard Law Review 129
- Thomas J *Public Rights, Private Relations* (Oxford University Press 2015)
- Thorburn M, 'Justifications, Powers and Authority' (2008) 117 Yale Law Journal 1070
- — 'Constitutionalism and the Limits of the Criminal Law' in R.A Duff, Lindsay Farmer, S.E. Marshall, Massimo Renzo, and Victor Tadros (eds), *The Structures of the Criminal Law* (Oxford University Press 2011)
- Thornton M, 'Loss of Consortium: Inequality Before the Law' (1984) 10(2) *Sydney Law Review* 259
- Tigar MA, 'Foreword: Waiver of Constitutional Rights: Disquiet in the Citadel' (1970) 84 Harvard Law Review 1
- Tribe L, *American Constitutional Law* (2nd edn, Foundation Press 1988)
- Tushnet M, 'The Issue of State Action/Horizontal Effect in Comparative Constitutional Law' (2003) 1 International Journal of Constitutional Law 79
- Van der Walt J *The Horizontal Effect Revolution and the Question of Sovereignty* (De Gruyter 2014)
- — 'Abdications of Sovereignty in State Action and Horizontal Effect Jurisprudence' in Tsvi Kahana and Anat Scolnicov (eds), *Boundaries of State, Boundaries of Rights* (Cambridge University Press 2016)
- Valentini L, 'Kant, Ripstein, and the Circle of Freedom' (2012) 20(3) European Journal of Philosophy
- Varuhas J, 'Three Issues in the Law of Contractual Discretion' (2022) 42(3) Oxford Journal of Legal Studies 787
- von Prondzynski F, 'The Protection of Constitutional Rights: Comparisons between Ireland and Germany' (1980) 2 Dublin University Law Journal 14
- — 'Freedom of Association and the Closed Shop: The European Perspective' (1982) 41(2) Cambridge Law Journal 256
- Wade W, 'Horizons of Horizontality' (2000) 116 Law Quarterly Review 217
- Waldron J, 'Rights in Conflict' (1989) 99(3) Ethics 503
- — 'Homelessness and the Issue of Freedom' (1991) 39 UCLA Law Review 295
- — 'Property, Justification and Need' (1993) 6(2) Canadian Journal of Law and Jurisprudence 185

- – ‘Homelessness and Community’ (2000) 50(4) University of Toronto Law Journal 371
- – ‘The Concept and the Rule of Law’ (2008) 43(1) Georgia Law Review 1
- – ‘Community and Property – for Those Who Have Neither’ (2009) 10(1) Theoretical Inquiries in Law 161
- Walsh B, ‘The Judicial Power and the Protection of the Right to Privacy’ (1977) 3 Dublin University Law Journal 3
- – ‘The Constitution: a View from the Bench’ in Brian Farrell (ed.), *De Valera’s Constitution and Ours* (Gill & Macmillan 1988)
- Walsh R, *Property Rights and Social Justice: Progressive Property in Action* (Cambridge University Press 2021)
- Warren SD and Brandeis LD, ‘The Right to Privacy’ (1890) 4(5) Harvard Law Review 193
- Wedderburn L, *Employment Rights in Britain and Europe: Selected Papers in Labour Law* (Lawrence and Wishart 1991)
- Weinrib E, ‘Poverty and Property in Kant’s System of Rights’ (2003) 78 Notre Dame Law Review 795
- – *Corrective Justice* (Oxford University Press 2012)
- – *The Idea of Private Law* (2nd edn, Oxford University Press 2012)
- – *Reciprocal Freedom* (Oxford University Press 2022)
- Weinrib J, *Dimensions of Dignity: A Theory and Practice of Modern Constitutional Law* (Cambridge University Press 2016)
- – ‘What is Purposive Interpretation’ (2024) 74(1) University of Toronto Law Journal 74
- Weinrib L and Weinrib E, ‘Constitutional Values and Private Law in Canada’ in D Friedmann and D Barak-Erez (eds), *Human Rights in Private Law* (Hart Publishing 2002) 71
- Wells K, ‘Homelessness and Freedom’ (2024) 27(7) Critical Review of International Social and Political Philosophy 1111
- Wells K, ‘Homelessness and Freedom’ (2009) 10(1) Theoretical Inquiries in Law 161
- Wenar L, ‘The Nature of Claim-Rights’ (2013) 123(2) Ethics 202
- Whyte G, ‘Constitutional Protection and the European Convention on Human Rights – An Irish Joke: The Punchline’ (1981) 44 Modern Law Review 541

- – ‘Industrial Relations and the Irish Constitution’ (1981) 16(1) *Irish Jurist* 35
- Wilken S and Ghaly K, *The Law of Waiver, Variation, and Estoppel* (3rd edn, Oxford University Press 2012)
- Wilkinson B, ‘Workers, Constitutions, and the Irish Judiciary: A Jurisprudence of Labour Liberty?’ (1989) 24(2) *Irish Jurist* 198
- – ‘The Irish Industrial Relations Act 1990 – Corporatism and Conflict Control’ (1991) 20 *Industrial Law Journal* 21
- Williston S, ‘Consideration in Bilateral Contracts’ 27(6) *Harvard Law Review* 503
- Wood AW, *The Free Development of Each: Studies on Freedom, Right, and Ethics in Classica German Philosophy* (Oxford University Press 2014)
- Young A, ‘Mapping Horizontal Effect’ in David Hoffman (ed), *The Impact of the UK Human Rights Act on Private Law* (Cambridge University Press 2011)
- Zipursky B, ‘Rights, Wrongs, and Recourse in the Law of Torts’ (1998) 51(1) *Vanderbilt Law Review* 1
- Zylberman A, ‘Human Rights and the Rights of States: A Relational Account’ (2016) 46(3) *Canadian Journal of Philosophy* 291
- – ‘Why Human Rights? Because of *You*’ (2016) 24(3) *Journal of Political Philosophy* 321

1. INTRODUCTION

...[I]t appears that the Irish approach...is the most extreme example of horizontal effect. The law in this regard is not particularly persuasive or elegant and the fact that the Supreme Court has sought to impose some practical limitations on the impact of constitutional issues on the law of torts is, perhaps, evidence of an unarticulated unease with the principle, but I do not propose here to argue that the position adopted in Ireland is necessarily wrong. What is striking is that the position the Irish courts adopted was arrived at almost without argument as to its consequences and without acknowledging the significant departure involved in contending that the Constitution is not simply a guarantee of rights between the state and the individual but also creative of rights and claims between individuals. It is perhaps worthwhile to reconsider the theoretical underpinning of this jurisdiction particularly in the light of the current debate under other constitutional regimes of the nature and extent of the horizontal effect of Constitutions.¹

Donal O'Donnell SC (as he then was)

1.1. INTRODUCTION

1.1.1. Vertical and Horizontal

¹ Donal O'Donnell, 'A Comparison of Article 6 of the European Convention on Human Rights and the Due Process Requirements of the Constitution of Ireland' (2004) 4(2) Judicial Studies Institute Journal 37, 55. See, similarly, O'Donnell J's comments in *Clarke v O'Gorman* [2014] IESC 72 [32] that "[i]t is not necessary to discuss here *the theoretical basis* for permitting claims to be brought by one individual against another for breach of the provisions of the Constitution, and any possible limits to such claims [my emphasis]"; in *NHV v Minister for Justice and Equality* [2017] IESC 35 [12] that "it appears that the Constitution provides for horizontal enforcement between individuals, albeit *without much discussion of the theoretical justification for this development* [my emphasis]"; and, speaking of *Meskeil v CIE* [1973] IR 121 in *McGee v Governor of Portlaoise Prison* [2023] IESC 14 [43]: "In the style of the times, however, the judgment is in broad terms, and the issue is formulated as one of principle and answered in general and unqualified terms".

The concept of constitutional horizontality is best introduced by way of a contrast.

In modern legal systems, constitutional rights' core domain of legal operation is the "vertical" relation between the State and private persons. In this guise, constitutional rights function as public law constraints on the activities of state officials. They fetter those officials' law-making authority. They impose legal duties on them to act in certain ways. They help guard the guardians.²

"*Constitutional horizontality*", by contrast, names that phenomenon whereby constitutional rights acquire legal significance for the "horizontal" legal relations between private persons. Those relations are the ordinary province of the private law of tort, contract, property, and so forth. Horizontality thus raises the possibility that well-thumbed private law rules might need to be recharacterized, reshaped, or replaced on constitutional grounds. At the same time, it prompts reflection on the scope, boundaries, and basis of constitutional law, constitutional rights, and constitutionalism.

1.1.2. *TL;DR*

The topic of this thesis is the Irish law of constitutional horizontality. Its question is: is that law justified? Its answer is a longwinded, qualified, and (in a sense to be explained) *detached* "yes".

1.1.3. *Topic; Question; Answer*

This introductory chapter divides into three parts.

² *Retail, Wholesale and Department Store Union, Local 580 v Dolphin Delivery* [1986] 2 SCR 573, 593: ("In deciding that the Charter does not extend to private action, the Supreme Court of Canada has affirmed the normal role of a constitution. A constitution establishes and regulates the institutions of government and it leaves to those institutions the task of ordering the private affairs of the people"); *De Klerk v Du Plessis* [1994] (6) BCLR 124 (T): ("Traditionally bills of rights have been inserted in constitutions to strike a balance between governmental and individual liberty"); BVerfGE 7, 198 (*Lüth*) ("There is no doubt that the main purpose of basic rights is to protect the individual's sphere of freedom against encroachment by public power: they are the citizen's bulwark against the state. This emerged from both their development as a matter of intellectual history and their adoption into the constitutions of the various states as a matter of political history"); *North Western Health Board v HW* [2001] 3 IR 622 (SC) 764 (Hardiman J): "The primary purpose of the provisions of the Constitution as to fundamental rights is to protect such rights and the people who enjoy them from arbitrary State action"; *PH v Murphy (John) & Sons Ltd* [1987] IR 621 (HC) 626 (Costello J).

The first introduces the topic of this thesis. It does so in five stages. First, it clarifies what horizontality is (§1.2.1). Second, it gives an initial impression of its stakes (§1.2.2). Third, it outlines horizontality's international significance (§1.2.3). Fourth, it briefly sketches the general shape of the Irish law of horizontality (§1.2.4). Finally, it clarifies some terminology (§1.2.5).

The second section presents the question to which this thesis offers an answer: is the Irish law of horizontality justified? It clarifies the notion of "justification" at issue, and so the constraints to which an adequate answer to our question must conform (§1.3.1). It also offers some reasons for thinking that the question is worth asking and answering (§1.3.2).

The third section summarises the answer developed in this thesis, initially in general terms and then by way of a chapter-by-chapter roadmap outlining its components and their organization.

As we will see (§1.2.4), the Irish law of horizontality appears radical and idiosyncratic when viewed in comparative relief. At the same time, domestic scholarship variously disparages it as "[un]persuasive and [in]elegant",³ "[un]nuanced and [un]systematic",⁴ "seemingly haphazard",⁵ both confused and confusing. In particular, the charge our current Chief Justice levels in the passage reproduced above is frequently voiced: important aspects of the current law, for all their apparent radicalism and idiosyncrasy, were seemingly "arrived at almost without argument." That the foundational authorities were assertive in this way, the charge sometimes continues, left them vulnerable to equally assertive circumscription downstream; leaving us with a hodgepodge law in search of its own principle of organization. Irish lawyers, then, even those occupying decidedly practical standpoints typically weary of abstraction, have identified constitutional horizontality as

³ O'Donnell (n 1), 55.

⁴ Colm O'Cinneide, 'Taking Horizontal Effect Seriously: Private Law, Constitutional Rights, and the European Convention of Human Rights' (2003) 4 *Hibernian Law Journal* 77, 79.

⁵ Martin B. Margulies, 'Standards of Review and State Action Under the Irish Constitution' (2002) 37 *Irish Jurist* 23, 23.

one arena where, in Holmes's phrase, "we have too little theory in the law rather than too much".⁶

In this context, this thesis takes up O'Donnell's invitation to "reconsider the theoretical underpinning" of Ireland's law on horizontality and, by doing so, looks to locate a standpoint from which the basic shape that law takes can be seen to make sense. The argument proceeds from a simple, familiar, and powerful moral principle; one that Kantian private law theorists already identify as immanent in the practice of private law: *no one is anyone else's subordinate*. Although it certainly cannot resolve all the law's puzzles nor remove all its ambiguity, I argue that taking this moral principle seriously as a basic *constitutional* principle can make the courts' key doctrinal choices in this area seem natural rather than awkward, perceptive rather than arbitrary, and (on the whole) justified. That is, the principle can be seen to undergird and unify the horizontal significance(s) constitutional rights have had in Irish law. It can account for the sharp limits to that significance. And it vindicates the sense in which certain aspects of our legal relations with one another are, indeed, properly *constitutional* in character. In our legal order, as a matter of constitutional right, persons are to meet one another as independent equals; each their own master and none the subordinate of any other. The particulars of our law of horizontality consistently reflect that abstract idea, and can be seen as contributing piecemeal to its realization. Both in Ireland and elsewhere, much contemporary thinking on horizontality is animated by an inchoate but persistent intuition that there is some, incomplete, continuity in the principles governing how citizens may relate to one another and those governing how government may relate to its citizens. My claim is that a principle of non-subordination offers a compelling vindication of this continuity's appeal; illuminating both its basis and its boundaries.

1.2. TOPIC

1.2.1. *The Law of Horizontality*

Consider the following questions of law. In all examples, D and P are private persons.

⁶ Oliver Wendell Holmes, 'The Path of the Law' (1897) 10 Harvard Law Review 457, 476.

- D terminates P's employment contract. He does so because P refuses to become a trade union member. Does D violate P's constitutional right to free association?⁷
- D made a defamatory statement about P. But D honestly (albeit unreasonably and incorrectly) believed that this statement was true. Does D's constitutional right to freedom of expression preclude her liability to P?⁸
- P sues D after the statutory limitation period applicable to her tort claim has expired. Is the statute invalid because inconsistent with P's constitutional right to litigate, such that P's action against D can proceed?⁹
- In disposing of her property by will, D discriminates against P, a potential beneficiary, on the grounds of race. Can D validly do so given P's constitutional right to equality before the law?¹⁰
- D is a needy overholding tenant with nowhere else to go. P is her landlord. Can D invoke her constitutional right to "inviolability of the dwelling" to resist a court order for possession being made in P's favour?¹¹
- P is the plaintiff in a nuisance action. Through no fault of P's own, it is very difficult for P now to prove on the balance of probabilities that D's activities damaged P's land. Is the burden on P to do so inconsistent with her constitutional right to property?¹²

⁷ Cf. *Meskill* (n 1); *Ryanair v Labour Court* [2007] IESC 6 (SC) 2 (Geoghegan J).

⁸ Cf. *Hynes-O'Sullivan v O'Driscoll* [1988] IR 436; *New York Times v Sullivan* 376 US 254 (1964); *Khumalo v Holomisa* [2002] ZACC 12; *Grant v Torstar Corp* [2009] 3 SCR 640.

⁹ Cf. *O'Brien v Keogh* [1972] IR 144; *O'Brien v Manufacturing Engineering* [1973] IR 344; *Moynihn v Greensmyth* [1977] IR 55; *Cahill v Sutton* [1980] IR 269; *Tuohy v Courtney* [1994] 3 IR 1.

¹⁰ Cf. *Burke and O'Reilly v Burke and Quail* [1951] IR 216; *Re Blake* [1955] IR 89; *Re Doyle* (HC, 15 February 1973).

¹¹ *Murtagh v Cooke* [2022] IEHC 436 [72]-[80] (Phelan J); Conor Crummey, 'Unconstitutional Evictions' (2023) 7(3) Irish Judicial Studies Journal 1. Cf. *Clare County Council v McDonagh* [2022] IESC 2 [104] (Hogan J); *Cluid Housing Association v Whelan* [2022] IEHC 302 [61] (Bolger J); *Pepper Finance Corporation (Ireland) dac v Persons Unknown* [2022] IECA 170 [97] (Whelan J); [2023] IESC 21 [66] (Hogan J); *Verwey v Hogan* [2023] IEHC 574 [17] (Twomey J).

¹² *Hanrahan v Merck Sharpe & Dohme* [1988] ILRM 629.

- Under what circumstances, if any, can one private person obtain a court-ordered remedy against another private person for a violation of some constitutional right of theirs?

These questions are diverse. In their own ways, each one of them is difficult. But all alike are horizontality questions. They inquire into the legal implications of a certain category of legal norm (constitutional rights) for a certain category of legal relation (that between private persons). In this respect, and if only at first blush, these questions differ from most other questions ventilated in constitutional law classes, addressed in constitutional law treatises, or that inspire the persistent fascination and fervour surrounding the ideal “constitutionalism”. Those other questions take the allocation, organization, and regulation of *public* power as their focus. As such, the legal relations into which they primarily inquire are either (a) those between the distinct public persons comprising government; *or* (b) the “vertical” relation between public persons and the private persons subject to their authority, *not* (c) “horizontal” relations between private persons.

Nonetheless, any system of constitutional rights must answer horizontality questions, even if its answers combine to assign those rights scarce significance for private legal relations.¹³ Indeed, as an entirely general matter, any legal system must determine how (including *with respect to which relations*) its component norms are to operate in law. Answering horizontality questions is just one aspect of discharging this responsibility in the case of constitutional rights. In that (thin) sense, horizontality is inescapable. In answering horizontality questions, a legal system develops – more or less self-consciously and systematically – a *law of horizontality*: a set of legal norms determining the legal significance(s) constitutional rights will have for private persons’ legal relations with one another, if any.

¹³ *McGee* (n 1) [1]-[2] (O’Donnell CJ): “[I]f...the drafters of the 1922 or 1937 Constitutions had intended to produce a comprehensive code, then the question of when the rights protected by the Constitution would give rise to a successful claim for damages in a civil action is undoubtedly one that would have demanded particular attention and careful analysis. In the first place, the drafters would have had to consider if the Constitution created a right between citizens (or other rights holders) and the State alone, or if it could affect the relations between private parties; in modern parlance, whether the Constitution created rights having vertical effect only, or whether they also had horizontal effect, and, if so, in all cases, or only in certain circumstances.”

1.2.2. *Horizontality's Stakes*

As the foregoing procession of lawyerly questions suggests, horizontality problems loom over private interaction from the everyday to the peculiar, and so threaten to complicate much practical business of the courts. The threat lies partly in the *generality* of constitutional rights provisions: their surface malleability toward a diversity of inconsistent legal conclusions across a vast expanse of legal space – a malleability which necessitates limitation by legal principle.¹⁴ The threat lies also in those provisions' *majesty*:¹⁵ the immense power of their animating ideas, not only as basic constraints on the proper exercise of public authority, but as basic guides to fair interpersonal interaction. Besides it being inescapable, then, it matters a great deal how a legal system develops this aspect of its constitutional law. This is for at least four overlapping reasons, each of which also explains why the topic has proved controversial.

The first – both the most abstract and most fundamental – was just hinted at. Whatever of constitutional rights' *legal* implications, the idea(l)s they incorporate – dignity, equality, liberty, privacy, property, free expression, and so forth – strike us as having important *moral implications for interpersonal interaction*, and not just for the State's treatment of its citizens. Indeed, in our everyday forms of moral address and political culture, these idea(l)s figure as guides for living well side by side, and not just for *governing* well: we are about as apt, for instance, to criticise corporations in the language of human rights as we are public officials.¹⁶ The point might be put in terms of the individual "interests" constitutional rights protect.¹⁷ As a matter of interpersonal morality, those interests (in dignity, equality, liberty, etc) often seem relevant to how we ought treat one another. We ought generally avoid actively frustrating them, and at least sometimes must take positive action to advance them. Through its law of horizontality, a legal system directly considers

¹⁴ Robert Alexy, *A Theory of Constitutional Rights* (trans Julian Rivers, Oxford University Press 2002) 354: "The adoption of principles at the highest level of abstraction has advantages and disadvantages. The advantage lies in their flexibility. They can be used as the starting-points of doctrinal justification for a great variety of structural and substantive constitutional requirements in all areas of law. The disadvantage lies in their vagueness. They invite one of the most obscure forms of legal justification, the 'deduction' or 'derivation' of concrete content from abstract principles".

¹⁵ *West Virginia State Board of Education v Barnette* 319 US 624, 639 (1943) (Jackson J.).

¹⁶ William Wade, 'Horizons of Horizontality' (2000) 116 *Law Quarterly Review* 217, 224.

¹⁷ Jean Thomas, *Public Rights, Private Relations* (Oxford University Press 2015) 10-11. On the relationship between interests (or values) and rights more generally: Joseph Raz, 'On the Nature of Rights' (1984) 93(370) *Mind* 194; Thomas Scanlon, 'Adjusting Rights and Balancing Values' (2004) 72(5) *Fordham Law Review* 1477; Leif Wenar, 'The Nature of Claim-Rights' (2013) 123(2) *Ethics* 202.

and partially determines how, if at all, this moral position will be reflected in law. Insofar as we think these underlying issues of interpersonal morality (and our constitutional law's response to them) important, the law of horizontality is important too.

Second, in its law of horizontality, a legal system also partially determines how it will demarcate the *public* (law/persons/spheres) from the *private* (law/persons/spheres). In this way, horizontality has important implications both for the legal system's own structural organization and for the scope of individual liberty. Indeed, much anxiety around constitutional rights' horizontal significance has been motivated by a concern to preserve the distinction between public and private law and, relatedly, public and private persons. In particular, many private lawyers fear horizontality will see private law's distinctive categories effaced by a sort of constitutional imperialism.¹⁸ All legal questions will become applied constitutional ones, the law governing private persons' legal relations thereby rendered radically uncertain; well-established, iteratively refined, private law doctrine becoming destabilized by reference to abstract constitutional imperatives. Further, that this private law doctrine exists already might even be thought to render horizontality superfluous: so far as private interaction is concerned, existing doctrines already appropriately accommodate the relevant values, or can be modified by legislation or progressive judicial development so that they do. The need for *constitutional* constraints on public persons arises, we might think, only because of private law's inadequacy for regulating the performance of distinctively public tasks (paradigmatically, legislation, adjudication, enforcement).¹⁹ At the same time, some enthusiasm for horizontality is motivated by the thought that constitutional *supremacy* now precludes the maintenance of any sharp public-private law separation, at least where constitutional rights are at stake.²⁰

¹⁸ Michael Forde, 'Who Can Remedy Human Rights Abuses? The State Action Question' in Keith D. Ewing, Conor A. Gearty, and Bob A. Hepple (eds), *Human Rights and Labour Law: Essays for Paul O'Higgins* (Mansell 1994) 237; Jan Smits, 'Private Law and Fundamental Rights – A Sceptical View' in Tom Barkhuysen and Siewert D. Lindenbergh (eds), *Constitutionalisation of Private Law* (Martinus Nijhoff 2006) 16-19; Hugh Collins, 'On the (In)compatibility of Human Rights Discourse and Private Law' in Hans-W Micklitz (ed), *Constitutionalization of European Private Law* (Oxford University Press 2014) 42; Hugh Collins, 'The Challenged Presented by Fundamental Rights to Private Law' in Kit Barker, Karen Fairweather, and Ross Grantham (eds), *Private Law in the 21st Century* (Hart Publishing 2017) 216-7; Ernst-Wolfgang Böckenförde, *Constitutional and Political Theory: Selected Writings* (Oxford University Press 2017) 240-243.

¹⁹ Aharon Barak, 'Constitutional Human Rights and Private Law' in Daniel Friedmann and Daphne Barak-Erez (eds), *Human Rights in Private Law* (Hart Publishing 2001) 13; Erwin Chemerinsky, 'Rethinking State Action' (1985) 80(3) *Northwestern University Law Review* 503, 513.

²⁰ Stephen Gardbaum, 'The "Horizontal Effect" of Constitutional Rights' (2003) 102(3) *Michigan Law Review* 387.

If one accepts that constitutional rights are in some sense *basic to* or *definitive of* the entire legal system, and *higher* than all other law, it is easy to infer that their legal implications ought be wide-ranging; if only because all law – public or private – must be properly policed for consistency with them.²¹

This boundary dispute seems often to reflect a deeper disagreement about the relation between individual liberty and collective purpose.²² Private individuals, it seems, have a weighty moral entitlement to the self-directed pursuit of their own self-chosen purposes, which the law must find some way to accommodate. Public persons, *qua* public persons, lack any such entitlement. They are required always to act for properly public purposes, and the law must find some way to police that requirement. That basic contrast poses obvious moral and practical challenges for any assimilation of the private to the public of the sort horizontality seems to involve. Plausibly, however, these challenges must somehow be surmounted to realize valuable public objectives to which modern constitutional rights law might be thought to aspire: the sustenance of flourishing public debate, the universal provision of basic education, the elimination of pernicious social inequalities, the maintenance of a dignified standard of living for all, etc. In any event, horizontality questions force us to confront more basic questions about how, in law, private liberty is to be conditioned by public purpose. They acquire those more basic questions' significance.

Third, horizontality raises vexed *institutional* questions about the appropriate decision-making authority of different organs of government. Naturally, these questions take different forms in different legal systems.²³ The most general such questions concern

²¹ Along these lines, O'Cinneide (n 4) has suggested that horizontality might contribute to a legal system's *integrity* – its consistency in principle – in the Dworkinian sense (Ronald Dworkin, *Law's Empire* (Harvard University Press 1986) 176-225) and valuable for that reason.

²² François du Bois, 'Social Purposes, Fundamental Rights and the Judicial Development of Private Law' in Donal Nolan and Andrew Robertson, *Rights in Private Law* (Hart Publishing 2011); Mark Tushnet, 'The Issue of State Action/Horizontal Effect in Comparative Constitutional Law' (2003) 1 *International Journal of Constitutional Law* 79; Laurence Tribe, *American Constitutional Law* (2nd edn, Foundation Press 1988) 1691; William P. Marshall, 'Diluting Constitutional Rights: Rethinking State Action' (1985) 80 *Northwestern University Law Review* 558; *Lugar v Edmondson Oil Co* 457 US 922, 936 (1982); Smits, (n 18) 19-21; Hugh Collins, 'On the (In)compatibility' (n 18) 27.

²³ To take two illustrative examples, in *federal* systems, issues as to the respective powers of federal and sub-federal units are raised by horizontality problems. Some will worry that, if ordinary private disputes can be cast as (federal) constitutional matters, federal decision-makers will manage to seize control over them, even though they are properly matters for sub-federal units: See e.g. *Lugar* (n 22), 936 (1982); William Burke and David Reber, 'State Action, Congressional Power and Creditors' Rights: An Essay on the 14th Amendment' (1973) 46 *Southern California Law Review* 1003, 1011-7. Similarly, in systems with *separate constitutional and private law courts*, questions will arise as to the respective

judicial power. Even if we think it both possible and desirable for private persons' legal relations to better reflect certain constitutionally important ideals and values, we might feel uncomfortable about empowering *judges* to effect the repair job via constitutional interpretation/adjudication. We might prefer for the task to be left to a legislature, whether for reasons of democratic legitimacy, relative institutional expertise, or legal certainty (§3.3.4). One task for any legal system's law of horizontality is to determine where decision making authority will lie in this regard. The task of delineating the respective scope of judicial and legislative power is important and controversial here as elsewhere, and for the same reasons.

Fourth, horizontality's stakes are amplified by uncomfortable realities about the distribution of *power* in contemporary constitutional democracies.²⁴ Certain private actors – employers, landlords, social media companies, big business – wield immense influence over the lives the rest of us lead. Directly and indirectly, they control much about what we can say, where we can be, what we have, how we think, for whom we vote. Their power is in many ways comparable to that of States, sometimes displaces and dwarves that power, and is in many respects more difficult to reconcile ourselves to.²⁵ Much of it goes without meaningful legal check. Indeed, it is only possible because of the law's positive support, most obviously via the enforcement of property and contract law. All this means that, in truth, private relations are often far from "horizontal".²⁶ They are defined by hierarchy and verticality, more than by reciprocity and equality. Some of us are up high, and others down

powers of these separate courts: by rendering some legal issues *both* private law *and* constitutional ones, horizontality risks threatening the entire basis of the separation. If it is to survive, doctrines limiting the scope or intensity of constitutional court review of other courts' decisions will need to be developed: for the development of the German doctrine on that point, contrast BVerfGE 30, 173 (*Mephisto*) and BVerfGE 42, 143 (*Deutschland-Magazin*).

²⁴ R.A. McDonald, 'Postscript and Prelude: The Jurisprudence of the Charter – Eight Theses' (1982) 4 Supreme Court Law Review 321, 347: "In our day, the most grievous and most frequent abuses of civil liberties occur in the exercise of private power. The occasions for discriminatory state action are both comparatively few and subject to relatively formalized procedures for their exercise, when contrasted with an employer's power to dismiss, a landlord's power to exclude the needy, or an entrepreneur's refusal to provide services".

²⁵ For a powerful elucidation of this thought, as it pertains to the employment relation: Elizabeth Anderson, *Private Government: How Employers Rule Our Lives and Why We Don't Talk About It* (Princeton University Press 2017).

²⁶ Several recent monograph studies of horizontality (none tethered to the law in any particular jurisdiction(s)), forcefully emphasise this point: Johan Van der Walt, *The Horizontal Effect Revolution and the Question of Sovereignty* (De Gruyter 2014); Thomas, *Public Rights, Private Relations* (n 17); Gautam Bhatia, *Horizontal Rights: An Institutional Approach* (Bloomsbury 2023). For discussion: (§3.3.7).

low. Insofar as, historically, constitutional rights have been conceived primarily as basic legal safeguards against the state's immense *power* over citizens, it might seem that this safeguard now requires extension if it did not before. A legal system's answers to horizontality questions partially determine its overall response to these problems of private power. Those answers matter for that reason too.

1.2.3. *Horizontality – International*

Reflecting a predictable diversity of views on how the foregoing considerations might properly be managed, approaches to horizontality vary widely across jurisdictions. One commonality is, however, clear. In *no* system recognising constitutional rights (of which I am aware) do those rights have *no* significance at all for private persons' legal relations. And, in many such systems, constitutional rights have had fairly substantial, even legally revolutionary, horizontal effects. Indeed, in recent years, the expansion of that significance has been prominently described as both “the most far-reaching international development in private law since the end of the Second World War”²⁷ and as at the “core” of a new global model of constitutional rights.²⁸

The comparative terrain is too complex to meaningfully capture here, and multiple excellent surveys of it are available.²⁹ Appropriately, those surveys tend to give special prominence to the 1958 decision of the German Federal Constitutional Court (FCC) in *Lüth*.³⁰ *Lüth* was to prefigure much of the intellectual effort expended on horizontality in other jurisdictions, as human rights charters proliferated across the globe in the post-WWII period. It thus remains a helpful starting point for understanding horizontality's international development and contemporary status; helping us to appreciate the distinctiveness of the Irish position.

²⁷ Ernest Weinrib, *Reciprocal Freedom* (Oxford University Press 2022) 117.

²⁸ Kai Möller, *The Global Model of Constitutional Rights* (Oxford University Press 2012) 10-13.

²⁹ For two such (concise) surveys: Barak (n 19); Gardbaum (n 20).

³⁰ BVerfGE 7, 198 (*Lüth*). A translation of the decision by Tony Weir, to which I make reference in the text, is available at: *Foreign Law Translations, University of Texas at Austin School of Law* <<https://law.utexas.edu/transnational/foreign-law-translations/german/case.php?id=1477>> accessed 9 January 2025.

In *Lüth*, D, a civil society activist,³¹ called for a boycott of the film “Unsterbliche Geliebte” (“Immortal Beloved”). He did so because the film had been made by the notorious film director Veit Harlan. Harlan was best known for writing and directing “Jud Süß” (“Süß the Jew”), an anti-Semitic propaganda film commissioned by the Nazis. The companies that produced and distributed “Unsterbliche Geliebte” (Ps) sought to injunct D from further calling for a boycott. They relied on §826 of the German Civil Code. §826 prohibits one person intentionally inflicting damage on another “in a manner contrary to good morals”. The Hamburg Regional Court concluded that D’s call for a boycott violated this provision, and ordered an injunction against D in Ps’ favour.

However, in a constitutional complaint against this decision brought by D, the FCC determined that, by making this order, the court had violated D’s constitutional right to free expression. Whilst conceding that “the main purpose of basic rights is to protect the individual’s sphere of freedom against encroachment by public power”, the Court went on to explain:

[T]he Constitution erects an objective system of values in its section on basic rights, and thus expresses and reinforces the validity of the basic rights. This system of values, centring on the freedom of the human being to develop in society, must apply as a constitutional axiom throughout the whole legal system: it must direct and inform legislation, administration, and judicial decision. It naturally influences private law as well; no rule of private law may conflict with it, and all such rules must be construed in accordance with its spirit.

That is, constitutional (“basic”) rights provisions would have significance for the legal relations between private persons like P and D just because those provisions erected a “system of values” that had a “radiating effect” throughout the entire legal system. All legal norms (including norms of private law) had to conform to those constitutional values. So too did all public activity, including public activity involving the creation, adjudication,

³¹ There’s a wrinkle here, ultimately immaterial for our purposes, but nonetheless interesting to note: D also held public office – he was a senator in Hamburg and also head of the Hamburg Press Office. It is nonetheless clear that the FCC approached the case as a dispute between two private persons: D’s call for a boycott was (appropriately) not characterised as an exercise of his public power, but instead as a decision he made in a private capacity.

and enforcement of private law norms.³² In *Lüth* itself, the upshot of this “radiating effect” was that D owed *no private law duty* to P to refrain from calling for a boycott of Harlan’s film.³³ When §826 of the German Civil Code was faithfully construed in light of the Constitution’s “objective system of values” (and, in particular, freedom of expression), D’s conduct did not violate the Civil Code: it was not, properly speaking, “offensive to good morals”. As such, the Regional Court’s order was based on a constitutionally unsupportable interpretation of the Civil Code. It violated D’s constitutional right for that reason.

In *Lüth*’s wake, many other jurisdictions have cast constitutional rights’ horizontal significance in broadly similar terms. They too recognise that constitutional rights can, in principle, become significant for private legal relations because: (1) *the law* regulating private interaction must conform to, or ought develop to adequately reflect, constitutional rights/values;³⁴ and/or (2) *public activities* (including, in some jurisdictions, the *courts*’ adjudicative activity) touching on private persons’ legal relations must conform to constitutional rights/values.³⁵ Often, legal systems have endorsed (1) and/or (2) only equivocally, subject to an elaborate series of caveats the meaning and justificatory basis of which can be difficult to discern: Charles Black’s oft-cited remark that the US law of horizontality (or “state action”) is a “conceptual disaster area” finds easy resonance elsewhere.³⁶ Nor, of course, do the complexities end once a system answers the threshold

³² *Lüth* (n 30): “If [the judge] issues a judgment which ignores this constitutional influence on the rules of private law, he contravenes not only objective constitutional law by misconceiving the content of the objective norm underlying the basic law, but also, by his judgment, in his capacity as a public official, contravenes the Constitution itself, which the citizen is constitutionally entitled to have respected by the judiciary”.

³³ *ibid*: “The judge is constitutionally bound to ascertain whether the applicable rules of substantive private law have been influenced by basic rights in the manner described; if so, he must construe and apply the rules so modified. This is what is meant by saying that the civil judge is bound by the basic rights”.

³⁴ *Dolphin Delivery* (n 2), 573 (McIntyre J); *Khumalo* (n 8) [35]-[46].

³⁵ s. 6(1) Human Rights Act 1998 (3)(a); Article 8(1) of the Constitution of South Africa 1996; *Shelley v Kraemer* 334 US 1 (1948); *New York Times v Sullivan* 376 US 254 (1964), 265 (Brennan J). Most obviously, as was discussed in *Lüth*, a jurisdiction’s signing up to (2) has horizontality implications because it can mean that public activities involving the creation, adjudication, and enforcement of private law norms must conform to constitutional right/values. However, a jurisdiction adopting (2) might also (and is likely to) draw from it the further implication that even otherwise *private* persons are bound by constitutional rights/values when they are engaged in public activities (e.g. the provision of public services) (§3.3.6). This might then be thought yet another distinct modality of horizontality: Alison Young, ‘Mapping Horizontal Effect’ in David Hoffman (ed), *The Impact of the UK Human Rights Act on Private Law* (Cambridge University Press 2011).

³⁶ Charles L. Black, Jr, ‘The Supreme Court, 1966 Term – Foreword: “State Action,” Equal Protection, and California’s Proposition 14 (1967) 81 Harvard Law Review 69, 95. See, especially, charges of conceptual confusion or opacity levelled at the Canadian and South African law in this area: Peter Hogg, ‘Case Comment on *Dolphin Delivery*’ (1987) 51 Saskatchewan Law Review 273; David Beatty,

question of whether constitutional rights might, in principle, acquire horizontal significance via modalities (1) and/or (2). At that point, downstream questions arise as to whether any particular law or public activity is, in substance, compatible with constitutional rights. Legal systems invariably divide over those questions too.

Still, across a diversity of legal systems, horizontal legal relations of all sorts today bear a distinct constitutional imprint which “every properly advised litigant must now understand”.³⁷ Constitutional rights have operated to ground privately actionable duties not to defame the dead.³⁸ Or to refrain from non-consensually publicising (or accessing) sensitive details about others’ private lives.³⁹ Or even to make one’s property available for the provision of basic education.⁴⁰ Various contractual arrangements - whether relating to employment,⁴¹ residential tenancies,⁴² insurance,⁴³ or loan guarantees⁴⁴ - now bear a marked constitutional gloss, which gloss either overrides or substantially nuances and supplements a private agreement’s express terms.⁴⁵ Even in the United States - a jurisdiction typically cast as hostile to horizontality - the Supreme Court has taken federal constitutional rights to necessitate both (a) a bar on private enforcement of racially

‘Constitutional Conceits: the Coercive Authority of the Courts’ (1987) 37 *University of Toronto Law Journal* 183; Brian Slattery, ‘The Charter’s Relevance to Private Litigation: Does *Dolphin* Deliver?’ (1987) 32 *McGill Law Journal* 905; Allan Hutchinson and Andrew Petter, ‘Private Rights/Public Wrongs: The Liberal Lie of the Charter’ (1988) 38 *University of Toronto Law Journal* 278; Allan Domes, ‘The Courts, the Common Law, and the Constitutional Imperative: Beyond *Dolphin Delivery*’ (1989) 27(3) *Alberta Law Review* 430; Nick Friedman, ‘Human Rights and the South African Common Law: Revisiting Horizontality’ (2014) 30 *South African Journal on Human Rights* 63; Tom Lowenthal, ‘*AB v Pridwin Preparatory School*: Progress and Problems in Horizontal Human Rights Law’ (2020) 36(2) *South African Journal on Human Rights* 261. As we will see, similar charges of conceptual confusion and opacity have been directed at the Irish position.

³⁷ Laura Weinrib and Ernest Weinrib, ‘Constitutional Values and Private Law in Canada’ in Daniel Friedmann and Daphne Barak-Erez (eds), *Human Rights in Private Law* (Hart Publishing 2002) 71.

³⁸ BVerfGE 30, 173 (*Mephisto*); Hannes Rösler, ‘Dignitarian Posthumous Personality Rights – An Analysis of US and German Constitutional and Tort Law’ (2008) 26 *Berkeley Journal of International Law* 153, 174-84.

³⁹ BVerfGE 34, 269 (*Princess Soraya*); BVerfGE 35, 202 (*Lebach*); *Campbell v MGN Ltd* [2004] UKHL 22; *Jones v Tsige* [2012] ONCA 32; *Herrity v Associated Newspapers* [2008] IEHC 249.

⁴⁰ *Governing Body of the Juma Musjid Primary School v Essay No* [2011] ZACC 13.

⁴¹ *Meskeil* (n 1); *Glover v BLN* [1973] IR 388; *ESB v Sharkey* [2024] IEHC 65; *Barbalescu v Romania* App No 61496/08 (ECHR, 5 September 2017); BVerfGE 81, 242 (*Handelsvertreter*), and for discussion of early case law of the German Federal Labour Court: Kenneth M. Lewan, ‘The Significance of Constitutional Rights for Private Law: Theory and Practice in West Germany’ (1968) 17 *International and Comparative Law Quarterly* 571, 583-591.

⁴² BVerfGE 9, 90 (*Parabolantenne*); *Daniels v Scribante* [2017] ZACC 13; *Ghaidan v Godin-Mendoza* [2004] UKHL 30; Cf. *Schlegel v Corcoran and Gross* [1942] IR 19 (HC) 25 (Gavan Duffy J).

⁴³ *Barkhuizen v Napier* [2007] ZACC 5.

⁴⁴ BVerfGE 89, 214 (*Bürgerschaftsfall*).

⁴⁵ See, generally, Olha O. Cherednychenko, ‘Fundamental Rights and Private Law: A Relationship of Subordination or Complementarity?’ (2007) 3(2) *Utrecht Law Review* 1.

discriminatory restrictive covenants;⁴⁶ and (b) a sea-change in the common law of defamation.⁴⁷ And whilst these global developments have largely been driven by judicial decision absent much textual guidance, they have evidently influenced recent efforts in constitution making. Post-1990, the new constitutional texts of democratizing African and Eastern European states often expressly provided for constitutional rights' horizontal effect.⁴⁸

Even still, though, general descriptions of the realm of the “constitutional” tend either to obscure the very possibility of horizontality or assign it only peripheral relevance: they cast that realm as either centrally or exclusively concerned with the constitution and regulation of government authority.⁴⁹ Equally, whilst recent theoretical accounts of private law's nature and justification exhibit remarkable diversity and sophistication, rarely do any of them mention (or, one worries, leave any room for) private law's interaction with constitutional rights guarantees. In looking to understand the significance(s) of constitutional rights for private persons' legal relations, then, one confronts the combined effects of constitutional and private lawyers' respective *déformations professionnelles*; each of which relegates horizontality questions to the edges of its disciplinary territory, to the limbo of the border that separates them.

⁴⁶ *Shelley* (n 35).

⁴⁷ *New York Times* (n 35). There are several other prominent US Supreme Court authorities where the First Amendment's protection for freedom of speech has acquired substantial private law significance: *American Federation of Labour v Swing* 312 US 321 (1941) (First Amendment limits scope of private law liability for peaceful secondary picketing); *Snyder v Phelps* 562 US 433 (2011) (First Amendment limits scope of tort of intentional infliction of emotional distress); *NAACP v Claiborne Hardware Co* 458 US 886 (1982) (First Amendment limits private law liability for politically motivated boycott).

⁴⁸ Article 25(1) of the Greek Constitution; Article 11(3) of the Czech Charter of Fundamental Rights and Basic Freedoms; Article 20(3) of the Constitution of Slovakia; Article 74 of the Constitution of Slovenia; Article 8(2) of the Constitution of South Africa; Article 18 of the Constitution of Cape Verde; Section 12(1) of the Constitution of Ghana; Section 15(1) of the Constitution of Malawi; Section 5(1) of the Constitution of the Gambia; Article 20(1) of the Constitution of Kenya; Article 20(2) of the Constitution of Uganda.

⁴⁹ Thomas Paine, *The Rights of Man* (1791) (Gregory Claeys (ed) Hackett Publishing 1992) 153; Hans Kelsen, *General Theory of Law and State* (Oxford University Press 1949), 124-129 (on the “material constitution”); Giovanni Sartori, ‘Constitutionalism: A Preliminary Discussion’ (1962) *American Political Science Review* 853; Nicholas Barber, *The Constitutional State* (Oxford University Press 2010) 75-88; John Gardner, ‘Can There be a Written Constitution?’ in Leslie Green and Brian Leiter (eds), *Oxford Studies in Philosophy of Law: Volume 1* (Oxford University Press 2011); Larry Alexander, ‘What are Constitutions, and What Should (and Can) They Do?’ (2011) 28(1) *Social Philosophy and Policy* 1, 4; Jacob Weinrib, ‘What is Purposive Interpretation’ (2024) 74(1) *University of Toronto Law Journal* 74, 84.

1.2.4. Horizontality - Ireland

A key aspect of *Lüth*'s significance was its rejection of what the FCC there cast as an "extreme" doctrinal position, earlier adopted by Germany's Federal Labour Court under the leadership of Hans Carl Nipperdey,⁵⁰ on which constitutional rights apply directly to private, as well as to public/State, conduct. That is, private persons are bound by constitutional duties corresponding to other private persons' constitutional rights, just as public persons are so bound. In this respect, constitutional rights' provisions are directly "addressed" to both categories of person: it is not just that constitutional rights govern *public activities* that happen to touch on private persons' legal relations, nor only that constitutional rights somehow condition private *law*'s content. Under "direct horizontality", distinctively, private persons can *constitutionally wrong* one another. It is thus flatly incompatible with the most fundamental proposition of US "state action" jurisprudence, canonically captured in Bradley J's opinion in the *Civil Rights Cases*:

Civil rights, such as are guaranteed by the Constitution against State aggression, cannot be impaired by the wrongful acts of individuals, unsupported by the State authority in the shape of laws, customs, or judicial or executive proceedings. The wrongful act of an individual, unsupported by any [State] authority is simply a private wrong, or a crime of that individual.⁵¹

Under the influence of the *Civil Rights Cases*, *Lüth*, and the conception of constitutional rights underlying them, many other legal systems have opted to reject constitutional (or human) rights' direct horizontality too.⁵² By contrast, the most frequently observed feature of the Irish law of horizontality is its full-blooded embrace of direct horizontality. In Irish law, private persons owe certain constitutional duties to one another, the breach of which

⁵⁰ Hans Carl Nipperdey, *Grundrechte und Privatrecht* (Scherpe, 1961) 13; Lewan, (n 41); Stefan Oeter, 'Fundamental Rights and Their Impact on Private Law – Doctrine and Practice Under the German Constitution' (1994) 12 Tel Aviv University Studies in Law 7, 11-12; Basil Markesinis, 'Privacy, Freedom of Expression, and the Horizontal Effect of the Human Rights Bill: Lessons from Germany' (1999) 115 Law Quarterly Review 47; Christian Starck, 'Human Rights in German Constitutional Development and in the Jurisdiction of the Federal Constitutional Court' in Daniel Friedmann and Daphne Barak-Erez (eds), *Human Rights in Private Law* (Hart Publishing 2002) 98-9.

⁵¹ *The Civil Rights Cases* 109 US 3 (1883) 17 (Bradley J).

⁵² *McDonald v McDonald* [2016] UKSC 28; *Dolphin Delivery* (n 2); *Du Plessis v De Clerk* [1996] (3) SA 850. Cf. Article 8(2) of the Constitution of South Africa; Article 20(2) of the Constitution of Uganda; Article 35(3) of the Federal Constitution of the Swiss Confederation; Article 25(1) of the Greek Constitution; *Kaushal Kishore v State of Uttar Pradesh* [2023] 4 SCC 1.

will amount to a constitutional wrong. In Budd J's sweeping terms (which, we will see, are much *too* sweeping: §3.3.3):

Obedience to the law is required of every citizen, and it follows that if one citizen has a right under the Constitution there exists a correlative duty on the part of other citizens to respect that right and not to interfere with it.⁵³

Not only that, but these correlative duties are enforceable in court at the private instance of the right-holder, on the principle that “a constitutional right carries within it its own right to a remedy or for enforcement of it”.⁵⁴ In Irish constitutional law, then, constitutional rights are capable of being both directly horizontally *binding* and directly horizontally *enforceable*. Indeed, “Ireland has been the prototype jurisdiction used by comparatists to illustrate direct horizontal effect”.⁵⁵

The most conspicuous, practically important, and comparatively distinctive upshot of direct horizontality in Irish law is the existence of a “pure” horizontal constitutional tort action.⁵⁶ By such an action, a private person, P, has the power to obtain a court-ordered remedy against another private person, D, purely on the grounds that D has violated P's constitutional right.⁵⁷ The action is available only where existing causes of action under the

⁵³ *Educational Company of Ireland Ltd v Fitzpatrick (No. 2)* [1962] IR 345 (HC) 368 (Budd J); *DPP v Delaney* [1997] 3 IR 453 (SC) 460 O'Flaherty J: “...the obligation that devolves on *all* citizens to observe and implement the requirements of the Constitution [my emphasis].”

⁵⁴ *Meskill* (n 1) 132-2 (Walsh J).

⁵⁵ Wilmai Rivera-Perez, ‘What's the Constitution Got to Do With It? Expanding the Scope of Constitutional Rights into the Private Sphere’ (2012) 3(1) *Creighton International and Comparative Law Journal* 177, 196.

⁵⁶ For my view on the nature of the “pure” constitutional tort action in this jurisdiction more generally, see: Daniel Gilligan, ‘Constitutional Torts as Private Wrongs’ (2024) 6 *Irish Supreme Court Review* 181.

⁵⁷ Although this thesis has much to say about constitutional torts, it neither comes close to exhausting that topic, nor is it confined to it. It does not exhaust the topic because, owing to the fact that state institutions have distinctive constitutional duties (often, constraining the exercise of distinctively public powers), there are constitutional torts that can *only* be committed by public persons, not private persons: *Kearney v Minister for Justice* [1986] IR 116; *McHugh v Commissioner of An Garda Síochána* [1986] IR 228; *Graham v Minister for the Environment* [1996] WJSC-HC 1172; *Gulyas v Minister for Justice* [2001] EHC 100; *Sinnott v Minister for Education* [2001] IESC 63; *Redmond v Minister for Environment (No. 2)* [2004] IEHC 24; *Keating v Judge Crowley* [2010] IESC 29; *GC v Director of Public Prosecutions* [2012] IEHC 430 [24] (Hogan J); *Brady v Wicklow County Council* [2016] IEHC 371; *Nash v DPP* [2017] IESC 51; *SF (A Minor) v Director of Oberstown Children Detention Centre* [2017] IEHC 829; *Simpson v Governor of Mountjoy Prison* [2019] IESC 81. Except to the extent consideration of “vertical” constitutional torts like these occasionally assists in sharpening our understanding of constitutional rights' significance for horizontal legal relations, they are not my focus. Equally, as we have just seen, constitutional rights can become significant for private persons' legal

“ordinary” law (statute, common law, equity) are inadequate to vindicate P’s constitutional rights against D’s violation. Nonetheless, since being recognised, the power to sue for “pure” constitutional torts has been successfully exercised against private persons of many stripes: unyielding teachers’ unions,⁵⁸ opportunistic coach operators,⁵⁹ unscrupulous debt collectors,⁶⁰ prying media outlets,⁶¹ and employers exercising contractual powers of dismissal.⁶² It has prompted significant modification/supplementation of our laws of privacy (§4.2), dismissal (§6.1; §6.5.2), industrial relations (§6.5), harassment (§4.4), and breach of statutory duty (§4.3). The Oireachtas has expressly contemplated the power’s existence in statute.⁶³

Although it understandably draws the bulk of scholarly attention, this “pure” horizontal constitutional tort action does not exhaust constitutional rights’ horizontal significance in Irish law. Constitutional rights have also impacted horizontal legal relations in other ways. A constitutional right might *invalidate legislation* touching on horizontal legal relations – as where statutory limitation bars for tort claims have been found invalid because inconsistent with the constitutional right to litigate (§3.2.5).⁶⁴ Or, without grounding a “pure” constitutional tort action, a constitutional right might bear on the judicial modification of *existing common law* norms concerning horizontal legal relations – as where the common law consortium action was expanded on constitutional equality grounds (§3.2.6).⁶⁵ Or, short of invalidation or modification, a constitutional right might bear on the judicial *interpretation* or *application* of existing law pertaining to a horizontal legal relation – for instance, by resolving indeterminacy in statutory, common law, or equitable rules (§3.2.7).

relations *other* than by grounding a horizontal constitutional tort action. This thesis is just as concerned with these other forms of significance as it is with horizontal constitutional torts.

⁵⁸ *Crowley v Ireland* [1980] IR 102; *Hayes v Ireland* [1987] ILRM 651; *Conway v INTO* [1991] 2 IR 305.

⁵⁹ *Parsons v Kavanagh* [1990] ILRM 560; *Lovett v Gogan* [1995] 3 IR 132.

⁶⁰ *Sullivan v Boylan (No. 1)* [2012] IEHC 389; *Sullivan v Boylan (No. 2)* [2013] IEHC 104.

⁶¹ *Herrity* (n 39).

⁶² *Meskill* (n 1); *Glover v BLN* [1973] IR 388; *ESB v Sharkey* [2024] IEHC 65.

⁶³ Personal Injuries Assessment Board Act 2003, s 4(1)(b)(iii). For judicial interpretation, see *PR v KC* [2014] IESC 72; *Clarke* (n 1).

⁶⁴ *O’Brien v Keogh* (n 9); *O’Brien v Manufacturing Engineering* (n 9); *Moynihan* (n 9); *Cahill* (n 9); *Tuohy* (n 9).

⁶⁵ *McKinley v Minister for Defence* [1992] 2 IR 333.

Indeed, the State has a duty under Article 40.3 of the Irish Constitution to respect, defend, and vindicate constitutional rights by law. In virtue of this duty, constitutional rights govern the State's creation, interpretation, application, and enforcement of *all* law determining horizontal legal relations. Combined with what we said above about direct horizontality, this means that in Irish law, as a threshold matter, constitutional rights are apt to *govern the conduct of all persons* (private or public) and condition *the content of all law* (private or public, judge-made or legislated). In comparative context, this makes the Irish law of horizontality look *structurally* very radical indeed. In Ireland, constitutional rights norms are regulative both for the entire legal system *and* the activities of all persons within it. Constitutional scrutiny is extended as far as it might conceivably go.

At the same time, the impact of constitutional rights on the *substance* of horizontal legal relations under Irish law has been notably limited. Prior to 1937, horizontal legal relations were determined for the most part by common law rules and, apart from statutory intervention, this remains the case. Overwhelmingly, our courts have characterised longstanding common law rules as adequate to constitutional rights' requirements – as effective “implementations” of constitutional rights in the sphere of private interaction – and thus in no constitutional need of modification. There have, as we will see, been important exceptions. But, against the background of our law of horizontality's generally conservative orientation, these exceptions can seem like unpredictable, unprincipled, “spasmodic” aberrations,⁶⁶ rather than component parts of a coherent doctrinal scheme geared towards disciplining private persons' legal relations to the Bunreacht's requirements.⁶⁷ Commentators accordingly bemoan “the serious lack of conceptual clarity that exists in relation to when, how, and to what extent horizontal effect should be given to

⁶⁶ O'Cinneide (n 4), 94.

⁶⁷ Margulies, (n 5); O'Cinneide, (n 4); O'Donnell, (n 1), 55; Colm O'Cinneide, ‘Irish Constitutional Law and Direct Horizontal Effect - A Successful Experiment?’ in Dawn Oliver and Jörg Fedtke (eds), *Human Rights in the Private Sphere: A Comparative Study* (Routledge-Cavendish 2007); William Binchy, ‘Meskill, The Constitution and Tort Law’ (2011) *Dublin University Law Journal* 339; Aoife Nolan, ‘Holding Non-State Actors to Account for Constitutional Economic and Social Rights Violations: Experiences and Lessons from South Africa and Ireland’ (2014) 12(1) *International Journal of Constitutional Law* 61, 93; Bryan E. McMahon and William Binchy, *Law of Torts* (4th edn, Bloomsbury Professional 2013) [1.45]-[1.124]; William Binchy, ‘Tort Law in Ireland: A Half-Century Review’ (2016) 56 *Irish Jurist* 199, 202-206; Gerard Hogan, ‘Mr Justice Brian Walsh – The Legacy of Experiment and the Triumph of Judicial Imagination’ (2017) 57 *Irish Jurist* 1, 6; Gerard Hogan, ‘The Farthest – December 1972’ (2019) 62 *Irish Jurist* 1; Gerard Hogan, Gerard Whyte, David Kenny, and Rachael Walsh, *Kelly: The Irish Constitution* (Bloomsbury Professional 2018) [7.1.169].

constitutional rights by the Irish courts”.⁶⁸ In a sense to be specified, this thesis asks whether there is any order to be had (§1.3.1).

1.2.5. Terminology

Again, my topic is the Irish law of horizontality: the law determining the legal significance(s) constitutional rights have for private persons’ legal relations with one another. At this early stage, I intend to draw the boundaries of that topic widely, so as to avoid deciding controversial questions of substance by way of definitional fiat.

As for “private person”, it therefore suffices to say that a private person is any person who is not a public (i.e. *State*) person. There are, to be sure, “borderline” or “mixed” cases of private and public persons, cases where public persons act as private persons, and vice versa (§3.3.6; §6.5.3). Where these cases plausibly arise, I consider the significance of any conceptual fuzziness for the argument. For the most part, the argument can afford to focus on core cases, and to avoid taking any (inevitably controversial) more detailed position on what the distinction between private and public persons comes to.

As for “constitutional right”, it suffices to say that a constitutional right is any legal norm (or “bundle” thereof) designated as such by a source legally authoritative on the point in a given jurisdiction. In this jurisdiction, those sources are the constitutional text and judicial decision.

⁶⁸ Nolan, (n 67), 74. In particular, they worry we lack satisfyingly clear doctrinal answers to important questions raised by direct horizontal effect. For an extended statement of that problem: McMahon and Binchy (n 67) [1.92]-[1.125]. Do *all* constitutional rights give rise to duties on private persons, as early cases might be taken to suggest – see, prominently, *Educational Co of Ireland* (n 53); *Meskeil* (n 1) where the reasoning evinces no attempt (nor clear analytical resources) to circumscribe direct horizontality’s general applicability to *all* constitutional rights and *all* private persons? Are constitutional duties identical in their content (i.e. do they mandate the same action) irrespective of whether a private or public person is being bound? If not, in what respects does the content of the relevant duties vary? For instance, does the constitution create any “positive” duties on private persons to confer benefits on others, as it sometimes does for public persons, or are private persons’ constitutional duties wholly of a negative, “non-interference”, variety? Can constitutional rights be violated only by a private person’s *intentional* wrongdoing, or will recklessness, negligence, or something else, suffice? Does the answer vary from right to right? Must counterfactual loss be proven to make out a violation, whether by private persons or otherwise, or is it possible for a constitutional right violation to be complete, in the terminology of the Roman lawyer, *sine damno*?

Throughout, I understand “legal relations” in Hohfeldian terms.⁶⁹ On Hohfeld’s scheme, the legal relations between any two persons (P and D) can be exhaustively described in terms of four pairs of correlative “jural incidents” running between them. These pairs are:

- (1) *Legal Duty/Claim-Right*: P has a legal claim-right against D if (and only if) D owes a legal duty to P to take or refrain from taking some action (ϕ). I have a legal claim-right against you that you deliver me a tonne of aubergines if (and only if) you owe me a legal duty to deliver me a tonne of aubergines. Your failure to do so would amount to a breach of your legal duty, a violation of my legal claim-right, and your legally wronging me.
- (2) *Legal Liberty/No-claim*: D has a legal liberty against P to ϕ if (and only if) D owes no legal duty to P not to ϕ . I have a legal liberty against my friends to stay at home reading books about Hohfeld; I do my friends no legal wrong by doing so.
- (3) *Legal Power/Liability*: D has a legal power over P in relation to some aspect of P’s legal relations if (and only if) D has the capacity to alter (or prevent the alteration of) that aspect of P’s legal relations.⁷⁰ A liability is the correlative of a power. On this usage, if I have the legal power to accept your offer of employment, you are under a liability to me: I have the capacity to alter an aspect of your legal relations, by becoming your employee.

⁶⁹ Hohfeld’s own articulation of the scheme is spread across two articles in the Yale Law Journal: Wesley N. Hohfeld, ‘Some Fundamental Legal Conceptions as Applied in Judicial Reasoning’ (1913) 23 Yale Law Journal 16; Wesley N. Hohfeld, ‘Fundamental Legal Conceptions as Applied in Judicial Reasoning’ (1917) 26(8) Yale Law Journal 710. For a sample of the (very plentiful) insightful commentary by both lawyers and philosophers on the scheme: John Finnis, ‘Some Professorial Fallacies About Rights’ (1972) 4 Adelaide Law Review 377; Judith Jarvis Thomson, *The Realm of Rights* (Harvard University Press 1990) 37-61; Peter Jones, *Rights* (Macmillan 1994) 12-25; Robert Alexy, *A Theory of Constitutional Rights* (Julian Rivers tr, Oxford University Press 2002) 131-8; Pierre Schlag, ‘How to Do Things With Hohfeld’ (2015) 78 Law and Contemporary Problems 185; Luís Duarte d’Almeida, ‘Fundamental Legal Concepts: The Hohfeldian Framework’ (2016) 11(10) Philosophy Compass 554; Nicholas McBride, *The Humanity of Private Law – Part I: Explanation* (Hart 2019) 35-70; Michael Da Silva, ‘Correlativity and the Case Against a Common Presumption About the Structure of Rights’ (2020) 54 Journal of Value Inquiry 289; Eleanor Eldridge, ‘Rights That’ (2024) 44(4) Oxford Journal of Legal Studies 808.

⁷⁰ For most purposes, this notion of a legal power is far too broad to be helpful (Joseph Raz, *The Roots of Normativity* (Oxford University Press 2022) 162), but controversies about how the concept of power might usefully be narrowed need not detain us.

- (4) *Legal Disability/Immunity*: D is under a disability in relation to P if (and only if) D *lacks* a legal power to alter some aspect of P's legal relations. The correlative of a disability is an immunity. I am under a legal disability to consent to medical treatment on behalf of my friend, another adult with full capacity: I lack the power to do so, and he has an immunity against me doing so.

There are two keys to understanding the scheme. First, the “correlativity” of each pair consists in the analytic equivalence of its component incidents.⁷¹ One of those incidents (e.g. duty) just *is* its correlative (e.g. claim-right) looked at from a different perspective, as a downward slope viewed from above is an upward slope viewed from below.⁷² Second, Hohfeld's scheme is not intended to capture ordinary linguistic usage of terms like “right”, “power”, etc. Indeed, it was originally advanced as a corrective to the loose and ambiguous use of legal terminology. As such, it was, and remains, avowedly stipulative.⁷³ As with all stipulative conceptual schemes, it is to be assessed by reference to its utility in illuminating the phenomena it purports to capture (here, legal relations). Therefore, the best defence of the scheme I can hope to offer is both partial and indirect: insofar as its *use* in this thesis helps illuminate the legal relations into which this thesis inquires, the scheme will be vindicated to that extent. Equally, whilst I believe the Hohfeldian scheme generally aids clear *exposition* of this thesis's arguments, those arguments do not depend on that scheme. With some terminological tweaking, they could be comfortably recast in different terms.

Accepting this picture of legal relations, a constitutional right has *legal significance* for private persons' legal relations where it has legal significance for the set of Hohfeldian legal incidents running between them. It will have such significance wherever, legally, the constitutional right plays a role in making that set what it is: i.e. where it partially legally explains why the set has the membership it does, why its members have the characteristics

⁷¹ Weinrib, *Reciprocal Freedom* (n 27) 39-40.

⁷² The “slope” analogy is Matthew Kramer's: Matthew Kramer, ‘Rights Without Trimmings’ in Matthew Kramer, Nigel Simmonds and Hillel Steiner (eds) *A Debate Over Rights* (Oxford University Press 2000) 24.

⁷³ It has been suggested there is a “difficulty” with adopting Hohfeld's conceptual scheme in approaching the Irish constitution because whilst Hohfeld “[insists] that a duty exists as a correlative only to a right and never to a freedom”, under the constitution, “the State...has a duty not to interfere with those concepts described as ‘freedoms’ therein”: Hogan, Whyte, Kenny and Walsh, (n 67) [7.1.128]. This does not show that constitutional relationships cannot be usefully described in Hohfeldian terms, only that the constitution's usage of “right” and “freedom” cannot map precisely onto Hohfeld's usage of “right” and “privilege”. That would not surprise Hohfeld: again, his is a stipulative enterprise, intended as a corrective to ambiguous legal terminology.

they do, and so why private persons' legal relations with one another are as they are. Again, horizontality questions are always about the legal upshots of one sort of legal norm (constitutional rights) for one sort of legal relation (that between private persons). A jurisdiction's law of horizontality is that set of legal norms determining the legal significance(s) constitutional rights have for private persons' legal relations with one another, if any.

A final point of terminology. As Hohfeld emphasised, lawyers use the term "right" (or, indeed, "constitutional right") indiscriminately to refer to claim-rights, liberties, powers, immunities, and bundles thereof. They also sometimes use the term to refer to a *value*, *weighty interest*, or *reason*, which might in turn justify those particular claim-rights, liberties, and so forth.⁷⁴ Where possible, I clarify the usage I have in mind. Where I mean to leave things ambiguous – as is occasionally analytically helpful – I use the term "right".

1.3. QUESTION

This thesis answers to a justificatory question: is Ireland's law on constitutional horizontality justified? In this section, I pause to consider the question's nature: the success conditions by reference to which any answer to it will appropriately be assessed, the tools I use to answer it, and the reasons why a good answer to it might be worth having. Focussing as it does on "meta" questions about my research question and approach, this section might helpfully be considered a "methodology" section.

1.3.1. *Justification: Objectives and Tools*

As a general matter, justification is a matter of demonstrating rational *sufficiency*. To show that a belief, action, attitude, or policy is justified is to show that it is supported by sufficient, or "undefeated", reason.⁷⁵ Hence, the project of justification is often a

⁷⁴ Pavlos Eleftheriadis, *Legal Rights* (Oxford University Press 2008) 1 (contrasting rights as "statements of high minded reasons" and rights as "results"); Jeremy Waldron, 'Rights in Conflict' (1989) 99(3) *Ethics* 503.

⁷⁵ John Gardner, 'Justifications and Reasons' in *Offences and Defences: Selected Essays in the Philosophy of Criminal Law* (Oxford University Press 2008) 91-120; Derek Parfit, *On What Matters: Volume I* (Oxford University Press 2011) 32-3; Mark Schroeder, 'What Makes Reasons Sufficient' 52(2) (2015) *American Philosophical Quarterly* 159.

“defensive” one: “in standard cases, [it] centrally involves rebutting certain kinds of possible objections” to whatever is being justified,⁷⁶ so as to show that the reasons counting in its favour are not overcome by the reasons against. A “justification” of a body of law, then, is a particular form of explanation of it; viz. an explanation as to why the reasons counting in favour of its adoption/maintenance are not defeated by the reasons going the other way (that is, are rationally *sufficient* to support its adoption/maintenance).⁷⁷

Importantly, a justification is not the only form of explanation that we might be concerned to offer when contemplating a given body of law. We might, for instance, look to causally explain how a body of law came to take the shape it did as a matter of historical fact; identifying the psychological, socio-economic, or ideological *determinants* of law-makers’ choices. From the other direction, we could look to identify certain *effects* that the law has produced, and chart the causal mechanism by which it has produced them. In either case, the explanation that resulted would be a form of causal explanation pertaining to a body of law, but would not (by itself) be any justification of it. Bodies of law also invite forms of non-causal, non-justificatory explanation: for instance, explanations of how important concepts that figure in their practice (e.g. “causation”, “burden of proof”, etc) are understood by those who employ them. Each of the answers to these distinct inquiries (justificatory, causal, conceptual) might, loosely, be labelled “explanations” of the same body of law, or as efforts to render the one body of law “intelligible”. Insofar as each aspires to contribute to our understanding of a single object (the body of law), this designation makes sense. For most theoretical purposes, though, it is too loose. It is better to emphasise instead that, in answering different “why?” questions, each of these explanations explains (or “renders intelligible”) something different (or, at least, a different aspect of the one thing).

In this thesis, again, I inquire into *the Irish law of horizontality*’s justification: is the adoption and maintenance of that body of law’s component rules, principles, and doctrines

⁷⁶ A. John Simmons, ‘Justification and Legitimacy’ (1999) 109 *Ethics* 739, 740.

⁷⁷ Eyebrows may be raised by my running “adoption” and “maintenance” together here. Although it is, as a general matter, perfectly conceivable that certain legal rules, principles, doctrines were once justifiably adopted but their continued maintenance is not justified (or vice versa), or that the reasons which explain why adoption was justified are distinct from those which explain why maintenance is, I do not consider these wrinkles to show up in this thesis: the argument I develop is sufficient to justify both the initial adoption and continued maintenance of the key features of Ireland’s law on constitutional horizontality.

supported by sufficient reason? A preliminary task for any justificatory inquiry is to get a good grasp of the relevant object of justification. In our case, that requires discovering what the Irish law of horizontality says: ascertaining its *content*, by identifying the norms of which it is composed. The method I employ for doing so is wholly orthodox. It starts from the authoritative legal sources. Because the Irish constitutional text is ambiguous on most (if not all) important horizontality questions (§3.3.5), ascertaining the law’s content mostly involves close analysis of the answers *courts* have given to those questions, and the reasoning they have employed in reaching them. The courts’ role within our separation of powers inevitably means that their development of the law in this area (as in others) is piecemeal.⁷⁸ But where possible and necessary, doctrinal exposition in this thesis looks to go beyond mere reportage of single instances. It infers general rules, principles, or trends from the case law data, where this serves to better ascertain and clearly present the content of the law as it now is. In doing so, it purports to reveal a structure that the doctrine *already* exhibits, irrespective of whether those who crafted that doctrine had that structure in mind in doing the crafting. To the extent permitted by the materials, then, it tries to present our law of horizontality as more than “just one damned thing after another”.⁷⁹

However, owing to its justificatory orientation, this project is not an exclusively “descriptive” one: although much of what follows is taken up with doctrinal exposition, the project does not solely “aim to describe the law as it is now...[as] lawyers explain...law to their clients”.⁸⁰ Nor is the project properly described as “historical”: it does not “seek to explain how and why the law has developed the way it has [or] to reveal the law’s causal history”.⁸¹ Beyond whatever engagement with legal chronology is necessary to accurately identify the law’s content and assess its justification, I have little to say about the historical determinants of the present state of the law in this area. Nor, however, is my account full-bloodedly “prescriptive” either: it does not purport to derive an “ideal law” of horizontality

⁷⁸ *McGee* (n 1) [1] (O’Donnell CJ): “The development of constitutional law in a common law system owes more to chance, therefore, than to systematic deduction from accepted principle. It is dependent on the happenstance of litigation raising an issue that is recognised as such by the lawyers and judges involved, and then the manner in which it is analysed. Development is at best incremental, random, and unpredictable”.

⁷⁹ A phrase generally attributed to the historian Arnold J. Toynbee, of a view one might have about history. For a memorable invocation in legal philosophy: Jeremy Waldron, ‘The Concept and the Rule of Law’ (2008) 43(1) *Georgia Law Review* 1, 33. See, similarly, Tennyson in *Aylmer’s Field* (1793): “...the lawless science of our law,/That codeless myriad of precedent,/That *wilderness of single instances* [my emphasis]”.

⁸⁰ Stephen A. Smith, *Contract Theory* (Oxford University Press 2004) 5.

⁸¹ *ibid* 4.

from an abstract extra-legal starting point.⁸² Instead, this thesis asks a justificatory question about the law we actually have, and answers that question only in the *detached* and *qualified* affirmative. That its answer is detached and qualified imposes sharp constraints on its ambition, and has important implications too for the tools appropriate to defend it.

The answer is detached in the following way. The claim developed in this thesis will be that, for the most part, our law of horizontality *would* be justified if the constitutional role I suggest for the principle of interpersonal non-subordination were independently defensible as a matter of political morality. However, I mean to remain mostly aloof (“detached”) on the question of whether it is so defensible.⁸³ My claim is therefore usefully tested by asking the following hypothetical question: if courts had simply been endeavouring to decide the horizontality cases before them consistently with the non-subordination principle, would they have developed the content of our constitutional law in this area as they have?⁸⁴ I argue for an affirmative answer. Some might prefer to say that

⁸² *ibid* 5.

⁸³ On the distinction between “detached” and “committed” normative theories: Tarunabh Khaitan and Sandy Steel, ‘Theorizing Areas of Law: A Taxonomy of Special Jurisprudence’ (2022) 28 *Legal Theory* 325, 337-9. See, further John Gardner, ‘What is Tort Law For? Part 1: The Place of Corrective Justice’ (2011) 30(1) *Law and Philosophy* 1, 2-5 (on detached justificatory theories of areas of law) and Joseph Raz, *The Authority of Law* (Oxford University Press 1979) 156-7 (on detached normative statements more generally): “Imagine an orthodox but relatively ill-informed Jew who asks the advice of his friend who is Catholic but an expert in Rabbinical law. ‘What should I do?’ he asks, clearly meaning what should I do according to my religion, not yours. The friend tells him that he should do so and so. The point is that both know that this is not what the friend thinks that he really ought to do. The friend is simply stating how things are from the Jewish Orthodox point of view”.

⁸⁴ It is common for theorists to inquire into the “aims”, “purposes”, or “functions” of bodies of law: for discussion, Tarunabh Khaitan and Sandy Steel ‘Areas of Law: Three Questions in Special Jurisprudence’ (2023) 43(1) *Oxford Journal of Legal Studies* 76, 90-6. When they do so, their objective is not generally to develop a descriptive account of the *psychology* of those who create, maintain, or use that body of law. They are not asking about *those peoples’* aims, purposes, or intentions as to function. Much less are they (implausibly) supposing that bodies of law are themselves the sorts of things which can have “aims” or “purposes” in the descriptive psychological sense of those terms. Nor, usually, are they looking to develop a wholly descriptive, sociological account of the effects a body of law causally produces, i.e. of what its “social functions” are in that (again, wholly descriptive) sense. Instead, in inquiring into a body of law’s aims/functions/purposes, theorists are most often asking a (detached or committed) justificatory question. When they ask about “functions” or “purposes”, they are asking about the “functions” or “purposes” a body of law serves *which (whether detachedly or full-bloodedly) justify having it around and/or its having the features it does*. When they ask about “aims”, they are asking what “aims” (in the descriptive sense) one could impute to those responsible for adopting or maintaining a body of law in order to explain why those people took themselves to have sufficient reason to adopt/maintain it. In these ways, I think very many inquiries into “aims”, “functions”, or “purposes” of bodies of law can be comfortably recast without remainder as justificatory inquiries (whether detached or committed). For at least three reasons, I would consider these recharacterizations unhelpful, at least for my purposes. First, characterizing a justificatory inquiry into a body of law as one about that body of law’s “aims”, “functions”, or “purposes” risks that inquiry being mistaken as a non-justificatory, causal one (most obviously, as one about lawmaker’s psychological motivations). Second, and relatedly,

my claim is therefore really that the non-subordination principle “fits” our law of horizontality, rather than that it justifies it. Properly understood, however, claims of principled “fit” are always detached justificatory ones: a principle “fits” the law to the extent it *would* justify that law if it were a genuine, valid one.⁸⁵ This is the sort of claim I make about the non-subordination principle as it relates to the Irish law of horizontality.

Openly, then, the thesis contains no sustained, sophisticated normative defence of that principle’s status as a sound principle of political morality, nor of the prominent role I suggest it plays in our constitutional law. The thesis thus cannot be taken as offering a full-throated justification of the body of law it considers. Its core claim – a detached justificatory one – could be accepted by someone who, after coming to the end of this thesis, still thought our law of horizontality irredeemably wrong-headed. Nonetheless, at various points, I *do* claim the non-subordination principle both (a) coheres with certain of our pre-theoretical

the fact that there are senses of “aim”, “purpose”, and “function” on which it is implausible to suppose bodies of law can have aims, purposes, or even functions means that recharacterizing a justificatory theory into a body of law in any of these terms risks tacitly undermining that theory’s plausibility. Third, the recharacterizations risk begging an important question about whether all justifications of a body of law must be in terms of some *end* (aim, purpose, function) extrinsic to, and intelligible apart from, the body of law the justification of which is at issue, on which see Ernest Weinrib’s influential discussion of justificatory functionalism: *The Idea of Private Law* (2nd edn, Oxford University Press 2012).

⁸⁵ Despite mention of both “fit” and “justification”, I eschew the descriptor “interpretive”: Dworkin (n 21); Smith, *Contract Theory* (n 80) 5-35; Allan Beever and Charles Rickett, ‘Interpretive Legal Theory and the Academic Lawyers’ (2005) 68 *Modern Law Review* 320; Steve Hedley, ‘The Shock of the Old: Interpretivism in Obligations’ in Charles Rickett and Ross Grantham (eds), *Structure and Justification in Private Law* (Hart Publishing 2008); Emily Sherwin, ‘Interpreting Tort Law’ (2011) *Florida State University Law Review* 227. This is for two main reasons. First, “interpretive” theories are often described as attempts to locate the “*best* explanation” of a body of law. As such, they claim to be capable of providing a reliable guide to decision in future cases. But my objective in this thesis is to detachedly demonstrate that there is *a* justification for Ireland’s law on constitutional horizontality, not to demonstrate that the justification I detail is the only or the very best one available. As I have said, the argument here is put in a detached register. Further, it leaves the possibility of justificatory overdetermination open (on which more in a moment). Second, interpretive theories are generally seen as subject to (at least) two seemingly incommensurable criteria of success – (1) how accurately the theory maps onto the relevant legal materials (“fit”); (2) how normatively appealing the law looks in light of the theory (“justification”). These criteria are often understood as more or less independent of one another, such that a theory might perform very well with respect to “fit” but lousily in terms of “justification”, and vice versa. In such a circumstance, it might seem mysterious how the theory’s *overall* success should be judged, and thus how we could compare a given theory to other candidate theories so that we might reasonably classify one as *best* (John Finnis, ‘On Reason and Authority in *Law’s Empire*’ (1987) 6 *Law and Philosophy* 357, 372: “[I]n such a case, a claim to have found the right answer is senseless, in much the same way as it is senseless to claim to have identified the English novel which meets the two criteria ‘shortest and most romantic’ (or ‘funniest and best’ or ‘most English and most profound’). However, I do not understand the argument I advance as being answerable to multiple independent (and potentially conflicting) criteria of success, but only one criterion: whether it (detachedly) demonstrates that the adoption/maintenance of the body of law I am considering is justified. The theory fits the legal materials in the sense that it justifies *them* (rather than something else); it can justify them only by fitting them: fit and justification are not independent variables at all.

moral convictions about particular cases; and (b) can fruitfully be deployed to *explain* those convictions: making us more transparent to ourselves (§2.2.1).⁸⁶ Further, I suggest that, because the principle is (at least facially) appealing in this way, horizontality decisions that seem deeply puzzling from other perspectives appear more attractive when viewed in its light. To that extent, whilst falling (far) short of a full demonstration of this body of law's foundation in sufficient reason, the argument that follows aspires to locate some normative sense in a body of law so often dismissed as senseless. Below, I suggest there is value even in a modest normative conclusion of this sort (§1.3.2). But, again, one might reject that the non-subordination principle has any genuine appeal at all and still accept my core detached justificatory claim: the claims are independent. Still, if the non-subordination principle has the freestanding plausibility I suggest for it, it make its fit with our law look less of a coincidence: it helps us to see how conscientious persons of sound judgment might, on reflection, have thought it best to decide the cases before them as they did.

How is a detached justificatory account like mine to be falsified? Because it contends that particular legal data are justifiable by the lights of a more abstract principle, the account is falsified to the extent those data are not justifiable by that principle's lights. The primary way of undermining the plausibility of a detached justificatory account, then, is to point to aspects of the law it purports to capture for which the principle(s) on which it is based cannot account.

Importantly, the account is *not* falsified by showing that the data *also* permit of justification by the lights of some alternative principle(s): it is perfectly possible for a single body of law to permit of multiple distinct justifications, such that its justification is overdetermined.⁸⁷ In this thesis, I mean to leave the possibility of justificatory overdetermination open, so far as the Irish law of horizontality is concerned: I argue (detachedly) for the non-subordination principle's justificatory sufficiency, not its *necessity*. Nonetheless, in making that claim of sufficiency I often argue, along the way,

⁸⁶ Derek Parfit, *On What Matters* (n 75) 189-90 (on the distinction between principles as *criteria* for wrongness, and principles as *explanatory* of wrongness); Christine Korsgaard, 'Creating the Kingdom of Ends: Reciprocity and Responsibility in Personal Relations' (1992) 6 *Philosophical Perspectives* 305, 312.

⁸⁷ Conceivably, for example, considerations of economic efficiency and promissory morality each independently provide sufficient rational support for the central doctrines of the common law of contract. On justificatory overdetermination: John Gardner, 'The Purity and Priority of Private Law' (1996) 46(3) *The University of Toronto Law Journal* 459, 472.

that other considerations are *insufficient* to justify the law we have. These negative arguments are primarily helpful in indicating the parameters of the justificatory puzzles that I go on to suggest the non-subordination principle can solve.

I said above that my justificatory account of the Irish law of horizontality is not only detached, but *qualified*. That is because, on occasion, I openly acknowledge the existence of features of the law that are not justifiable by the lights of the principle: if they are to be justified, they need a different justification. The argument that follows is only that in its *central features* and in very many of its details, the Irish law of horizontality is justifiable by the lights of the non-subordination principle. I consider the “centrality” of a feature of a body of law to be a function of the role it plays in legal practice: as such, a feature upon which many other features depends is more central than an aberrant, isolated single instance; case results are generally more central than the reasons judges offer in their defence; *ratio* generally more central than *obiter dicta*.⁸⁸ The argument’s worth, in light of its acknowledged qualification and detachment, is to be assessed by reference to the contribution it makes to serving the ends of justificatory theory discussed in a moment (§1.3.2).

First, though, a final comment on the extent of the project’s justificatory ambitions. The body of law I consider in this thesis is predominantly judge-made. I take that fact, together with the reasons that courts offer in support of their conclusions, as part of what is to be (detachedly) justified – my *justificandum*. The selection of this *justificandum* is not a matter of theoretical necessity: a justificatory theory with a narrower object of justification – just brute case results, for instance – might be successful on its own terms. Instead, my selection of it is motivated by a moral conviction that law’s subjects are entitled to a justification for *all* of the law’s operation: not just the bottom line of the rules to which they are subject, but also the manner in which those bottom lines have emerged by law. The force of that entitlement is perhaps easiest to see from the perspective of the disappointed litigant: from that perspective, it is clear that the locus of moral concern is not just the order a court might make against you. It extends to the institutional process by which that order is made, and the explanation you receive for it. I therefore take it to count against candidate justifications for case results that they preclude any justification for *judges* reaching those results, and

⁸⁸ See, similarly, Allan Beever. *Rediscovering the Law of Negligence* (Hart Publishing 2007) 28-34.

for giving the *reasons* they did for them. In the latter connection, my suggestion will be that the non-subordination principle not only tracks the results of the decided cases, but also often vindicates how those cases are reasoned. It makes sense of judicial decision-making in terms coherent with the terms on which the judges themselves made sense of it; rather than exhibiting their reasoning to be either irredeemably confused or corruptly dishonest.⁸⁹

1.3.2. *Value*

Why is a justificatory account of the Irish law of horizontality like the one offered in this thesis something worth having?

At bottom, it is because the call for justification is a generic feature of rational life: one must always believe, act, intend, etc for a sufficient (i.e. undefeated) reason. The call for justification is particularly insistent where we have some reason to suspect an answer to it may not be forthcoming: where we have objections to refute, doubts to dispel, worries to assuage. In this way, “[j]ustifying punishment is different from justifying...opera”.⁹⁰ As we have already started to see, Ireland’s law on horizontality has been subject to several pressing objections, doubts, and worries. The stakes are high (§1.3.1). It is more like punishment than it is like opera. For us, the objections are pressing not only because of justification’s generic rational necessity, but especially because each of them might be voiced by persons subject to the law and its coercive machinery; persons who, as free and equal members of a liberal democratic order, are entitled to be engaged with by legal institutions on the basis of reasons they can understand as reasons, rather than arbitrarily or unintelligibly.⁹¹ That is, they are owed a justification. It is close to the opposite of an

⁸⁹ Consider Samuel Williston, ‘Consideration in Bilateral Contracts’ 27(6) Harvard Law Review 503, 512: “A mild protest must be entered against a method of using...cases as if they would support equally any theory of the law which would involve the same result. Unless the ground on which the court rested the decisions can first be shown to be inadequate for their support, there is no necessity or, indeed, opportunity to seek for another basis. To do otherwise is to treat the rulings of the court ‘as the utterings of Balaam’s ass, absolutely true, but not presupposing any conscious intelligence in the creatures from whom they proceed.’”

⁹⁰ Jeremy Waldron, ‘Property, Justification and Need’ (1993) 6(2) Canadian Journal of Law and Jurisprudence 185, 191-2.

⁹¹ For insightful discussion in the context of private law theory: Felipe Jiménez, ‘Justifying Private Law’ in Paul B. Miller and John Oberdiek (eds), *Oxford Studies in Private Law Theory: Volume II* (Oxford University Press 2023).

assumption of my sort of justificatory inquiry that a justification of its object is possible.⁹² It is precisely the anxiety that its justification might be impossible, but is nevertheless rationally and morally necessary, that motivates the project.

Other of justificatory theory's upshots are more worldly. Absent a sense of if and how Ireland's law on constitutional horizontality can be justified, we are left in the dark about whether and how its component rules, principles, and doctrines should be interpreted, developed, extended, narrowed, abandoned, or replaced. That is, in order to know what we ought do about a body of law, or even the attitude we ought adopt towards it as citizens attempting to understand our social world,⁹³ we need "to consider the ends which the several rules seek to accomplish, the reasons why those ends are desired, what is given up to gain them, and whether they are worth the price".⁹⁴ In that process, legal theory's resort to abstraction, at its best, offers a reflective standpoint unsullied by particularities about which we are confused or over which we sharply disagree. To quote Rawls:

The work of abstraction...is not gratuitous: not abstraction for abstraction's sake. Rather, it is a way of continuing public discussion when shared understandings of lesser generality have broken down. We should be prepared to find that the deeper the conflict, the higher the level of abstraction to which we must ascend to get a clear and uncluttered view of its roots.⁹⁵

And whilst a justificatory account of Ireland's law on horizontality would be valuable in these ways, we currently lack a sufficiently sophisticated one. That is a claim I develop in detail over the course of this thesis, in tandem with my attempt to offer a new way forward. At the outset, though, I do not suspect that this claim will be very controversial. In the first place, many have joined O'Donnell in thinking Irish courts' own rationalisation of their answers to constitutional horizontality questions remarkably thin. Although I think our courts' reasoning in this domain has often been insightful, I must concede that it has just as

⁹² Cf. David Kenny, 'Embracing Difference, Divergence, and Diversity: The Case for Pragmatic Constitutionalism in the 21st Century' (unpublished manuscript, 2022).

⁹³ John Rawls, *Justice as Fairness: A Restatement* (Harvard University Press 2001) 2-3; Waldron (n 90), 187: "Even if we are pessimistic about [change or redesign of our institutions] justificatory argument still has its place, for we are interested not only in what immediately there is to be done, but also in *how* and *on the basis of what attitudes* it is proper to inhabit this society."

⁹⁴ Holmes (n 6), 476.

⁹⁵ John Rawls, *Political Liberalism* (Columbia University Press 1993) 45-6.

often been delphic. As such, and as we will see, unlocking its lessons for our justificatory enterprise requires close exegesis and (sometimes) imaginative interpretation.

At the same time, the academic literature on constitutional horizontality in Ireland is relatively sparse, and the literature making some attempt to justify the legal position arrived at sparser still. Indeed, as we will see, academic commentary on Ireland's law of horizontality is, in the main, either sharply critical of much of our existing law, or confines itself to pointing out its ambiguities. On the other hand, international literature is understandably not directed towards justifying the Irish legal position in all its idiosyncrasy nor, as we will see, are the claims made in that literature easily reconcilable with that idiosyncrasy. Justifying the Irish case requires us to return to the drawing board.

Of course, that the account offered here is both detached and qualified means that it cannot be treated as anything like a final word so far as this area of law's justification is concerned. It nonetheless takes an important first step. It (detachedly) constructs a standpoint from which much of our law of horizontality can be defended and, in doing so, indicates other perspectives from which that law is indefensible and ought be reformed. From there, further moral analysis about the non-subordination principle's appropriate role in our law is required to resolve what ought be done next, and so different people might draw different lessons from what they find here. For some, the thesis will primarily be valuable as indicating the parameters an argument for reform must meet. For others, it will provide a framework for a full-blooded, committed justification of many of our law of horizontality's particular features, and a critique of others. In circumstances where we are bound to be unsure or to disagree over what principles of (political) morality are genuine, I consider the enterprise of detached justificatory theory a valuable preliminary to a full assessment of any body of law's justification.⁹⁶

1.4. ANSWER

In this thesis, I argue that the significance constitutional rights have had for horizontal legal relations in our legal system is justifiable by reference to a principle of non-subordination. That principle is a moral principle of interpersonal interaction, applicable to private persons

⁹⁶ Khaitan and Steel, 'Theorizing Areas of Law' (n 83), 339.

in their relations *inter se*: abstractly, it says that no private person is *in charge of* any other. At bottom, then, it is an idea about the *bipolar* relation in which two private persons may permissibly stand to one another and, in particular, how the *choices* of those persons may permissibly interact. In a sense to be specified, it requires that those relations be characterised by the reciprocal independence of both parties' choices, rather than the unilateral *subjection of one party's choice to that of the other*. On any plausible view, that is nowhere near an exhaustive principle of private persons' *moral* relations: we owe one another far more than merely to refrain from subordinating one another to our respective wills. But it is, I will suggest, far closer to being an exhaustive principle of private persons' *constitutional* relations in our legal system: the upshot of our law of horizontality is that, as a matter of constitutional right, no private person is the rightful subordinate of any other. To be sure, the Constitution allocates and constrains the legal authority of the most basic *public* institutions to make, apply, and enforce law. But it also contains an important rule about *private* authority, one which can be seen to undergird the necessity for constitutionally limited public authority in the first instance: in our constitutional order, private persons are not one another's masters; instead, as against one another, they are each to enjoy an equal authority over their own lives.

The next chapter (Chapter 2) introduces the non-subordination principle in abstract, summary terms. Owing to the influence of Kantian perspectives within contemporary private law theory, that principle's broad contours will already be familiar to some readers. Its details are fleshed out more fully in later chapters' close treatment of particular topics. Nonetheless, it is hoped that a preliminary overview of the principle – at the outset of the thesis, and all in one place – will assist clear presentation of the rest of the argument.

Chapter 3 begins to put that principle to work in making normative sense of the Irish law of horizontality. It inquires into the possibility of reconciling that body of law's two most striking general features: first, its embrace of a *structurally* radical species of horizontal effect; second, the overwhelming continuity of our private law's *substance* despite that structural radicalism. Although these two features of our law might seem strange bedfellows, I argue that the non-subordination principle furnishes a standpoint from which they can instead be seen as complementary parts of a coherent whole. The chapter begins with a detailed exposition of the current state of the Irish law of horizontality, grounded in a four-way distinction between different modes of horizontal significance constitutional

rights might have (§3.2). From there, it assesses the power of several lines of thought, each familiar from the horizontality case law and literature, to account for the relevant doctrinal data (§3.3). Finding each of these lines of thought wanting, the chapter's core contention is that cases where Irish courts have found the common law governing private legal relations is compatible with – even *buttressed by* – constitutional rights reflect how, in horizontal operation, those rights figure as markers of our reciprocal non-subordination (3.4).

Chapter 4 likewise covers lots of ground. Moving from Chapter 3's focus on our private law's continuity, it turns to consider cases where constitutional rights *have* grounded change in horizontal legal relations. The argument divides into four sections, each analysing a different set of changes. Three of those sections concern "pure" constitutional torts actionable against private persons: torts variously grounded in the right to privacy (§4.2), the right to earn a livelihood (§4.3), and the rights to inviolability of the dwelling and person (§4.4). In each case, I argue that these constitutional torts are best understood as wrongs of subordination: each involves one private person, D, subordinating the rightful means of another, P, to their determining choice. The final section concerns an instance of *indirect* horizontality – a modification to the common law of loss of consortium – that also openly turned on the thought that, as a matter of constitutional right, persons are to meet one another as separate sovereign agents, and never one another's things (§4.5).

Chapter 5 is a change of pace. Its topic is the *waiver* of constitutional rights; a topic that has frequently cropped up in our law of horizontality, and is often thought to pose a special challenge for those concerned with constitutional rights' upshots for private interaction. The chapter begins by separating out different phenomena of constitutional relevance that may travel under the label "waiver". From there, it moves to consider the rules governing one such phenomenon – which I call "waiver as permission" – of particular relevance to our law of horizontality. With the non-subordination principle in clear view, I argue that phenomenon emerges as part of a broader pattern of constitutional rights' susceptibility to voluntary control by their holders. Rather than being a mark of their weakness, that susceptibility reflects those rights' tight justificatory connection to the self-determining will of free agents; a connection that the analysis in other chapters looks to draw out.

Chapter 6 is, in the first instance, concerned with the Supreme Court’s decision in *Meskeil v CIE*,⁹⁷ widely considered this jurisdiction’s leading case on (direct) horizontality. It argues that the holding in that case is best understood in terms of a problem of *systemic* subordination, which problem bears on the proper construction of certain horizontal contractual transactions in our constitutional order. Armed with this insight, together with the previous chapter’s analysis of waiver, the discussion moves to examine horizontality’s operation in the world of work more generally. Here, again, I suggest that the non-subordination principle can be seen to undergird and colour our courts’ particular conclusions on horizontal effect.

Chapter 7 briefly concludes, cataloguing some of the most important limitations of this work, indicating questions for future research raised by its arguments.⁹⁸

⁹⁷ *Meskeil* (n 1).

⁹⁸ One such limitation is worth mentioning at this juncture, so that readers might bear it in mind. Considerations of space have unfortunately precluded full consideration of the significant impacts that constitutional rights arguments have had on (a) the horizontal legal relations that distinctively obtain between *children and their parents* (natural, adoptive, married, or otherwise) (*G v An Bord Uchtála* [1980] IR 32 (SC) 55-56 (O’Higgins CJ), 69 (Walsh J); *North Western* (n 2); *In re Baby AB, Children’s University Hospital, Temple St v D* [2011] IEHC 1); (b) the horizontal legal relations that distinctively obtain *between parents themselves* (natural, adoptive, married, or otherwise) with respect to children (*Re Tilson, infants* [1951] IR 1; *BB v AA* [2013] IEHC 394; *O’S v Doyle* [2013] IESC 60); and (c) the horizontal legal relations that distinctively obtain between private third parties and parents (natural, adoptive, married, or otherwise) with respect to children (*Burke* (n 10); *Blake* (n 10) *Re O’Brien, an Infant* [1954] IR 1; *The State (Nicolaou) v An Bord Uchtála* [1966] IR 567; *M v An Bord Uchtála* [1977] IR 287; *Re JH, an infant* [1985] IR 375; *Re SW an infant, K v W* [1990] 2 IR 437; *FN v CO* [2004] IEHC 60; *N v Health Service Executive* [2006] 4 IR 374). From the theoretical perspective adopted in this work, all of these relations are properly considered distinctive, so as to justify their separate treatment: they pertain to a private person (the child) whose capacity to independently set and pursue their own purposes is incipient and yet to fully develop, and whose purposiveness is therefore dependent on the actions of others for its adequate realization (§6.5.3). That much is clearly also the Constitution’s starting point: hence the existence of special constitutional rights in all children, binding on their parents – and, in the case of parental failure, the State “supply[ing] the place of the parents” (Article 42A.1.2.1) – “to be fed and to live, to be reared and educated, to have the opportunity of working and of realising his or her full personality and dignity as a human being” (*G v v An Bord Uchtála* [1980] IR 32 (SC) 56 (O’Higgins CJ)). No comprehensive attempt, however, is made here to defend the complex and controversial Irish constitutional doctrine touching on horizontal relations (a)-(c). Indeed, certain familiar criticisms of that doctrine strike me as compelling (*O’R v EH* [1996] 2 IR 248 (SC) 283-4 (Barrington J); Hogan, Whyte, Kenny, and Walsh (n 67) [7.7.255], [7.7.261]). Nonetheless, it is hoped that the argument of this thesis – which anyway covers a wide expanse – can help shed light on what is distinctively normatively at stake in those relations. In what follows, for economy and unless otherwise stated, I will use “horizontal legal relations” and “private legal relations” to mean horizontal legal relations *apart* from relations (a)-(c)).

2. NON-SUBORDINATION

2.1. INTRODUCTION

2.1.1. *No Masters*

At a high level of abstraction, the idea that no one is rightfully anyone else's subordinate – that we are each our own master, and in no one else's rightful charge – is both intuitively appealing and very widely shared. It captures the sense – unmistakable in our contemporary moral and political discourse – that people have their own lives to lead and choices to make, such that it is to do something peculiarly dehumanising to them to usurp their powers of self-direction, making choices that were theirs to make in their stead. At the same time, it vindicates the concomitant thought that each of us is fully *equal* in this respect: despite our many differences along other dimensions, we *all* meet one another each of us alike our own separate, sovereign, and independent person. None of us “has, simply by birth, either the right to command others or the duty to obey them”.¹ As such, our objection where our own choices are subordinated to others' discretion can be understood not only as borne of a concern for our freedom *from* those others, but also for our equality *to* them. Accordingly, and still speaking at a high level of abstraction, an ideal of non-subordination holds out promise of a (partial) reconciliation of liberalism's constitutive, facially conflicting, commitments to freedom and equality.²

Indeed, and perhaps because ours is (at least in many dimensions) a liberal culture,³ echoes of the ideal are frequently heard in our mundane, everyday practices of moral criticism:

¹ Arthur Ripstein, *Force and Freedom: Kant's Legal and Political Philosophy* (Harvard University Press 2009) 36.

² In this way, it provides a grounds for rejecting “the simple idea that liberalism consists in a distinctive weighting between constitutive principles of equality and liberty” that Ronald Dworkin influentially insisted we must reject: Ronald Dworkin, ‘Liberalism’ in Stuart Hampshire (ed), *Public & Private Morality* (Cambridge University Press 1978) 126.

³ The principle will strike some as a *republican* one. There are very strong resonances, both on the surface and at their foundations, between the republican conception of freedom as non-domination (Philip Pettit, *On the People's Terms: A Republican Theory and Model of Democracy* (2013 Cambridge University Press); Eoin Daly and Tom Hickey, *The Political Theory of the Irish Constitution: Republicanism and the Basic Law* (Manchester University Press 2015)) and the idea of freedom as independence as it has been elaborated in the contemporary literature on Kant's political philosophy. The ideas are treated together for many purposes, often illuminatingly (see, recently, Niko Kolodny, *The Pecking Order: Social Hierarchy as a Philosophical Problem* (Harvard University Press 2023) 273-88). But the ideas are not the same, and I hope to explore their relationship – and especially how the ideas

“you’re not the boss of me”, “you used me”, and so forth. In the political sphere, a concern with subordination to others’ wills seems often to lie behind our discomfort with (even well-meaning and effective) paternalistic interventions; our eagerness to eliminate unfettered authority (public and private); and (more distantly, but still starkly) our constitutional order’s foundational rejection of colonial domination and correlative affirmation of popular sovereignty.⁴ The idea also has, I hope to show, deep resonances in the complex (but still everyday) arguments of principle that preoccupy law students, legal practitioners, and the courts across a range of constitutional and private law cases. People, we are now convinced, are not our tools; nor can we carry on as though they are not there, *also* carrying on, “swimming in their own lane”.⁵

2.1.2. *Scope*

This chapter is a preliminary attempt to place the non-subordination principle on surer, more precise footing than these everyday discourses of ours might allow; to put some analytical flesh on some intuitively promising bones. It develops the thought that no person is anyone else’s subordinate in terms of a more precise idea: private persons’ equal, reciprocal freedom to *pursue their self-chosen purposes*. No one else is your master just because no one else is entitled to determine the purposes you pursue with your rightful powers – your means.

might compare so far as *private law’s* justification is concerned – in future work. For now, perhaps the most important difference is that whilst Pettit conceives of non-domination as a consequentialist good to be promoted and aggregated (Philip Pettit, *Republicanism: A Theory of Freedom and Government* (Oxford University Press 1997) 99-102), the Kantian view is conspicuous in its non-consequentialism: it does not, for instance, permit of aggregation across persons, with a loss of freedom for some being compensated for by a gain for others. See, further, Ariel Zylberman, ‘Human Rights and the Rights of States: A Relational Account’ (2016) 46(3) *Canadian Journal of Philosophy* 291, 296; Louis-Phillipe Hodgson, ‘Kant on the Right to Freedom: A Defense’ (2010) 120 *Ethics* 791; Ernest Weinrib, *Reciprocal Freedom* (Oxford University Press 2022) 109.

⁴ Notice the centrality of conspicuously relational ideas about standing to decide in the Proclamation of the Irish Republic 1916 (declaring “the right of the people of Ireland...to the unfettered control of Irish destinies, to be sovereign and indefeasible” in the face of “the long usurpation of that right by a foreign people and government”) or Article 1 of the 1937 Constitution: “The Irish nation hereby affirms its inalienable, indefeasible, and *sovereign* right to *choose its own* form of Government, to *determine* its relations with other nations, and to develop its life, political, economic and cultural, in accordance with *its own* genius and traditions [my emphasis]”; Kolodny, (n 3) 155-56.

⁵ The metaphor is Ronald Dworkin’s: *Justice for Hedgehogs* (Harvard University Press 2011) 287-8.

As such, the discussion draws much inspiration from Kant’s legal and political philosophy,⁶ closely tracking recent influential readings thereof – particularly the magisterial reconstructive work of Arthur Ripstein.⁷ Still, what follows is not an attempt to faithfully re-state what Kant, Ripstein, or anyone else thought or thinks on any matter. Instead, I aspire here only to introduce a normative idea that, in subsequent chapters, I argue renders morally intelligible many of our law of horizontality’s component doctrines, rules, and principles. At various points in this thesis, my development and application of that normative idea departs, sometimes significantly, from the work of Kant and his interpreters whilst remaining recognisably influenced by it. Indeed, although this chapter starts things off on an abstract philosophical footing, my concern in this thesis is ultimately always the *cases*, and the ideas normatively unifying and undergird them. In that sense, the argument’s starting (and, indeed, ending) point is the law we have. As explained earlier (§1.3.1), that argument is not best understood as a derivation of some ideal law from an abstract, extra-legal philosophical foundation. It is something like the inverse of such a derivation: the identification of an abstract moral idea of which the legal materials we *already* have can be seen as institutional specifications.⁸ The decision to begin with this chapter’s unavoidably abstract discussion of principle therefore reflects a concern for clarity of argumentative presentation rather than either priority of argumentative ambition or order of explanation.

Nor does what follows purport to be (anything like) a deduction of the non-subordination principle from self-evident or uncontroversial premises.⁹ In this chapter and those that follow, I attempt merely to present the principle in tolerably clear and precise terms,

⁶ The mature statement of which is contained in his *Doctrine of Right (Rechtslehre)*, Part I of *The Metaphysics of Morals*. Citations throughout will be to the translation contained in Mary Gregor (trans and ed), *Practical Philosophy* (Cambridge University Press 1996).

⁷ The key contributions are Ripstein, *Force and Freedom* (n 1); Arthur Ripstein, *Private Wrongs* (Harvard University Press 2016); Arthur Ripstein, *Kant and the Law of War* (Oxford University Press 2021); Arthur Ripstein, ‘Authority and Coercion’ (2004) 32 *Philosophy and Public Affairs* 2; Arthur Ripstein, ‘Beyond the Harm Principle’ (2006) 34(3) *Philosophy and Public Affairs* 215.

⁸ To repurpose Ernest Weinrib’s characteristically evocative turn of phrase in *Reciprocal Freedom* (n 3), the non-subordination principle “lies at the apex of a system of nested abstractions and determinations” (7) that comprise the positive law in this area; it is the “barest and most comprehensive abstraction that is distinctive” (4) of our law of horizontality.

⁹ For some prominent attempts to defend the general principle, none of which can be usefully understood as deductions from uncontroversial premises, see especially: Ripstein, *Force and Freedom* (n 1) 355-89.; Hodgson, (n 3); Japa Pallikkathayil, ‘Deriving Morality from Politics: Rethinking the Formula of Humanity’ (2010) 121 *Ethics* 116; Allen W. Wood, *The Free Development of Each: Studies on Freedom, Right, and Ethics in Classical German Philosophy* (Oxford University Press 2014) 70-89; Barbara Herman, *The Moral Habitat* (Oxford University Press 2021).

indicating some of its key implications.¹⁰ From here, I do what I can to bring out the principle's attractions piecemeal over the course of this thesis; abductively showing how, where other explanations fail, the principle can make good sense of decisions conscientiously and consistently reached by judges on diverse topics in our law of horizontality.¹¹

Finally, but importantly, what follows is not an attempt to specify the conditions under which competent speakers of English will think the term "subordination" correctly employed. It is not a *definition*, in that sense. Indeed, the category of phenomena qualifying as "subordination" on my account will be in some respects wider and in other respects narrower than the category of phenomena qualifying as "subordination" on the ordinary meaning of that term. Again, I am attempting to articulate a normative idea that I argue can help us make normative sense of our law of horizontality. That idea might be captured more or less successfully in various different idioms. For our purposes, I think its rudiments are

¹⁰ Whilst suggesting that they not only cohere with certain of our pre-theoretical convictions about particular cases, but can also be fruitfully deployed to *explain* them: making us more transparent to ourselves: Derek Parfit, *On What Matters: Volume I* (Oxford University Press 2011) 189-90 (on the distinction between principles as *criteria* for wrongness, and principles as *explanatory* of wrongness); Christine Korsgaard, 'Creating the Kingdom of Ends: Reciprocity and Responsibility in Personal Relations' (1992) 6 *Philosophical Perspectives* 305, 312.

¹¹ When it comes to the non-subordination principle's validity as a sound principle of political morality, then, I again emphasise that I have no knockdown proof, instead relying on the combined force of a "panoply of more or less independent and individually less conclusive persuasions": Daniel C. Dennett, 'Philosophy According to Nozick' (1982) 7 *New Boston Review* 9.

most evocatively captured by the terminology of “subordination”.¹² Nonetheless, here, as elsewhere, we should think thoughts, not words.¹³

2.1.3. Roadmap

This chapter introduces the non-subordination principle in three stages.

First, I lay the principle’s foundations. As against one another, private persons are each entitled to pursue their own purposes, compatibly with an equal entitlement on the part of everyone else to do the same (§2.2.1). This requires that they have certain *means* that are available for their rightful use, and unavailable for use or destruction by others (§2.2.2). Most basically, one’s rightful means include one’s own body, but need not be so limited (§2.2.3).

Second, I recapitulate Ripstein’s distinction between two varieties of bipolar subordination – wrongful *use* of another’s means (§2.3.2) and wrongful *damaging* of another’s means (§2.3.3). I distinguish both from the frustration of another’s purpose (§2.3.4). I gesture towards the power of these distinctions to illuminate certain aspects of horizontal legal

¹² The language of non-subordination is common in the growing literature on Kant’s political philosophy: see, in particular, Ariel Zylberman, ‘Why Human Rights? Because of You’ (2015) 24(3) *Journal of Political Philosophy* 321; Ripstein, *Force and Freedom* (n 1) 4 (describing the starting point of Kant’s political philosophy as the “simple but compelling *normative* idea that, as a matter of right, each person is entitled to be his or her own master, not in the sense of enjoying some form of special self-relation, but in the contrastive sense of not being subordinated to the choice of any other particular person”); Herman, *The Moral Habitat* (n 9) 93 (holding that by violating duties of right “one person asserts herself against the equality and independence of another, setting terms, by their willing, for how things are to go for both of them, subordinating the other’s choice to their own”). Other popular terminology has its problems. Ripstein’s preferred phrase in *Force and Freedom* (n 1) is “independence”, which is Kant’s own (*Metaphysics of Morals*, 6:237). Although I sometimes employ it in what follows, I think as a general description of the principle the terminology has misleading connotations, particularly as applied to questions of *systemic* subordination (§6.4.1), in suggesting a far more austere libertarian idea of interpersonal interaction than that which I (and I think Ripstein) have in mind. Similarly, I do not use “dignity” (which is Jacob Weinrib’s preferred terminology: *Dimensions of Dignity: A Theory and Practice of Modern Constitutional Law* (Cambridge University Press 2016)) because, as Weinrib himself acknowledges (28-31), in ordinary usage, the broader philosophical literature, and even in Kant’s own philosophy, “dignity” has a very diverse range of meanings some of which have little to do with “non-subordination”. I do not use “non-domination” (even though, as a matter of ordinary usage, “subordination” and “domination” are in many contexts synonymous) because the latter is strongly associated with the neo-republicanism of Philip Pettit, and the distinctive conception of “freedom as non-domination” which animates it (see n 3 above).

¹³ The formulation is Ernest Weinrib’s, *The Idea of Private Law* (Oxford University Press 2012) xv.

relations at *common law*. Those distinctions are returned to at various points throughout this thesis.

Third, I characterise private law's role in realizing the requirements of the non-subordination principle (§2.4.1). I also outline the role the non-subordination principle will play in this thesis (§2.4.2).

2.2. FOUNDATIONS

2.2.1. Subjection to Another's Choice

The non-subordination principle says that no person is rightfully anyone else's subordinate nor, correlatively, anyone else's master: no one is *in charge of* anyone else as a matter of right. As we will see at various junctures in this thesis, that idea has implications for what citizens can expect from their state.¹⁴ Plausibly, too, it provides reason to object to hierarchical social stratification between groups.¹⁵ At bottom, though, it is an idea about

¹⁴ For detailed discussion of those implications: Julius A. Ebbinghaus, 'The Law of Humanity and the Limits of State Power' (1953) 3(10) *The Philosophical Quarterly* 14; Thomas Pogge, 'Is Kant's Rechtslehre a "Comprehensive Liberalism"?' in Mark Timmons (ed), *Kant's Metaphysics of Morals* (Oxford University Press 2002); Ernest Weinrib, 'Poverty and Property in Kant's System of Rights' (2003) 78 *Notre Dame Law Review* 795; Weinrib, *Reciprocal Freedom* (n 3); Ripstein, *Force and Freedom* (n 1) 182-355; Arthur Ripstein, 'Means and Ends' (2015) *Jurisprudence* 1; Arthur Ripstein, 'Reclaiming Proportionality' (2017) 34(1) *Journal of Applied Philosophy* 1; Arthur Ripstein, 'Mandatory Co-operation' (2022) 96(1) *Aristotelian Society Supplementary* 23; Weinrib, *Dimensions of Dignity* (n 12); Rainer Forst, 'A Kantian Republican Conception of Justice as Nondomination' in Andreas Niederberger and Philipp Schink (eds) *Republican Democracy: Liberty, Law and Politics* (Edinburgh University Press 2013); Malcolm Thorburn, 'Justifications, Powers and Authority' (2008) 117 *Yale Law Journal* 1070; Malcolm Thorburn, 'Constitutionalism and the Limits of the Criminal Law' in R.A Duff, Lindsay Farmer, S.E. Marshall, Massimo Renzo, and Victor Tadros (eds), *The Structures of the Criminal Law* (Oxford University Press 2011); Christian F. Rostbøll, 'Kant, Freedom as Independence, and Democracy' (2016) 78(3) *The Journal of Politics* 792; Japa Pallikkathayil, 'Neither Perfectionism nor Political Liberalism' (2016) 44(3) *Philosophy & Public Affairs* 171; Alec Stone Sweet and Eric Palmer, 'A Kantian System of Constitutional Justice' (2017) 6(3) *Global Constitutionalism* 377; Pavlos Eleftheriadis, 'In Defence of Constitutional Law' (2018) 81(1) *Modern Law Review* 154; Zylberman, 'Human Rights and the Rights of States' (n 3).

¹⁵ There is, for instance, a rich stream of literature in American constitutional scholarship, mostly concerning the Fourteenth Amendment, on an "anti-subordination" (or "antisubjugation" or "anticaste") principle: Owen M. Fiss, 'Groups and the Equal Protection Clause' (1976) 5 *Philosophy and Public Affairs* 107; Catharine A. MacKinnon, 'Sexual Harassment of Working Women' (Yale University Press 1979); Jack M. Balkin, 'The Constitution of Status' (1997) 106 *Yale Law Journal* 2313; Reva B. Siegel, 'Equality Talk: Antisubordination and Anti-classification Values in Constitutional Struggles Over *Brown*' (2004) 117(5) *Harvard Law Review* 1470. I will defend no claims here about the relationship between my non-subordination principle (a principle which would regulate interpersonal conduct even where all objectionable social hierarchies between groups were miraculously eliminated) and an anti-

the *bipolar* relation in which two private persons may permissibly stand to one another and, in particular, how the *choices* of those persons may permissibly interact. In a sense to be specified, it requires that those relations be characterised by the reciprocal independence of both parties' choices, rather than the unilateral *subjection of one party's choice to the choice of the other*.

The sense of “subordination” we will be working with is relatively capacious, but usefully introduced by considering its paradigmatic, totalising, most troubling instantiation: the relation of slave to master. Again, as it will concern us in this thesis, subordination involves one person's choice being rendered subject to the choice of another, on a special sense of “subject to”. A slave is someone *all* of whose choices are subject to those of their master on this special sense. They are, on the relevant sense, a total subordinate.

There is an alternative, looser, sense of “subject to” on which, just by virtue of living with others, our choice is always and inevitably subject to theirs, because their choices furnish part of the environment in which we ourselves choose. To be sure, what others choose to say and do influences – in ways both patent and imperceptible, objectionable and salutary – what we now choose to say and do: the concepts with which we think, the forms of life we consider valuable, the options and resources we have available to us. Often, these diverse forms of influence make it impossible to imagine the choices we might otherwise have made, and even who we might otherwise be, in the absence of what those other people did. Nonetheless, the slave's choices are “subject to” those of their master in a distinctive sense. Their predicament is thus different categorically – not just as a matter of yawning degree – from the predicament we all encounter as people who find ourselves living alongside others, and so unavoidably susceptible to their influence.

How so? Within an institution of slavery, the master's choice is not just some (highly influential) feature of the environment in which the slave exercises her own choice. Instead, the master is entitled, by their choice, to *unilaterally determine what purposes the slave*

caste principle (a principle concerned to eliminate or restrict such social hierarchies' operation), beyond noting that the foundation for the latter principle strikes me as most persuasively resting on irreducibly relational ideas about *standing*.

will pursue. That is, they are entitled to choose *for* the slave. In Ripstein's terms, a "slave is entirely at the disposal of his or her master...the master gets to decide what to do with the slave and what the slave will do. The slave does not set his own ends, but is merely a means for ends set by someone else".¹⁶ The master is entitled to conscript the slave in pursuit of any *purpose* at all – material prosperity, charitable giving, sadistic amusement – and in *any way* at all. In this way, the slave relates to their master just as any mere thing does: as a tool available for use and, in the limiting case, destruction. As against the master, the slave lacks any entitlement whatever to set and pursue their own purposes. Instead, the slave's pursuit of purposes is subordinated to their master's determining choice. It is this relation of subordination that is the basic source of slavery's moral catastrophe: hence anti-abolitionist myths of happy slaves and permissive masters strike us as beside the point.¹⁷ In those cases, the fundamental evil of slavery persists because what *the master says goes*: the slave suffering what (the master says) she must, and profiting only what (the master says) she may.

This is not, we are now convinced, how persons ought stand to one another as free and equal. Instead, we ought meet one another each of us, in Hart's memorable phrase, a "small-scale sovereign",¹⁸ neither a small-scale despot. Others may therefore choose alongside us, invariably affecting our option-set, and brushing up against us. They must never choose *for* us. As against others, we are each entitled to set and pursue our own purposes, compatibly with everyone else's equal entitlement to do the same. Others wrong you by acting inconsistently with that entitlement of yours, subordinating your pursuit of purposes to theirs. That is what it means to say none of us are masters, and none subordinates.

This, then, is an entitlement that our *pursuit* of purposes be up to us, rather than to other people. It is not an entitlement that our *attainment* of those purposes not be obstructed by others, and so not an entitlement to be immune from the *effects* of others' choices. Put differently, whilst our *capacities* to set and pursue our own purposes must be reconciled

¹⁶ Ripstein, *Force and Freedom* (n 1) 36.

¹⁷ *ibid.*

¹⁸ In Hart's memorable phrase: Herbert L.A. Hart, *Essays on Bentham: Jurisprudence and Political Philosophy* (Oxford University Press 1982) 183.

with one another, “we do not need to reconcile our *actual pursuits*”.¹⁹ Indeed, if each of us is to be entitled not to have the purposes we pursue determined for us by others, it could not be the case that we were *also* entitled to be free of others’ obstruction in attaining those purposes. A requirement to modulate our own pursuit of purposes so as better to facilitate others’ achievement of their particular purposes would subordinate us to their choice: by setting a purpose for themselves, they would also be setting a purpose for us; requiring us to assist them in advancing it. In this way, such a requirement “would violate one or the other of our claims to set and pursue our *own* conceptions of the good”.²⁰

By the lights of the non-subordination principle, though, the purposes a person sets and pursues are up to them, rather than to other people: as against others, we each have, in Rawls’s terms, the “moral power to form, to revise, and rationally to pursue a conception of the good”;²¹ to plough our own furrow, walk our own path, and to determine for ourselves what is valuable and choice-worthy. The principle therefore does not directly proscribe or require particular purposes for any of us. Instead, it only implies a set of adverbial constraints on *how* we may each pursue whatever purposes we happen to have. It says we must pursue our own conception of the good in a manner that can be reconciled with others’ equal capacity to set and pursue theirs. In that way, it puts the right prior to the good. It sets constraints on how others may treat you, but without identifying or presupposing a good to be promoted that is intelligible apart from those constraints.²² In Weinrib’s phrase, “[t]he point of [those constraints] is not to promote particular ends, but to provide the conditions for the rightful interplay of whatever ends persons might choose to have”.²³

In this way, the non-subordination principle is *exclusively* and *irreducibly* an idea about each persons’ moral *standing* in their relations with others – the moral footing on which they must engage with one another.

¹⁹ Arthur Ripstein, ‘Private Order and Public Justice: Kant and Rawls’ (2006) 92(7) Virginia Law Review 1391, 1401.

²⁰ *ibid.*

²¹ John Rawls, *Political Liberalism* (Columbia University Press 1993) 186.

²² Arthur Ripstein, *Force and Freedom* (n 1) 15. For doubts about whether Ripstein’s Kant is relational all the way down: Katrin Flikschuh, ‘A Regime of Equal Private Freedom? Individual Rights and Public Law in Ripstein’s *Force and Freedom*’ in Sari Kisilevsky and Martin J Stone, *Freedom and Force: Essays on Kant’s Legal Philosophy* (Hart Publishing 2017), and Ripstein’s (persuasive) rejoinder in the same volume at 194–6.

²³ Weinrib, *Reciprocal Freedom* (n 3) 29.

It is *exclusively* a norm of interpersonal moral standing because it governs only how one person relates (i.e. *stands*) to another person, and in particular who has *standing* to decide what as between persons.²⁴ It prohibits relations of subordination, but is compatible with a wide range of views on what is good for people considered apart from the relations in which they stand with others (e.g. “basic goods”, pleasure, desire-fulfilment, etc).

It is *irreducibly* a norm of personal standing because its force is not to be explained in terms of some non-relational norm like the value of individual autonomy or well-being (§2.3.4).²⁵ Those norms are non-relational, in the relevant sense, because they matter apart from how persons relate to one another: it makes sense to ask how a solitary desert islander fares in terms of well-being or autonomy, and how their well-being or autonomy are impacted by, say, changes in the weather. By contrast, subordination is a problem that can only arise where *other choosers* choose for us. As the happy slave hypothetical showed, their so choosing is objectionable in itself, even if it benefits us, and even if it ends up expanding the option-set from which we can choose all things considered. Similarly, that the man falsely imprisoned in *Huckle v Money* was plied with beef-steaks and ale does not cause us to doubt that there was something genuinely defective in his treatment: no matter how tasty the steaks, nor even if we discover the sustenance they provided greatly expanded the options he could autonomously pursue.²⁶

The moral problem with subordination, then, is just that others have caused themselves to stand in a relation to you (and you to them) inconsistent with your rightful status as a person – with your equality to them as a moral agent with a standing and purposiveness all your own. They have made a determination in your place that was yours and yours alone to make. In a public law idiom, they have usurped an office that was yours exclusively to occupy.

2.2.2. Means and Purposes

²⁴ See the helpful discussion of “relational legal directives” in John Goldberg and Benjamin Zipursky, *Recognizing Wrongs* (Harvard University Press 2020) 91-96.

²⁵ On irreducible relationality: Ripstein, *Private Wrongs* (n 7) 36-8; Ariel Zylberman, ‘Why Human Rights?’ (n 12).

²⁶ *Huckle v Money* (1763) 2 Wills 205.

If our *pursuit* of purposes is to be up to us, rather than other people, there must be certain *means* that are available for our use and not theirs. Why? Just because *the pursuit of any purpose at all involves the use of means*: that is another, more prosaic, truth to the old saying that “you can’t make an omelette without breaking some eggs”. Without making use of means, it may be possible to *adopt* or *wish for* certain ends – to abstractly consider them worth attaining, and perhaps to inwardly resolve to pursue them.²⁷ I might wish to learn German, but take no action towards achieving that end, and so make use of no means. But once I act in pursuit of some adopted end, I inevitably use *means*: my body, mental capacities, grammar books, energy drinks, and so forth.

Because the pursuit of purposes necessarily involves the use of means in this way, if you are to be entitled to set and pursue your own purposes, you must have certain means as exclusively *yours* as against others. Others may not deprive you of them, nor usurp your entitlement to determine the purposes for which they are used.²⁸ Without *means* that were one’s own in this way, one could not set or pursue *purposes* of one’s own: one’s purposiveness would be subject to the decisions *others* made about the use of means you might have used to pursue your purposes.

One’s status as one’s own master therefore implies that one has certain means of one’s own. Further, that status – together with the fact that it is also held, equally, by all others – also implies constraints on what those rightful means of yours both *can* and *must* be. In this way, to put things in Hohfeldian terms (§1.2.5), a general claim-right not to have one’s pursuit of purposes subordinated to another’s determining choice can be deployed to ground a series of more particular claim-rights.²⁹ In this thesis, I look to argue that the

²⁷ Ripstein, *Private Wrongs* (n 7) 31-3.

²⁸ In Kant’s phrase, “[t]hat is *rightfully mine* (*meum iuris*) with which I am so connected that another’s use of it without my consent would wrong me”: 6:246 (*Metaphysics of Morals*).

²⁹ This is the first response that can be given to assuage any worries that the norm of non-subordination, as I have formulated it, is empty or circular. That worry might arise in the following way: if (a) the non-subordination norm says that A may not determine the purposes for which B’s means are used, then (b) we need an explanation of which means are B’s means (and why), but (c) our non-subordination principle offers no resources in arriving upon such an explanation. The principle may therefore seem to assume, rather than provide, an account of our entitlements: Laura Valentini, ‘Kant, Ripstein, and the Circle of Freedom’ (2012) 20(3) *European Journal of Philosophy* 450; Sandy Steel, ‘Saving Private Wrongs’ (2016) 14(1) *Jerusalem Review of Legal Studies* 1. This worry is misplaced: the idea of non-subordination is not empty. Like all important normative concepts, it is abstract. As such, its application to particular cases requires the exercise of judgement: the principle does not itself mandate unique solutions to all questions of its application. But as I hope to illustrate in what follows – beginning with

particular *constitutional* claim-rights private persons hold against one another can be grounded in that more general claim-right. Those claim-rights are intelligible as markers of our reciprocal non-subordination.

2.2.3. Bodies and Property

Whatever else it requires, your status as your own master requires that your *body* be amongst your rightful means: you must be entitled, as against others, to determine the purposes for which it is used, insofar as your use remains compatible with a like entitlement on the part of everyone else. Your entitlement to your own body is both innately and necessarily yours – no affirmative act of acquisition is required to establish it; nor can it be alienated so that it comes to be held by someone else (§5.4.2).³⁰ This is just because you *are*, at least in part, your body, whatever else you might be.³¹ Your body is not separate from you: it is your person's spatial manifestation. You do what your body does: only by "making use of [your] bodily powers can you act in the external world",³² such that your body is the "sum of your capacities to set and pursue purposes".³³ Accordingly, if *you* are not to be subordinate to anyone else's pursuit of purposes in space, your *body* must not be so subordinate. That persons' bodies are amongst their rightful means is thus a precondition of the non-subordination principle's having any application.³⁴ As Peter Benson explains:

my discussion of bodily rights immediately below (§2.2.3) – it both structures the process of answering those questions, and rules out many candidate answers.

³⁰ Peter Benson, 'Misfeasance as an Organizing Normative Idea in Private Law' (2010) 60(3) University of Toronto Law Journal 731, 754-5. That your body is *necessarily* yours – and that this is so, as we will see, as a matter of our constitutional law – explains why you cannot be deprived altogether of your rightful control of it by virtue of committing some illegal act: *Carr v Ols* [2012] IEHC 59 [36] (Hogan J); *The Governor of A Prison v GDC* [2020] IEHC 354 [50] (Burns J): "In light of his right to bodily integrity of mind and personality and his right to autonomy, it is not appropriate that his will would be overwhelmed so as to force feed him. Although he is a prisoner on whom a substantial term of imprisonment has been imposed having been found guilty of the most vile crimes, his core and basic rights as a human being would be completely violated by such action. It would turn him into a lesser being and turn society into the captors of lesser beings. This is not what is envisaged by our noble Constitution. While the enforcement of court orders in the criminal justice system is of major significance, it does not trump the core rights of the person to autonomy and self-determination."

³¹ John Gardner and Stephen Shute, 'The Wrongness of Rape' in Jeremy Horder (ed.), *Oxford Essays in Jurisprudence, Fourth Series* (Clarendon Press 2000) 202: "[I]n the distinction between self and world, the body already belongs to the 'self' side without any need for, or possibility of, self-extension into it".

³² Hodgson, (n 3), 811

³³ Ripstein, *Force and Freedom* (n 1) 40.

³⁴ Japa Pallikkathayil, 'What is External Freedom?', forthcoming in Philipp-Alexander Hirsch and Martin Brecher (eds), *Law and Morality in Kant* (Cambridge University Press).

One's rightful exclusive control over one's body is innate because it is the necessary condition of one's counting, in the first place, as a distinct person in relation to others. As such, it is the essential presupposition of every other mode of having and exercising such control in relations with others.³⁵

In a moment, and more fully in the next chapter (§3.4.2), we will see how Irish constitutional law conceives of one's body as one's rightful means for the pursuit of one's own purposes. This conception both unifies and restricts the range of particular constitutional wrongs that other private persons might conceivably commit against it. It also explains why one's bodily integrity has a significance for horizontal constitutional relations that (other) important aspects of individual well-being lack (§3.4.2).

Although one's body is one's most basic means in this way, Irish constitutional law also clearly recognises that entities *apart* from one's body can be amongst one's rightful means as against other private persons. As the argument of this thesis develops, we will identify several respects in which the courts have progressively recognised this to be so (§4.2; §4.4; 5.4.2). But the point is anyway determined by the constitutional text. Article 43.1 reads:

43.1.1: The State acknowledges that man, in virtue of his rational being, has the natural right, antecedent to positive law, to the private ownership of external goods.

43.1.2: The State accordingly guarantees to pass no law attempting to abolish the right of private ownership or the general right to transfer, bequeath, and inherit property.

Further, by virtue of Article 40.3.2, the State is obligated "by its laws [to] protect as best it may from unjust attack, and in the case of injustice done, vindicate the...property rights of every citizen".³⁶

³⁵ Benson (n 30) 755.

³⁶ On the "mutually informing" juridical relationship between Article 43.1 and 40.3.2: Gerard Hogan, Gerard Whyte, David Kenny, and Rachael Walsh, *Kelly: The Irish Constitution* (Bloomsbury Professional 2018) [7.8.49]-[7.8.68].

A general justification for a system of private property in “external goods” is far beyond the scope of this thesis.³⁷ The argument that follows – together with Irish constitutional law – thus openly remains vulnerable to the possibility that no such general justification can be supplied. For present purposes, it suffices to flag the following point. So far as one’s horizontal legal relations with others are concerned, Irish constitutional law conceives of one’s property in a “strikingly parallel” way to one’s body: as one’s *rightful means* for the pursuit of one’s own self-chosen purposes, whatever those purposes might be.³⁸ As with the body, this conception unifies and restricts the range of constitutional property-based wrongs that private persons might conceivably commit against one another: those wrongs all have the structure of subordination. The idea thus helps to fill out the abstract commitments of Article 43 and 40.3. That is, by the lights of Irish constitutional law, “in virtue of [your] rational being” you are entitled, as against other private persons, to determine the purposes for which an item of your property is used; others wrong (“unjust[ly] attack”) you where they determine those purposes in your place; you are entitled to “vindication” on that basis alone.

2.3. WRONGS

2.3.1. *Determining the Purposes for Which Means are Used*

So far, we have said that one person wrongfully subordinates another where they determine the purposes for which that other person’s rightful means are used. What does “determining” the purposes for which means are used amount to? How, more specifically, can one’s entitlements to exclusive purposive control of one’s own means be violated?

³⁷ Not least because, for my part, I consider that any such justification must rely on a substantial dose of counterfactual empirical speculation (i.e. as to how people would behave in a world without any private property, or in a world with a system of private property which was somehow different from our own) in which I am in no position to compellingly engage within the confines of this project, from the comfort of my armchair. Ripstein takes a starkly different view, clearly also Kant’s own: *Force and Freedom* (n 1) 86-107. I find persuasive the response to it given in Kyla Ebels-Duggan, ‘Critical Notice: Arthur Ripstein’s *Force and Freedom*’ (2011) 41(4) *Canadian Journal of Philosophy* 549, 569-70; Pallikkathayil, ‘What is External Freedom?’ (n 34).

³⁸ Ripstein, *Private Wrongs* (n 7) 40.

Ripstein distinguishes between two ways in which D can determine the purposes for which P's means are used.³⁹ The first, direct, way is by *using* P's means for purposes that P has not authorized (§2.3.2). The second, indirect, way is by *damaging* P's means – rendering those means in themselves less usable – through conduct irreconcilable with each person's equal entitlement to pursue purposes with their own means (§2.3.3).

Both use-based and damage-based subordination are to be distinguished from cases where one person *frustrates* another's purpose – that is, precludes that person from achieving that purpose – without using or wrongfully damaging their means. Frustrating another's purposes does not, in itself, amount to subordination (§2.3.4). Again, we cannot require others to modify their pursuit of purposes so that we might attain our particular purposes more easily. If we could, their pursuit of purposes would be subordinated to ours.

As Ripstein also shows, the use-based and damage-based forms of subordination map on to, and undergird, particular common law wrongs that private persons might commit to one another's bodies and property. In turn, as detailed in the next chapter (§3.4.2), these common law wrongs have been judicially characterised as amounting to violations of *constitutional* rights in this jurisdiction. I take that to be an initial, highly inconclusive, suggestion of the promise of a non-subordination-based account of Ireland's horizontal effect jurisprudence.

In the discussion, it will be helpful to keep in clear view that moral blameworthiness is neither a necessary nor sufficient condition for subordination. As several examples below indicate, many instances of subordination are not blameworthy: although subordination is necessarily *wrongful* – in the sense that it involves D putting themselves in a moral relation to P inconsistent with P's rightful standing – it need not evince an attitude that is morally inappropriate in the circumstances (contempt for the well-being of the person subordinated, for instance). Equally, there are examples of blameworthy, morally troubling conduct involving no subordination: take, for instance, failing to effect an easy rescue (§2.3.4). In

³⁹ *ibid* 43-52. On a given set of facts, they may co-occur: that is, D's conduct can subordinate P in both ways at once.

this way, the non-subordination principle reflects only a “partial”,⁴⁰ “special”⁴¹ morality: one that, as I suggest below (§2.4) and throughout this thesis, plays a special constitutional role in our legal order.

2.3.2. *Using*

A person *uses* some means by employing those means as an instrument; that is, as a tool that they direct towards attaining some end. Using means is therefore an intentional activity: where one uses something – a body, a German book, a house – one directs that thing towards the production of an intentional object; a purpose.⁴² If I use your horse by taking it for a ride, I intend to direct it towards my purpose of having an exhilarating afternoon on horseback, or of evading capture, or of winning a prestigious race. This is so even if I do not intend to upset you or cause you any other loss. It is so even if I do not appreciate that it is your horse, instead (perhaps reasonably) thinking it is my own. Regardless, I intend to direct (what happens to be) your horse towards whatever purpose I happen to have in using it. That’s what distinguishes my *using* the horse from, say, accidentally bumping into it, or being involuntarily thrust upon it by someone else.

Using another person’s means without their authorization amounts to determining the purposes for which those means are used. By using those means without your authorization, I determine that your means will, on this occasion, be used for (at least) whatever purposes I happen to be pursuing by controlling them: my enrichment, the venting of my frustration, the satisfaction of my curiosity. Conversely, if you *authorize* me to use what is yours – whether for some purpose you prescribe, or for any purpose I please – you remain the person determining the purposes for which those means are used. Authorizing me to use your means for some purpose(s) is just one of the many uses you may make of your means. Using someone’s means without their authorization, however, is the core case of

⁴⁰ Hugh Collins, ‘Interpersonal Justice as Partial Justice’ (2022) 1(2) European Law Open 413.

⁴¹ Weinrib, *The Idea of Private Law* (n 13) 2.

⁴² There may be other senses in which a particular use of something is *unintentional*: in the effects it produces (which might not be intended), say, or in the fact it contravenes some norm (e.g. I might use your car without knowing it was yours, or that cars were subject to rules of mine and thine) (§4.2). If so, there are available senses in which the *wrong* I commit against you was not intended, but the activity of using still was.

subordination in the sense that concerns us. It is the direct, non-consensual conscription of what is another's for one's own purposes.

This prohibition on using others' means without their authorization can be seen to undergird common law trespassory torts vis-à-vis bodies and property. Those torts are all wrongs of unauthorized use. Seeing them that way illuminates their otherwise puzzling features.

Take trespass to the person first. Battery involves D making use of P's body by directly applying force to it – touching it – without P's authorization. The tort of assault extends the tort of battery to cover cases where D subjects P's body to D's own purposes by putting P in apprehension of an imminent battery, thus compelling P either to acquiesce to the battery or to use their body for the particular purpose of avoiding it.⁴³ False imprisonment involves D using P's body by intentionally detaining P's body in a confined space for a purpose set by P, without legal justification.⁴⁴

Because these wrongs are use-based, they are all actionable *per se*. D's wrong consists in the *use* of P's body, and so damage to P's body is beside the point: one can use something without damaging it.⁴⁵ For just the same reason, in battery, the physical contact must be *direct*. D must direct P's body itself towards a purpose – that is, use *it* – rather than something else that goes on to make contact with, or harm P. Equally, because using something involves intentionally directing it towards a purpose, trespassory torts are, at least in core cases, *intentional* torts: in committing trespass, D intends to touch P's body, or confine it, or to place P in reasonable apprehension of an imminent battery.⁴⁶ Moreover,

⁴³ *Dullaghan v Hillen* (1957] Ir Jur Rep 10, 13 (Fawsitt J). Cf. Scott Hershovitz, 'The Search for a Grand Unified Theory of Tort Law' (2017) 130(3) Harvard Law Review 942, 956.

⁴⁴ William Blackstone, *Commentaries on the Laws of England* (Clarendon, 1765-1769) Book 3, 127: [T]o constitute the tort of false imprisonment there are two points requisite: 1. The detention of the person; and, 2. The unlawfulness of such detention".

⁴⁵ *PR v KC* [2014] IEHC 126 [24] (Baker J): "The essence of the tort of...trespass to the person is that a plaintiff may be awarded damages even in the absence of actual injury to that person"; *Dullaghan* (n 43), 15 (Fawsitt J): "The law...protects us, not only against actual hurt and violence, but against every kind of bodily interference".

⁴⁶ It is perhaps not yet fully clear whether D's *intending* contact with P is a necessary element of trespass to the person in Irish law, as is the case in England: *Letang v Cooper* [1965] QB 232; *Wilson v Pringle* [1987] 1 QB 237, 249; *Bici v Ministry of Defence* [2004] EWHC 786 (QB) [77] [Elias J] (assault); *Iqbal v Prison Officers Association* [2010] QB 732 [72] (Smith LJ)(false imprisonment). The point was expressly reserved (so far as battery was concerned) by Geoghegan J in *Devlin v Roche* [2002] IESC 34, although he noted the anomalies to which the continued vitality of the tort of unintentional trespass

P's consent to D's treatment of them precludes D's liability for it in trespass to the person: the prohibition is only on *unauthorized use*. Authorizing someone else to use (part of) your body for some purpose(s) – as a shoulder to cry on, a hand to hold – is just one of the many uses you can make of your body. Because one's body is one's own means, the decision over whether to give the relevant authorization is P's, and P's alone: "the person of full age and capacity may make the decision for their own reasons".⁴⁷ This is so even if P would be better off if D made the decision in P's stead. Finally, torts of trespass to the person are torts of strict liability: if D uses P's body for their own purposes, it is irrelevant whether or not D's conduct was negligent or otherwise faulty.⁴⁸

Use-based wrongs to property – conversion, trespass to land, and trespass to chattels – all have a parallel structure. Again, because using something need not involve damaging it, these use-based property torts are all actionable *per se*: it is irrelevant whether I cause you loss, or could use your property more efficiently than you could, or for an otherwise greater social benefit.⁴⁹ The prohibition is, as in the case of bodies, both simple and categorical: it prohibits unauthorized use. Hence, consent is a total defence. Hence, too, these torts are wrongs of strict liability and (at least paradigmatically) intentional, in just the same sense

to the person would give rise. It is, in any event, at least clear that (a) intentional trespass to the person is understood in this jurisdiction as a *distinctive* – and, I am suggesting, constitutionally significant – wrong in our legal system, and (b) it is as at least understood as representing the *core* of trespass to the person, even if it does not occupy the field of trespass entirely. Consider, in this connection, the special mention of "intentional trespass to the person" in s. 1(3) of the Courts Act 1988 (right to jury trial maintained for "action where the damages claimed consist only of damages for false imprisonment or *intentional* trespass to the person or both [my emphasis]"); Baker J's view in *PR* (n 45) at [23] that "the essence of a claim for assault and battery and trespass to the person is the intentional infliction of injury to that person"); Hogan J's characterisation of the tort of battery as an intentional tort (on which characterisation the argument over contributory negligence turned) in *Savickis v Governor of Castlereagh Prison (No. 1)* [2016] IECA 310; Peart J's holding in *Devlin v Minister for Justice* [2008] IEHC 12, after citing *Stubbings v Webb* [1993] AC 498 that "assault is a separate cause of action to an action based on negligence, or as it was originally described 'on case'. The distinction lies in the fact that in the one case there is a deliberate intention to cause the injury. In the other such an intention need not exist'.

⁴⁷ *Re a Ward of Court (No. 2)* [1996] 2 IR 79 (SC) 156 (Denham J): "The consent which is given by an adult of full capacity is a matter of choice. It is not necessarily a decision based on medical considerations. Thus, medical treatment may be refused for other than medical reasons, or reasons most citizens would regard as rational"; *Schoendorff v Society of New York Hospital* 211 NY 125 (1914) (Cardozo J): "Every human being of adult years and sound mind has a right to determine what shall be done with his own body".

⁴⁸ Consider the emphasis placed on false imprisonment's nature as a strict liability tort in the characterisation of it as an adequate realisation of the constitutional right to personal liberty: *DF v Commissioner of An Garda Síochána (No. 3)* [2014] IEHC 213 [22] (Hogan J).

⁴⁹ *Watson, Laidlaw & Co Ltd v Pott, Cassels and Williamson* (1914) 31 RPC 104, 119 (Lord Shaw): "If A, being a livery man, keeps his horse standing idle in a stable, and B, against his wish or without his knowledge, rides or drives it out, it is no answer to A for B to say: 'Against what loss do you want restored? I restore the horse. There is no loss. The horse is none the worse; it is better for the exercise'".

we saw above. In committing them, D (standardly) *intends* to touch, stand on, or hold some object of P's property,⁵⁰ even if D reasonably thought the object of property was D's rather than P's, and so could not be said to have intended to deprive P, or anyone at all, of it.⁵¹

Because P is entitled to determine the purposes they set and pursue with their means, then, D is prohibited from determining those purposes in P's place, by using P's means for their own purposes.

2.3.3. *Damaging*

One person damages another person's means where they render those means in themselves less usable; that is, less apt for the pursuit of purposes. There are many purposes for which a body deprived of an arm, a German book deprived of all its chapters on verbs, or a house blown to smithereens could formerly have been used that it now cannot be. Damaging your means is therefore another way in which I can determine the purposes for which those means are used, even without using them myself. If I render some means of yours less usable, I have made it so there are fewer purposes *you* can use your means to pursue. My pursuit of my purpose has, to that extent, compromised your pursuit of yours.

As such, if you are to be entitled not to have the purposes you pursue determined for you by others, others must be under certain duties not to damage those means through which you are entitled to pursue purposes. At the same time, they could never be under an *absolute* or *strict* duty to refrain from damaging to your means, consistent with *their* own status as their own master. Such an absolute or strict duty would amount, in substance, to a duty not to pursue any purpose at all: "risk is an unavoidable concomitant of human action" because, "[a]lthough action is the attempt to realize some purpose that the actor sets, it takes places

⁵⁰ In this jurisdiction, there is very limited authority indeed for the wrongfulness of *unintentional* trespass to property: the result, if not the reasoning, in *ESB v Hastings & Co Ltd* [1965] Ir Jur 51 is easily intelligible in terms of the tort of *negligence* rather than trespass to goods; similarly Shanley J's comment in *RDS v Yates* [1997] IEHC 144 that "the intrusion [in trespass to land] may be intentional or it may be negligent" is clearly obiter.

⁵¹ *Farrell v Minister for Agriculture and Food* (HC, 11 October 1995); *Wilson v Lombank* [1963] 1 WLR 1294.

in a world that is not completely within the actor's control".⁵² To require each of us, in using our means, "to take account of that of which no account can be taken"⁵³ and avoid imposing any risk of damage on others would leave us constrained not to make use of any means at all.⁵⁴ Just like the polar opposite position – on which we would each be permitted to destroy others' means at will, so long as we didn't *use* those means – it is irreconcilable with our standing as self-determining agents, reciprocally free to make our own way in the world through action. If we are to be entitled to make use of any means at all, we must be entitled to impose risks on others that are the "inevitable concomitant" of any such use.⁵⁵

Once these two extreme positions are excluded, we are left with a more attractive one on which D is entitled as against P to make use of their own means – and so invariably to create *some* risk of damaging P's means as a side-effect – but only insofar as that entitlement can co-exist with a like entitlement for P. That imposes a requirement on D to moderate their conduct in light of its potential side-effects on P's means. Some conduct creates risks to the security of P's means that exceed whatever is made inevitable by D's entitlement to use theirs: its characteristic dangerousness brings it outside the bounds of normal "give and take [and] live and let live" that must organize D and P's relationship if they are each to make their own way in the world.⁵⁶ If damage to P's means results from the realization of such risks, P's choice has been subordinated to D's. D and P's rights to use means must therefore limit themselves as part of a system; their capacities for free

⁵² Weinrib, *The Idea of Private Law* (n 13) 151.

⁵³ Ripstein, *Private Wrongs* (n 7) 89.

⁵⁴ Sandy Steel's response to this argument, as made by Ripstein, is unsuccessful. He says: "The argument relies on the premise that our freedom over our bodies would be impermissibly constricted if the ordinary use of our means were *prohibited*. [But we need not posit such a prohibition because we might argue] that the imposition of ordinary risks is entirely permissible – except and until it materializes in physical injury...[So,] strict liability for harm does not entail a duty not to use one's means for ordinary purposes". Steel, 'Saving Private Wrongs' (n 29) 9-10. The correct response here is to concede the point – i.e. to concede that strict liability for harm does not entail a duty not to use one's means for ordinary purposes – but to say that strict liability for harm is just as objectionable, and objectionable for the same reasons, as would be a duty not to use one's means for ordinary purposes. This is because if it were impermissible for X not to make good all harm X caused to Y if Y demanded it, regardless of the sort of conduct which resulted in the harm (i.e. if X was liable to Y for harm caused to Y by any use X made of their means) Y *would* be entitled (albeit retrospectively, by activating the liability) to constrain X not to make any use their means, even though that entitlement would only be triggered in cases where harm happened to be caused. That the entitlement is conditional in this way is irrelevant from the perspective of the non-subordination principle: one person cannot have an entitlement (however conditional) to determine the purposes for which another's means are used, unless that entitlement is itself required for the reciprocal non-subordination of both (as are, for instance, legal powers to enforce compensatory duties).

⁵⁵ Ripstein, *Private Wrongs* (n 7) 103.

⁵⁶ *Bamford v Turnley* (1862) 3 B & S 66, 83-84 (Bramwell B).

purposiveness reconciled without subordinating either of their pursuit of purposes to the others. The common law effects such a reconciliation primarily through the law of negligence (in relation to bodies and property) and nuisance (in relation to property). Those bodies of law are variously organized in terms of indeterminate, connected ideas of “reasonable care”,⁵⁷ “reasonable user”,⁵⁸ “reciprocity”,⁵⁹ “neighbourliness”, and so forth.⁶⁰ In authoritatively working out the constraints these abstract ideas impose on our use of means, the law carves out a space in which persons can use what is theirs in pursuit of their own self-chosen purposes, compatibly with others’ also doing so. The wrong’s completion nonetheless always requires actually *damaging* another’s means – rendering those means less usable for the pursuit of purposes – just because D’s unneighbourliness “in the air” subordinates no one: absent the realization of damage to P’s means, P’s capacity to set and pursue purposes by taking up those means remains intact.⁶¹

2.3.4. *Frustrating*

I frustrate your purposes wherever I make it more difficult for you to achieve them. Whilst I might frustrate your purposes by subordinating you, I need not subordinate you to frustrate your purposes. Conversely, I might subordinate you without frustrating any particular

⁵⁷ *Donoghue v Stevenson* [1932] AC 562.

⁵⁸ *Cambridge Water Co v Eastern Counties Leather plc* [1994] 2 AC 264, 299 (Lord Goff).

⁵⁹ *Fearn v Board of Trustees of the Tate Gallery* [2023] UKSC 4 [34]-[35] (Lord Leggatt): “Put negatively, people cannot fairly demand of others behaviour which they would not at the same time allow others to demand of them”; *Southwark London Borough Council v Tanner* [2001] 1 AC 1, 20 (Lord Millett): “The governing principle is good neighbourliness, and this involves reciprocity. A landowner must show the same consideration for his neighbour as he would expect his neighbour to show for him”; Christopher Essert, ‘Nuisance and the Normative Boundaries of Ownership’ (2016) 52 *Tulsa Law Review* 85, 103-6; Ernest Weinrib, *The Idea of Private Law* (n 13) 190-6.

⁶⁰ For a formulation from the *plaintiff’s* perspective, vis-à-vis the law of nuisance: *Hanrahan v Merck, Sharp & Dohme (Ireland) Ltd* [1988] IRLM 629 (SC) 634 (Henchy J): “[W]hat an occupier of land is entitled to as against his neighbour, is the comfortable and healthy enjoyment of the land to the degree that would be expected by an ordinary person whose requirements are objectively reasonable in all the particular circumstances”.

⁶¹ *Palsgraf v Long Island Railroad Co* (1928) 248 NY 339 (Cardozo J); *Wagon Mound (No. 1)* [1961] AC 388, 425 (Viscount Simonds); Ripstein, *Private Wrongs* (n 7) 87-88: “The basic case of a damage-based tort is the case of a completed wrong, that is, the case in which one person damages what belongs to another through the use of means in ways that characteristically cause that type of damage. As always, the wrong consists in the inconsistency of the defendant’s act with the plaintiff’s right. Provided that the plaintiff’s means survive intact, there is no inconsistency between the defendant’s act and the plaintiff’s right to his or her means, regardless of how badly the defendant behaves in relation to some more general standard of conduct...Negligence always involves the realization of a specific risk to the plaintiff created by the defendant in an injury suffered by the plaintiff. The wrong is the completed act of the form defendant-injuring-plaintiff-through-the-negligent-use-of-defendant’s-means”.

purpose of yours, as when I detain you whilst you sleep without you ever finding out,⁶² or whilst you are anyway too sick to move from where you are being detained.⁶³ Subordination is wrongful in itself, frustration is not.

By deciding to turn up at your audition or job interview – applying for the same role with my superior qualifications – I frustrate your purpose of being hired. I make it more difficult for you to achieve what you set out to achieve. Similarly if I entice your customers away by offering them better products at lower prices, if I write an unflattering review of your restaurant on TripAdvisor, if I refuse to employ you, if I cause your corner shop to lose business by moving house, if I stop you from seeing me by staying indoors, if I elect not to tell you a secret about which you are desperately curious, if I do not give you permission to come into my home, or if I decide not to perform your root canal for you (or decline to allow you to practise your root canal skills on me).

In none of these cases do I subordinate you: *I* do not determine the purposes any of your means are used to pursue. That decision still lies with you. You *can* still pursue your purpose of being hired; turning up for the audition and giving it your best shot, despite the fact my decision has made your odds (perhaps impossibly) long. Your capacity to decide what purpose to pursue and how is left intact. All I have done is altered your prospects of successfully *achieving* what you set out to achieve, by altering the circumstances in which you pursue your purposes. Granted, to the extent your decisions about what purposes you pursue are sensitive to your (perceived) prospects of success, I am likely to have a causal influence on the decision that you make about what purposes you use your means to pursue. But it is still you, rather than me, deciding. As such, your choice is not subordinated to mine. Our interaction remains consistent with our reciprocal independence from one another.

As these examples indicate, other persons frustrating your particular purposes will often leave you worse off than you might have been otherwise, perhaps to a significant degree. But the non-subordination principle does not entitle anyone to insulation from being left worse off, just as such: it only prohibits others determining the purposes we pursue with

⁶² *Meering v Graham-White Aviation Co Ltd* (1919) 122 LT 44.

⁶³ *Grainger v Hill* (1838) 132 ER 769.

what is ours, *irrespective* of whether such determination is harmful or harmless along some other dimension. That prohibition does not depend on the content of anyone’s particular purposes; on whether they are trivial or noble, universal or idiosyncratic, extravagant or borne of natural necessity, etc. As such, even if your purpose is far from trivial – indeed, even if it is *central* to your well-being – I will not subordinate you by frustrating it. You cannot, consistently with my status as my own master, require me to use my means so as to accommodate your achievement of your particular purposes. If I pass you drowning in a shallow pool from which I could easily rescue you, I do not subordinate you if I elect to walk on by, thus frustrating your particular purpose of surviving unscathed.⁶⁴ Similarly, if I cause you devastating economic loss through negligently damaging your suppliers’ property, but without determining any of the purposes pursued with means to which you had an antecedent right.⁶⁵ Indeed, owing to the centrality of the distinction between determination and frustration to the non-subordination principle’s application, that principle cannot properly be conceived as a norm about well-being, at least not in full generality. This apparent austerity leaves it well-positioned to account for cases where our law of horizontality’s indifference to well-being would otherwise seem puzzling.

Nor, for the same reason, is the non-subordination principle a norm about *autonomy*: that is, about persons having the capacity to make choices from a wide range of (valuable) options that are genuinely guided by their own commitments and values.⁶⁶ Whilst the constraints it implies for interpersonal affairs might have the effect of safeguarding a sphere of autonomous discretion for every person,⁶⁷ its force is not grounded in any non-relational value there might be in persons having such a sphere. Indeed, the examples of frustration above might all be cast as injuries to autonomy; but none of them involve subordination. As your own master, you are under no general obligation to use your means for the particular purpose of making a wider range of choice-worthy options available for another

⁶⁴ On which, see Arthur Ripstein, ‘Three Duties to Rescue: Moral, Civil, and Criminal’ (2000) 19 *Law and Philosophy* 751; *UCC v ESB* [2020] IESC 38 [7.7] (Clarke J) (on the “do no harm” principle in the tort of negligence).

⁶⁵ *Glencar v Mayo County Council (No. 2)* [2001] IESC 64.

⁶⁶ Joseph Raz, *The Morality of Freedom* (Oxford University Press 1988) 369-99; David Enoch, ‘Autonomy as Non-Alienation, Autonomy as Sovereignty, and Politics’ (2022) 30(2) *The Journal of Political Philosophy* 143.

⁶⁷ On the difficulties of conceiving of private rights as “discretionary spaces”: Arthur Ripstein, ‘Embodied Free Beings under Public Law: A Reply’ in Sari Kisilevsky and Martin J Stone, *Freedom and Force: Essays on Kant’s Legal Philosophy* (Hart Publishing 2017), responding to the formulation in Japa Pallikkathayil, ‘Persons and Bodies’ (in the same volume).

person. Nor does the non-subordination principle prohibit you, just as such, from closing off options others might have autonomously chosen: you are prohibited only from determining the purposes they pursue with what is theirs, whether directly (*using*) or indirectly (*damaging*).

2.4. NON-SUBORDINATION, PRIVATE LAW, AND THE CONSTITUTION

2.4.1. *Determinacy and Vindication*

As just presented, the non-subordination principle is an abstract moral idea about what free, equal, and independent persons can require of one another. Existing Kantian theories of private law present the common law of torts, contract, and property as a realization, expression, specification, or determination of this moral idea; mediated and administered by public institutions.⁶⁸ Private law emerges as one avenue, amongst others, through which public institutions authoritatively secure each persons' rightful standing as their own master in their interpersonal relations.

The above discussion of use-based and damage-based common law wrongs gives a preliminary indication of the form such arguments take. By articulating and applying the positive norms of private law, the thought goes, courts make it possible for private persons to relate to one another on the right moral footing. Put differently, courts specify and secure the various horizontal entitlements *already* implied by private persons' respective status as their own masters. On this picture, courts do not (and ought not) use the adjudication of a horizontal dispute primarily as a fortuitous opportunity to pursue collective objectives they might consider valuable. In a constitutional democracy like our own, such an approach to adjudication would (at least often) raise concerns about usurping the proper role of an elected legislature.⁶⁹ But the present point is different: such a public-oriented approach

⁶⁸ Christopher Essert, 'Thinking Like a Private Lawyer' (2018) 68(1) The University of Toronto Law Journal 166. On how labelling the Kantian position a "corrective justice" view risks confusion: Nicholas McBride, *The Humanity of Private Law – Part I: Explanation* (Hart 2019)

⁶⁹ *ICS Building Society v Grant* [2010] IEHC 17 (Charleton J): "Under the Constitution, the courts adjudicate on disputes. Contrary to perceptions that might arise from the rare occasions when legislation is declared to be unconstitutional, the courts have no law-making powers"; *Flynn v Breccia* [2015] IEHC 547 [248] (Haughton J): "While the courts may become concerned with the 'the exigencies of the common good,' establishing the principles of social justice are matters for the legislators (the Oireachtas, and within the terms of the various EU Treaties, the European Union) rather than the judiciary"; *BL v ML* [1992] 2 IR 77 (§4.5.8).

would also fail to give one or other of the parties her *due* as against the other. Thus, courts' concern must instead be to do justice between the parties before them; to elaborate "[w]hat is due to an individual from another individual...from a relationship arising from their mutual dealings".⁷⁰ The non-subordination principle is an idea of what justice in such relationships requires. Again, on a Kantian view, courts are tasked with conscientiously drawing that idea's implications out, and applying them to the resolution of particular disputes between private persons. Their doing so makes the reciprocal non-subordination of private persons possible where it would not be otherwise.

Two aspects of this task, and its necessity, are worth emphasising for our purposes.

First, by elaborating private law doctrines, and exercising judgment in applying those doctrines to particular cases, courts render the abstract idea of non-subordination *more precise*. This makes it possible for that idea to determinately govern interactions between persons, so that those persons can interact "on the basis of a common set of restrictions on freedom".⁷¹ In itself, the non-subordination principle is far too abstract to determinately categorise all particulars, even though it governs them. Consider, illustratively, the prohibition on using another person's body. There are clear cases: rubbing someone's bald head to satisfy your curiosity as to the noise it makes, say, or locking someone in your basement to perform medical experiments on them. Other cases are less clear, and no single characterization of them will be clearly preferable. Do I make use of your body if I intentionally strike the horse you are sitting on, and it then throws you to the ground?⁷² How about if I touch (only) your clothes (whilst you are wearing them)?⁷³ Absent further specification of what "using" your body amounts to, reasonable people might disagree over how these situations are best characterised.⁷⁴ The same goes for "damage-based"

⁷⁰ *O'Reilly v Limerick Corporation* [1989] ILRM 81 (HC) 195 (Costello J).

⁷¹ Weinrib, *Dimensions of Dignity* (n 12) 48.

⁷² The common law, fully intelligibly, says yes (though a different resolution of the ambiguity is imaginable): *Dodwell v Burford* (1670) 1 Mod 24, 86 ER 703. See, similarly, *Hooper v Reeve* (1817) 7 Taunt 698, 699 (D's carriage hits a second which hits a third, which results in P being injured); *Fisher v Carrousel Motor Hotel, Inc* 424 SW 2d 627 (Tex, 1967) (D's grabbing a plate P was holding at a buffet lunch could constitute trespass).

⁷³ The common law says yes: *Humphries v Connor* (1864) 17 Ir CLR 1 (QB); *Corcoran v W & R Jacob & Co* [1945] IR 446.

⁷⁴ Further, reasonable people might disagree whether reasonable people *would* disagree over how these cases ought be characterized. Perhaps my examples are bad ones. More likely (I hope), the disagreement reflects *second-order* or *higher-order* indeterminacy (indeterminacy over whether the classification of a particular case under a general partially indeterminate category is itself determinate or indeterminate),

wrongdoing: absent further specification, there is no clearly correct answer to the question of which risks exceed the ordinary bounds of give and take; and so no clearly correct answer to the question of what instances of D damaging P's means will be wrongful. If the idea of non-subordination is to govern our interaction, we need *some common answer* to these questions.

In our legal system, courts play a role in authoritatively providing such common answers. They do so over time, and in the context of deciding particular disputes. By the operation of *stare decisis*, this leads to the gradual development of judge-made norms of positive law – norms that will *themselves* need specification. But through it all, non-subordination can be seen as the idea that “lies at the apex of [this] system of nested abstractions and determinations”.⁷⁵ This system allows for disputes to be resolved in terms of the idea of non-subordination, suitably specified, consistently with each person's standing as their own master. In this connection, courts' status as *public* institutions is essential: no *private* person could have the unilateral authority to impose any of their preferred specifications on other private persons, because no one else could be obligated to accept them.⁷⁶ Courts are differently positioned only because they do not represent any particular private purpose, and are instead charged and empowered to act in the name of everyone.⁷⁷

Secondly, courts have the authority to impose binding resolution on all legal disputes between private persons, including by ordering enforceable *remedies* for wrongs. Again, this authority must depend on courts' status as public institutions. No wholly *private* person could ever, just by their say so, unilaterally obligate another private person to accept its preferred resolution to a dispute between the two of them.⁷⁸ This means that in a legal dispute between private persons, each party is entitled to insist as against the other on its own view of the rights and wrongs of the situation, and is not required to yield. But if

which second-order indeterminacy also invites (inevitably partial) resolution by rules. On second-order vagueness: Rosanna Keefe, *Theories of Vagueness* (Cambridge University Press 2000) 31-6. As he acknowledges, the discussion in Frederick Schauer, ‘Second-Order Vagueness in the Law’ in Geert Keil and Ralf Poscher (eds), *Vagueness and Law: Philosophical and Legal Perspectives* (Oxford University Press 2016) employs a wholly different (and non-standard) sense of second-order vagueness.

⁷⁵ Weinrib, *Reciprocal Freedom* (n 3) 7.

⁷⁶ Ripstein, *Force and Freedom* (n 1) 145-81.

⁷⁷ Thomas Sinclair, ‘The Power of Public Positions: Official Roles in Kantian Legitimacy’ in David Sobel, Peter Vallentyne, and Steven Wall (eds) *Oxford Studies in Political Philosophy*, vol. 4 (Oxford: Oxford University Press, 2018).

⁷⁸ To repeat the point, none of us “has, simply by birth, either the right to command others or the duty to obey them”: Ripstein, *Force and Freedom* (n 1) 36.

neither private party to a legal dispute can be obligated to yield to the other's preferred resolution, whether their dispute can be resolved rightfully will depend on their respective preferences, appetites for conflict, etc. The solution to this prospect of deadlock is the judicial authority to impose a resolution on private disputes, that tracks both parties underlying rights, and that both parties are bound to accept.

On this ground, courts are empowered to order enforceable remedies for past, anticipated, or ongoing wrongs of subordination. On the picture under consideration, ordering such remedies *also* involves elaborating “[w]hat is due to an individual from another individual...from a relationship arising from their mutual dealings”.⁷⁹ The object of courts’ remedial jurisdiction is just to come as close as possible to giving P that to which they anyway had a pre-existing right against D, rather than to pursue some other (public) objective such as efficient loss-spreading, deterrence, and so on. In that sense, remedial courts orders against D function to *vindicate* P’s underlying rights. They are adequate insofar as they continue, instantiate, manifest, realise, substitute for, embody, or make material P’s underlying right against D, to the extent now possible in the circumstances of anticipated, ongoing, or past subordination. As such, the content of the duty D acquires by way of permanent injunction tends merely to replicate that of the duty they already owed to P.⁸⁰ Similarly, damages seek, at least in the first instance, to put the plaintiff in the position they would have been in had the wrong not occurred.⁸¹

⁷⁹ *O’Reilly* (n 70) 195 (Costello J).

⁸⁰ See Stephen A. Smith’s notion of a “replicative” order, examples of which include (uncontroversially) “specific performance orders, most injunctions, orders for a sum due, and orders for the recovery of land or other property”: *Rights, Wrongs, and Injustices* (Oxford University Press 2019) 97-8. Along with Goldberg and Zipursky, Smith prominently rejects the thought that *damages* orders might be replicative: Stephen A. Smith, ‘Duties, Liabilities, and Damages’ (2011) 125 *Harvard Law Review* 1727; Goldberg and Zipursky, *Recognizing Wrongs* (n 24) 154-163. Much the better view is that they are: Sandy Steel and Robert Stevens, ‘The Secondary Legal Duty to Pay Damages’ (2020) 136 *Law Quarterly Review* 283; John Gardner, ‘Damages Without Duty’ (2019) 69 *University of Toronto Law Journal* 412; Ripstein, *Private Wrongs* (n 7) 263-87.

⁸¹ *Livingstone v Raywards Coal* (1880 5 App Case 25, 38; *Kelleher v O’Connor* [2010] IEHC 313 at [9.1]. On the position in relation to constitutional torts: *Meskeil v CIE* [1973] IR 121 (SC) 136 (Walsh J); *Cotter v Ahern* [1976-1977] ILRM 248; *McHugh v Commissioner of An Garda Síochána* [1986] IR 228; *Kennedy and Arnold v Ireland* [1987] IR 587; *Conway v. Irish National Teachers Organisation* [1991] 2 IR 305, 317 (Finlay CJ); *Walsh v Ireland* [1994] WJSC-SC 4279; *Healy v Minister for Defence* [1994] WJSC-HC 3029; *Gulyas v Minister for Defence* [2001] 3 IR 216; *O’Donoghue v Legal Aid Board* [2004] IEHC 413; *Herrity v Associated Newspapers (Ireland) Ltd* [2009] 1 IR 316; *Raducan v Minister for Justice* [2012] ILRM 419; *Sullivan* (n 20); *GC v Director of Public Prosecutions* [2012] IEHC 430; *Nash v DPP* [2016] IESC 60. For Kantian ‘continuity’ theories of (compensatory) damages, on which compensatory duties reflect the continuity of the right/duty in the face of its violation, see: Arthur Ripstein, ‘As If It Had Never Happened’ (2007) 48 *William & Mary Law Review* 1957; Ernest J. Weinrib, *Corrective Justice* (Oxford University Press 2012) 91. On a subtly (albeit importantly)

In these two connected ways – by (a) providing determinacy to private persons’ entitlements against subordination; and (b) securing vindication of those entitlements – courts adjudicating horizontal disputes contribute to the non-subordination principle’s realization.

2.4.2. *Non-Subordination as Constitutional Principle*

My concern in this thesis is *not* to defend the foregoing picture of private law in its full generality. I make a far narrower claim: the non-subordination principle can account for the significance *constitutional* rights have had for horizontal legal relations in our legal system. How so?

In the first place, I will argue that the constitutional duties private persons owe one another are duties of non-subordination: they prohibit private persons from *determining* the purposes another private person pursues with their rightful means. They do not prohibit private persons merely from frustrating others’ purposes. Nor do they prohibit private conduct on account of its harmful social or political effects. They prohibit subordination. Put from the opposite direction, you have a general *constitutional claim-right* that other private persons not determine the purposes you pursue with your rightful means. That general claim-right decomposes into several more particular claim-rights, relating to different means and different ways the purposes for which they are used might be determined for you. In turn, the non-subordination principle illuminates both (a) why certain means, but not others, are rightfully yours as against other private persons as a matter of constitutional law *and* (b) why certain conduct, but not other conduct, amounts to a constitutionally wrongful interference with those means. In short, by articulating what the Constitution requires of private persons in their interaction *inter se*, Irish courts are well understood as giving “life and reality” to the abstract ideal sketched here.⁸² Further, as we will see, this same ideal can make sense of how and why constitutional rights sometimes

different conception of the continuity of right and remedy, according to which compensatory duties reflect the continuity of the *reasons* underlying the right/duty in the face of its violation: John Gardner, ‘What Is Tort Law For? Part 1. The Place of Corrective Justice’ (2011) 30 Law and Philosophy 1; Sandy Steel, ‘Compensation and Continuity’ (2020) 26 Legal Theory 250.

⁸² *Buckley v Attorney General* [1950] IR 67 (SC) 80 (O’Byrne J).

indirectly impact horizontal legal relations: by constraining state institutions in their articulation, adjudication, and enforcement of private law, but without imposing constitutional duties on private persons directly. In all, I will argue that our horizontality case law indicates that, as a matter of constitutional entitlement, private persons are to be their own master in their relations with others.

Despite relating to private interaction – rather than the constitution and organization of *public* institutions for making, applying, and enforcing law – the entitlement can meaningfully be described as *constitutional* one in at least four related ways. I return to each of them at various points in this thesis.

First, in our legal system, the various horizontal entitlements implied by the non-subordination principle are legally binding and enforceable absent any *sub*-constitutional source or recognition (e.g. in legislation; at common law; via custom, etc). Instead, so far as our horizontal relations are concerned, they are valid purely as “right[s] guaranteed by the Constitution or granted by the Constitution [which] can be protected by action or enforced by action even though such action may not fit into any of the ordinary forms of action”.⁸³ The Constitution, then, provides a sufficient legal basis for those horizontal entitlements’ validity; even if entitlements with the same content might be valid on different grounds in other legal systems, and even if their validity is overdetermined by other sources within our own legal system.

Second, the particular horizontal entitlements implied by the non-subordination principle are *entrenched* against repeal by ordinary legislation. Ordinary legislation that purports to vary them is only valid where such variation is necessary and proportionate in pursuit of a properly public purpose (§3.4).⁸⁴ Of course, “[n]one of the personal rights of the citizen are unlimited: their exercise may be regulated by the Oireachtas when the common good

⁸³ *Meskeil* (n 81) 132 (Walsh J).

⁸⁴ *Heaney v Ireland* [1994] 3 IR 593 (HC) 607 (Costello J).

requires this”.⁸⁵ Nonetheless, legislative interference with them raises a special (not unanswerable) demand for justification.⁸⁶

Third, horizontal entitlements of non-subordination furnish a (non-exhaustive) set of basic ground rules for how *politics is to operate* in our community: because others are entitled to pursue their own self-chosen purposes, we can lawfully persuade them of our cause only by words, not force.⁸⁷ As we look to realize our own conceptions of the (common) good, separately and together, we must leave others’ capacity to pursue their own such conceptions for themselves intact. That is a requirement with a validity independent of ordinary politics: indeed, observance of it is necessary if ordinary democratic politics of the sort envisaged by the Constitution is even to be possible.⁸⁸ The requirement is, in that sense, constitutionally basic: a higher law, and the making (i.e. *constitution*) of the polity that we are.

Fourth, just like vertical constitutional rights, the horizontal rights implied by the non-subordination principle are, in Henchy J’s terms, “fundamental to the personal standing of the individual...in the context of the social order envisaged by the Constitution”.⁸⁹ That social order, I will suggest, is one where private persons interact with one another on consensual terms, no person unilaterally setting the terms on which they interact with others. As O’Donnell J put it in *NHV v Minister for Justice*, “in its fundamental rights provisions, [the Constitution] is intended to permit, and perhaps encourage, without outside interference, *the development of the human personality in his or her relations with other persons*”.⁹⁰ As this thesis looks to illustrate, there is much to the Irish courts’ consistent

⁸⁵ *Ryan v Attorney General* [1965] IR 294 (SC) 312 (Kenny J); *Murray v Ireland* [1985] IR 532 (HC) 538 (Costello J).

⁸⁶ *The State (O’Flaherty) v Ó Floinn* [1954] IR 295 (SC) 313 (Ó Dálaigh J): “The subject matter of the change being the liberty of the individual I must begin by regarding any curtailment of that liberty as serious”.

⁸⁷ Cicero, *De Officiis* (translated in Walter Miller (tr) *On Duties* (Harvard University Press 1913) 36-7: “For since there are two ways of settling a dispute: first, by discussion; second, by physical force; and since the former is characteristic of man, the latter of the brute, we must resort to force only in case we may not avail ourselves of discussion”; Ripstein, *Kant and the Law of War* (n 7) 1-32, 108-10; *Coughlan v Broadcasting Complaints Commission* [2000] 3 IR 1 (SC) 44 (Barrington J): “A distinguishing feature of a democratic society is that political leadership rests, not on power, but on persuasion”.

⁸⁸ This thought gives one sense to the question asked by Kenny J in *Ryan* (n 85) (SC) 310: “Article 5 declares that Ireland is a democratic State and what can be more important in such a State than the personal rights of the citizens?”.

⁸⁹ *McGee v Attorney General* [1973] IR 284 (SC) 325 (Henchy J).

⁹⁰ *NHV v Minister for Justice* [2017] IESC 35 [15] (O’Donnell J).

view that such self-determination requires more than restrictions on the arbitrary or capricious use of *public* power. The Constitution prohibits despotism in service of sovereignty, always and everywhere, both small-scale and writ-large.

3. CONTINUITY

3.1. INTRODUCTION

3.1.1. *On the Cards; Not Wild Cards*

This chapter investigates the possibility of reconciling the two most conspicuous general features of the Irish law of horizontality. Both features have been the object of independent criticism, and their co-existence might be thought surprising.

First, as a matter of *structure*, Irish law embraces a robust, thoroughgoing form of horizontality. Private persons owe certain enforceable constitutional duties to one another (*direct horizontality*). Further, constitutional rights can bear on horizontal relations indirectly, by reason of the *State's* constitutional duty to respect, defend, and vindicate constitutional rights by its laws (*indirect horizontality*). As a threshold matter, constitutional rights are thus apt to govern the conduct of all persons (private and public) and to condition the content of all law (private and public, judge-made and legislated).

Second, as a matter of *substance*, Irish courts have seldom found that constitutional rights require modifying the content of horizontal legal relations. Instead, they have consistently held that, just as it is, the common law of torts, contract, and property constitutes a “basically effective” implementation of constitutional rights in the horizontal domain.¹ The Constitution therefore leaves this inherited body of doctrine substantially intact, unaltered, undisturbed.

In this way, our law in this area embodies a *radicalism of structure* and *conservatism of substance*. Owing to the radicalism of structure, there is a sense in which resort to constitutional rights is always “on the cards” in private legal disputes. But owing to the conservatism of substance, constitutional rights are very far from “wild cards which can be

¹ The language of “basic (in)effectiveness” has its source in *Hanrahan v Merck Sharp & Dohme (Ireland) Ltd* [1988] ILRM 629, 636 (Henchy J). See, further, §3.2.4.

played at any time to defeat all existing rules”.² In fact, in private legal relations, they have seldom defeated *any* existing rules.

3.1.2. *A Sceptical Challenge*

It is tempting to see these two aspects of our law as strange, even irreconcilable, bedfellows; cobbled inelegantly together only by an accident of history.³

Indeed, the early cases establishing horizontality’s *structural* possibility were typical products of the Supreme Court’s swashbuckling judicial activism of the 60s and early 70s. General principles were announced confidently, without caveat, “almost without argument”,⁴ and with little concern to locate any firm “root of title in the text or structure of the Constitution”.⁵ Plausibly, this reflected a more general nationalist eagerness on the part of our judiciary to “de-anglicize” our private law: to weave an indigenously *Irish* private law out of constitutional cloth.⁶ Such was the spirit of the age that, writing in 1976, Professor Robert Heuston speculated that nominate private law claims in tort and contract

² In Barrington J’s memorable phrase: *McDonnell v Ireland* [1998] 1 IR 134, 148 (Barrington J).

³ Though the scholarly literature on the point remains limited, I take it to be something like the prevailing academic assessment of the present state of Irish law of horizontality that its development has proved incoherent, both with its radical starting point and within itself: Martin B. Margulies, ‘Standards of Review and State Action Under the Irish Constitution’ (2002) 37 *Irish Jurist* 23; Colm O’Cinneide, ‘Taking Horizontal Effect Seriously: Private Law, Constitutional Rights, and the European Convention of Human Rights’ (2003) 4 *Hibernian Law Journal* 77; Donal O’Donnell, ‘A Comparison of Article 6 of the European Convention on Human Rights and the Due Process Requirements of the Constitution of Ireland’ (2004) 4(2) *Judicial Studies Institute Journal* 37, 55; Colm O’Cinneide, ‘Irish Constitutional Law and Direct Horizontal Effect - A Successful Experiment?’ in Dawn Oliver and Jörg Fedtke (eds), *Human Rights in the Private Sphere: A Comparative Study* (Routledge-Cavendish 2007); William Binchy, ‘Meskill, The Constitution and Tort Law’ (2011) *Dublin University Law Journal* 339; Aoife Nolan, ‘Holding Non-State Actors to Account for Constitutional Economic and Social Rights Violations: Experiences and Lessons from South Africa and Ireland’ (2014) 12(1) *International Journal of Constitutional Law* 61, 93; Bryan E. McMahon and William Binchy, *Law of Torts* (4th edn, Bloomsbury Professional 2013) [1.45]-[1.124]; William Binchy, *Tort Law in Ireland: A Half-Century Review* (2016) 56 *Irish Jurist* 199, 202-206; Gerard Hogan, ‘Mr Justice Brian Walsh – The Legacy of Experiment and the Triumph of Judicial Imagination’ (2017) 57 *Irish Jurist* 1, 6; Gerard Hogan, ‘The Farthest – December 1972’ (2019) 62 *Irish Jurist* 1; Gerard Hogan, Gerard Whyte, David Kenny, and Rachael Walsh, *Kelly: The Irish Constitution* (5th edn, Bloomsbury Professional 2018) [7.1.169]. Cf. Sibio Banda, ‘Taking Indirect Horizontality Seriously in Ireland: A Time to Magnify the Nuance’ (2009) 31 *Dublin University Law Journal* 263.

⁴ O’Donnell, ‘A Comparison’ (n 3), 55; Donal O’Donnell, ‘The Sleep of Reason’ (2017) 40 *Dublin University Law Journal* 191, 196; *McGee v Governor of Portlaoise Prison* [2023] IESC 14 [48] (O’Donnell CJ).

⁵ *Friends of the Irish Environment v The Government of Ireland* [2020] IESC 49 [8.6] (Clarke J).

⁶ Gerard Hogan, ‘Irish Nationalism As A Legal Ideology’ (1986) 75(300) *Studies: An Irish Quarterly Review* 528, 533.

might soon be replaced by some innominate constitutional claim for “infringement of personal rights”.⁷

Nothing of the sort occurred. Later judicial treatments of horizontality are notable primarily for their caution. They show signs of a long hangover from earlier heady days. Renewed distaste for “judicial legislation” prompted unease with the sweeping principles announced during that earlier, muscularly activist, period.⁸ At the same time, it made those principles’ wholesale abandonment unattractive: such abandonment *itself* being uncomfortably “legislative”. This being so, courts tried to limit those principles’ disruptive potential whilst purporting to apply them. And whatever about their nationalist predilections, it soon became clear that Irish judges’ familiarity with the common law had inculcated sympathy for its values and characteristic patterns of thought.⁹ Downstream, this sympathy both (a) obscured common law defects from judicial view; and (b) discouraged sweeping, constitutionally-inspired innovation even where such defects *were* identified.¹⁰

We might think that the resulting doctrine couldn’t hope to be anything more than the ad-hoc, pragmatic, circumspect qualification of an ambitious, foolhardy, or even baldly ideological judicial adventure: the incoherent product of conflicting judicial impulses, lacking any unifying principle(s) of organization. In light of the doctrinal trajectory just traced, we would be resigned to thinking that “the only interpretive theory of [this body of]

⁷ Albeit whilst emphasising that it was “impossible to predict how the law [would] develop”: Robert F.V. Heuston, ‘Personal Rights under the Irish Constitution’ (1976) 11(2) *Irish Jurist* 205, 222.

⁸ On this dynamic more generally, Oran Doyle, *The Constitution of Ireland: A Contextual Analysis* (Hart 2018) 165-71.

⁹ Gerard Hogan, ‘Harkening to the Tristan Chords: the Constitution at 80’ (2017) 40 *Dublin University Law Journal* 71, 80 (“the judiciary’s hidden love of the common law”); Hogan, ‘The Farthest’ (n 3), 19 (its “secret love of the common law”).

¹⁰ There is another important factor here: even where courts *did* identify some problem in the common law they might have been minded to fix, they were not required to reach for the Constitution to effect the repair-job. To the extent the effect of constitutional rights reasoning on the substance of our private law is less robust than it has been in, say, Germany or South Africa, this might explain why: whilst specialist constitutional courts can only modify private law doctrine on constitutional grounds (their jurisdiction being confined to constitutional issues), a court of general jurisdiction in a common law system can properly articulate some alternative basis for a desired modification, that might intelligibly be framed in constitutional rights terms. The point is made several times in Jud Matthews’ magisterial comparative study of the law of horizontality in Germany, Canada, and the United States: *Extending Rights’ Reach* (Oxford University Press 2018). See, too, Binchy, ‘A Half-Century Review’ (n 3), 204: “The truth of the matter appears to be that *Meskeil* has not, in the main, attracted the substantive philosophical support of the Irish judiciary, who prefer to look to other common law jurisdictions for the lead in developing Irish tort law”.

law faithful to its object must be one profoundly sceptical of its coherence”.¹¹ Here, as elsewhere, the possibility of the law’s incoherence should trouble us, and not out of any fetishism for tidiness. It should trouble us because of the tight connection between coherence and justification: to conclude that a body of law is comprised of incoherent parts, properly irreconcilable in principle, is to conclude that it is incapable of reasoned justification.¹²

3.1.3. *Continuity and Non-Subordination*

In this thesis, I offer a rosier picture. I claim not only that there is some coherence to Ireland’s law on horizontality, but that this body of law coheres around a moral principle that is familiar, intuitively appealing, and rich in implication: *no one is rightfully the subordinate of anyone else* (§2.2). Where other considerations fail, that principle can systematically account for an array of particular significances constitutional rights have had for private persons’ legal relations in our legal system, whilst also accounting for the limits of that significance.

In this chapter, I begin that argument in earnest.

I do so by considering how our legal system’s commitment to a *structurally* robust form of horizontality might be consistent with the limited impact constitutional rights have had on the *substance* of private persons’ legal relations. My contention will be that these two aspects of our law are not strange bedfellows, but component parts of a unified whole. Constitutional rights are “on the cards” in horizontal legal relations just because the Constitution insists that private persons are not one another’s subordinates: that much is “fundamental to the personal standing of the individual in the context of the social order

¹¹ Alan Brudner, *The Unity of the Common Law* (University of California Press 1995) 5.

¹² Here, I have in mind “coherence” only in the weak sense of non-contradiction – a contradictory body of law is one incapable of reasoned justification because, to justify it, one would be driven to accept a proposition and its negation: Stephen Smith, *Contract Theory* (Clarendon 2004) 7-32. For illuminating treatments of the relationship between justification and (different notions of) coherence as it pertains to law: Neil MacCormick, ‘Coherence in Legal Justification’ in Aleksander Peczenik, Lars Lindahl, and Bert van Roermund (eds), *Theory of Legal Science* (Reidel 1984); Neil MacCormick, ‘Reconstruction After Deconstruction: A Response to CLS’ (1990) 10(4) *Oxford Journal of Legal Studies* 539; Ernest Weinrib, *The Idea of Private Law* (2nd edn, Oxford University Press 2012) 39-42; Roderick Bagshaw, ‘Tort Law, Concepts, and What Really Matters’ in Andrew Robertson and Hang Wu Tange (eds), *The Goals of Private Law* (Hart 2009); Joanna Bell, *The Anatomy of Administrative Law* (Hart 2020) 230-7.

envisaged by the Constitution,”¹³ and has been consistently (if usually only implicitly) reflected in our courts’ engagement with horizontality questions. Constitutional rights’ impact on our private law’s substance has been limited for just the same reason: as we started to see in the last chapter, the common law governing horizontal legal relations *already* (imperfectly) reflects just the same idea. Where this is so, constitutional rights’ horizontal operation leaves scarce doctrinal trace, if any. The Irish law of horizontality therefore sees the Constitution play an *evolutionary* role of correcting imperfections in the realization of an ideal already embodied in existing law quite apart from the Constitution. It does not play a revolutionary role of “root and branch” re-organization.¹⁴

As such, this chapter focusses on what I will call cases of *continuity*: cases where constitutional rights have *not* grounded substantive modification in private persons’ legal relations with one another. Only in later chapters do I turn to detailed consideration of those (relatively rare) cases where constitutional rights *have* grounded such modification. Of course, any adequate normative account of this body of law will have to coherently explain both categories of case. I take it that little of substance turns on the order in which the categories of case are considered. The reason for my preferred sequence of argument – putting *continuity* cases first - is simple. In Ireland, horizontality’s precipitation of change in private persons’ legal relations has been the exception; its compatibility with their continuity the overwhelming rule. We understand a phenomenon best through the aspects that are central, rather than exceptional, to it.

3.1.4. Roadmap

The chapter divides into three substantive sections.

Following this introduction, the first section is devoted to doctrinal exposition (§3.2). The two remaining sections are then concerned with normatively accounting for the state of doctrinal affairs sketched in this first section.

¹³ *McGee v Attorney General* [1973] IR 284 (SC) 325 (Henchy J).

¹⁴ *McMahon and Binchy*, (n 3) [1.54].

The second section's contribution to that enterprise is wholly negative (§3.3). I identify certain considerations as insufficient to account for the doctrine presented in §3.2. All of the considerations I examine have found voice somewhere in the horizontality case law and literature, whether international or domestic. Locating the limits of their explanatory power helps identify the criteria for an improved approach, opening up argumentative space for my own proposal.

In the third section (§3.4), I introduce that proposal. This begins the case for the non-subordination principle's status as a *constitutional* principle of private interaction (§2.4.2). Again, my focus is on how that principle unifies the conclusions on horizontality Irish courts have reached in "continuity" cases. The analysis develops, roughly, right-by-right; considering the horizontal significance of constitutional rights to person, property, association, equality/non-discrimination, expression, assembly, and good name in turn. In each case, I argue that the (limits to the) horizontal significance of these rights reflects the distinctive morality of private interaction presented in the last chapter.

3.2. LAW

3.2.1. Overview

There are four ways in which a constitutional right can become significant for a horizontal legal relation in Irish law.

First, a constitutional right can ground the existence of a "*pure*" *constitutional tort claim*, actionable at the instance of one private person against another private person (§3.2.2-3.2.4)

Second, a constitutional right can *invalidate legislation* governing a horizontal legal relation (§3.2.5).

Third, a constitutional right can provide a reason for *modifying a common law (or equitable) rule* governing a horizontal legal relation, or for leaving that rule as it is (§3.2.6).

Fourth, a constitutional right can bear on the judicial *interpretation of a legal norm* already governing a horizontal legal relation (§3.2.7).

I will now say a little about each of these forms of significance in turn, before surveying their (generally modest) doctrinal fruits (§3.2.8).

3.2.2. “Pure” Constitutional Torts: Meskill

A “pure” constitutional tort claim is one:

- (a) By which a plaintiff (P) brings suit against a defendant (D) seeking a court-ordered remedy against D for D’s past, ongoing, or anticipated violation of P’s constitutional claim-right; and where
- (b) P’s action is not grounded on some pre-existing statutory, equitable, or common law cause of action, but directly in the Constitution itself.

Such “pure” constitutional tort claims exist in our legal system, and can be brought against either public or private persons.¹⁵ The leading case remains *Meskeil v CIE*.¹⁶

In *Meskeil*, D terminated P’s employment contract in an effort to encourage P to agree to new terms. These terms would have required P to maintain trade union membership for the duration of his employment with D.¹⁷ The termination was given with due notice, and otherwise in accordance with the contract’s express terms. It would not have been wrongful at common law. The Supreme Court nonetheless unanimously held that this termination by D violated P’s constitutional claim-right to freedom of association, and was therefore legally wrongful. Walsh J reasoned:

If the employer dismisses the worker because of the latter’s insistence upon exercising his constitutional right, the fact that the form or notice of dismissal

¹⁵ I consider the phrase “pure *Meskeil* action” to be synonymous with the phrase “pure constitutional tort action”. In *McGee* (n 4), O’Donnell CJ uses the phrase “pure *Meskeil* action” in a way that is, with respect, confusingly equivocal on whether such actions may be taken against *public* persons, or only against private persons. At some points in his judgment, he says a pure *Meskeil* action is ‘a claim made by one private party against another private party for a breach of a constitutional right’: [63]. However, he decides *McGee* on the basis that P’s claim is a pure *Meskeil* claim even though it ‘arose particularly and peculiarly against the State, because it was the body responsible for the detention of persons in prisons following a lawful conviction’: [20]. Throughout this thesis, the usage of the term “pure constitutional tort actions” and “pure *Meskeil* actions” I prefer is one on which such actions are capable of being taken against either private or public actors, despite O’Donnell CJ’s occasional contrary suggestion in *McGee*. I have resolved the equivocation in this way for two main reasons. First, because *Meskeil* has generally been considered the leading authority evidencing the availability of a constitutional tort action for damages, whether against public authorities or otherwise: e.g. *Kennedy v Ireland* [1987] IR 587; *McDonnell* (n 2); *Kemmy v Ireland* [2009] IEHC 178; *MC v Clinical Director of the Central Mental Hospital* [2020] IESC 28 [129] (Baker J); *Blehein v Minister for Health and Children* [2018] IESC 40. Second, O’Donnell CJ’s characterisation of the claim against a public actor in *McGee* as a pure *Meskeil* one is part of *McGee*’s ratio, whilst his comments to the contrary are not: see, generally, Daniel Gilligan, ‘Constitutional Torts as Private Wrongs’ (2024) 6 Irish Supreme Court Review 181. Another way to respond to the inconsistency would be to say that the claim in *McGee* was against a public actor acting in a private capacity, so it was ‘a claim made by one private party against another’ after all. Any such re-characterisation would be unpersuasive. The specific constitutional duty owed and breached by D in *McGee* was a constraint on its exercise of a paradigmatically public power of punitive detention. This is not to say, of course, that private actors could not, in some circumstances, acquire duties with a similar content, constitutional or otherwise (roughly, a duty that required provision of adequate sanitation facilities to another person) ([77]). In *McGee* itself, though, the duty breached was one D owed in virtue of their status as a public actor, exercising a public power, in pursuit of a public purpose: *Simpson v Governor of Mountjoy Prison* [2019] IESC 81 [11] (O’Donnell J), [84] (MacMenamin J).

¹⁶ *Meskeil v CIE* [1973] IR 121.

¹⁷ In *Meskeil* itself, D was a semi-State company, although it is clear from the passage cited below, and subsequent judicial treatment, that the result would have been the same had D been a wholly private person: (§6.2.3). Cf. Michael Forde, ‘Who Can Remedy Human Rights Abuses? The State Action Question’ in Keith D. Ewing, Conor A. Gearty, and Bob A. Hepple (eds), *Human Rights and Labour Law: Essays for Paul O’Higgins* (Mansell 1994) 234.

is good at common law does not in any way lessen the infringement of the right involved...In my view, upon the facts proved in this case the plaintiff is entitled to a declaration that *his dismissal was a denial and a violation of and an unlawful interference with his constitutional rights* [my emphasis].¹⁸

Further, the Supreme Court held that P had the power to obtain a court-ordered remedy against D for this constitutional violation by bringing suit against D. As Walsh J put it, “a constitutional right carries within it its own right to a remedy or for enforcement of it”.¹⁹ Accordingly, a person whose constitutional claim-right had been violated did not need to bring their claim within some existing common law, equitable, or statutory cause of action in order to obtain a court-ordered remedy for the violation against the violator. Here, P could obtain a remedy in damages “purely” for the violation of their constitutional right to freedom of association itself.

3.2.3. “Pure” Constitutional Torts: General

Since *Meskeil*, there have been several other cases where such “pure” constitutional tort actions have been successfully pursued against private persons. For reasons explained below (§3.2.4), they are not great in number. As such, they each receive a detailed treatment at some point in this thesis.

The most practically significant example is *Herrity v Associated Newspapers*.²⁰ In *Herrity*, D (a privately owned newspaper) published a series of articles about P’s romantic relationship with a parish priest. These articles included the transcripts of unlawfully intercepted telephone conversations of P’s, relating to P’s relationship with the priest. Dunne J held that D’s publication of these articles violated a constitutional privacy claim-right of P’s, binding on D. She awarded P €90,000 in compensatory, aggravated, and punitive damages against D for what she considered a conscious, deliberate, and unjustified breach of P’s constitutional right to privacy. As in *Meskeil*, the remedy here was a “pure” constitutional tort one. It was not made on the basis of some common law, statutory, or equitable cause of action. It was made purely for D’s violation of P’s constitutional claim-

¹⁸ *Meskeil* (n 16) 136 (Walsh J).

¹⁹ *ibid* 132-3 (Walsh J).

²⁰ *Herrity v Associated Newspapers* [2009] 1 IR 316.

right. *Herrity* has been followed in a series of more recent cases: our law now contains a “pure” constitutional tort of wrongful disclosure of private information (WDOPI) (§4.2).²¹

Another example is *Sullivan v Boylan* (§4.4).²² D was a private debt collector who embarked on a sustained campaign of harassment and intimidation of P in her own home in an effort to extract a building debt from her. Hogan J found that D’s conduct was a constitutional wrong to P. It violated her constitutional claim-rights under both Article 40.5 (“the inviolability of the dwelling”) and Article 40.3.2 (“the right to the person”). Hogan J awarded damages and an injunction on a “pure” constitutional basis for these violations.

Parsons v Kavanagh is an earlier example (§4.3).²³ In *Parsons*, P was a licensed coach operator. D had started to operate an *unlicensed* coach service along the route for which P had a licence, with predictable consequences for P’s business. In doing so, D was committing a criminal offence, but the penalties for this offence provided by the relevant statutory licensing scheme were meagre, and thus insufficient to deter D. In this context, P successfully obtained an injunction against D “purely” for a violation of a constitutional claim-right (to “a livelihood”), standing on that claim-right without relying on any other cause of action.

²¹ The remedy sought will standardly be an injunction in the case of anticipated disclosure (*Cogley v RTE* [2005] 5 ILRM 529; *Murray v Newsgroup Newspapers* [2010] IEHC 248; *Eoin McKeogh v John Doe 1 (User Name Daithii4U)* [2012] IEHC 95; *X v Sunday Newspapers* [2014] IEHC 696; *O’Brien v RTE* [2015] 2 IR 130) and damages in the case of past disclosure (*Hanahoe v Hussey* [1998] 3 IR 69; *Gray v Minister for Justice* [2007] IEHC 52; *Sinnott v Carlow Nationalist* (HC 2008, unreported); *Herrity* (n 20); *KL (A Minor) v Independent Star Ltd* [2010] IEHC 500; *Hickey v Agnew v Sunday Newspapers* [2010] IEHC 349; *Boyle v Governor of St Patrick’s Institution* [2015] IEHC 532; *Nolan v Sunday Newspapers* [2020] IECA 141; *Desmond v Irish Times* [2020] IEHC 95).

²² *Sullivan v Boylan (No. 1)* [2012] IEHC 389; *Sullivan v Boylan (No. 2)* [2013] IEHC 104.

²³ [1990] ILRM 560. See, also, *Lovett v Gogan* [1995] 3 IR 132; *O’Connor v Williams* [2001] 1 IR 248; *Pierce (t/a Swords Memorials) v Dublin Cemeteries Committee* [2006] IEHC 182; [2009] IESC 47.

All other (still binding) authorities where a “pure” constitutional tort remedy has been awarded against a private defendant concern the labour law context.²⁴ The two cleanest examples are *Crowley v Ireland* and *O’Connell v BATU* (§6.5.3).²⁵

In *Crowley*,²⁶ D (a teachers’ union) was found liable in damages to Ps (six school children) for violating Ps’ constitutional claim-right to free primary education. Pursuant to a resolution by D, nearly all primary school teachers who taught in Ps’ parish had gone on strike. D subsequently instructed all teachers in *neighbouring* parishes not to enrol Ps. This instruction, which left Ps with access only to “seriously deficient” primary education, was found to be constitutionally wrongful. In a series of later cases addressing the question of remedies, both compensatory and punitive damages were awarded against D for this wrong.²⁷

In the more recent case of *O’Connell v BATU*, D (a trade union) was found liable for violating P’s constitutional right to earn a livelihood where it refused to admit him “without good reason”.²⁸ So far as our constitutional law is concerned, trade unions are generally at liberty to set their own conditions for membership (§3.4.3).²⁹ However, D’s operation of a pre-entry closed shop arrangement meant it enjoyed an effective monopoly on employment of block-layers in the area where P lived and worked. In the Court of Appeal’s view, this constrained its liberty to determine its membership, and rendered its refusal of membership constitutionally wrongful in P’s case. Again, both compensatory and punitive damages were awarded on a pure constitutional basis for this wrong.

²⁴ If they are to be conceptualised as constitutional torts cases, rather than cases where some body (whether public or private) enforces the fundamental law of the State in the public interest, the decisions in *Attorney General (Society for the Protection of Unborn Children (Ireland) Ltd v Open Door Counselling Ltd* [1988] IR 593; *Society for the Protection of Unborn Children (Ireland) Ltd v Grogan* [1989] IR 753; *SPUC v Coogan* [1990] ILRM 70; *Attorney General v X* [1992] 1 IR 1; *Society for the Protection of Unborn Children (Ireland) Ltd v Grogan (No. 4)* [1994] 1 IR 46 would also have qualified at one time. None of them, of course, would be decided in the same way today after a series of constitutional amendments.

²⁵ Some other labour law cases where a constitutional right has become significant for a horizontal relation (including, I will argue, *Meskeel* itself) are best understood in terms of a constitutionally implied *contractual* term, and might be distinguished from *pure* constitutional torts cases (where the duty has no juridical source other than the Constitution) on this basis: §6.4, §6.5.2.

²⁶ [1980] IR 202.

²⁷ *Hayes v Ireland* [1987] ILRM 651; *Conway v INTO* [1991] 2 IR 305.

²⁸ *O’Connell v BATU* [2016] IECA 338 [89] (Peart J).

²⁹ *Tierney v Amalgamated Society of Woodworkers* [1959] IR 254; *Murphy v Stewart* [1973] IR 97; *Clancy v Irish Rugby Football Union* [1995] 1 ILRM 193; *O’Donohoe v O’Baróid and Quirke* [1999] IEHC 148.

Clearly enough, cases where a “pure” constitutional tort remedy is awarded against a private defendant for the violation of the plaintiff’s constitutional claim-right all manifest a *direct* form of horizontality. That form of direct horizontality has two components. First, a private person is found to owe a constitutional duty that has as its direct Hohfeldian correlative another private person’s constitutional claim-right (*direct horizontal bindingness*). Second, that constitutional duty is directly enforceable against the private duty-bearer in an action taken at the instance of the holder of the correlative constitutional claim-right (*direct horizontal enforceability*). D’s past, ongoing, or anticipated violation of P’s constitutional claim-right is the basis for the remedy. Put differently, these are actions taken by one private person to remedy a constitutional *wrong* by another private person.

As such, remedies for “pure” constitutional torts are awarded on much the same basis as they are in ordinary tort actions.

As with torts generally,³⁰ *damages* for pure constitutional torts seek, in the first instance, to “put the party who has been injured...in the same position as he would have been in if he had not sustained the wrong”.³¹ Accordingly, *nominal* damages have generally been awarded against D for pure constitutional torts that have caused P no counterfactual loss.³²

³⁰ *Livingstone v Raywards Coal* (1880 5 App Case 25, 38; *Kelleher v O’Connor* [2010] IEHC 313 [9.1] (Clarke J).

³¹ *Meskeil* (n 16) 136 (Walsh J); *Cotter v Ahern* [1976-1977] ILRM 248; *McHugh v Commissioner of An Garda Síochána* [1986] IR 228; *Kennedy* (n 15); *Kearney v Minister for Justice* [1986] IR 116; *Conway* (n 27) 317 (Finlay CJ); *Walsh v Ireland* [1994] WJSC-SC 4279; *Healy v Minister for Defence* [1994] WJSC-HC 3029; *Gulyas v Minister for Defence* [2001] 3 IR 216; *O’Donoghue v Legal Aid Board* [2004] IEHC 413; *Herrity* (n 20); *Raducan v Minister for Justice* [2012] ILRM 419; *Sullivan* (n 22); *GC v Director of Public Prosecutions* [2012] IEHC 430; *Nash v DPP* [2016] IESC 60.

³² *Kennedy* (n 15); *Kearney* (n 31); *Redmond v Minister for the Environment (No. 2)* [2004] IEHC 24; *SF (A Minor) v Director of Oberstown Children Detention Centre and ors.* [2017] IEHC 829. See, too, *Simpson v Governor of Mountjoy Prison* [2019] IESC 81 [48] (MacMenamin J). However, the recent case of *GE* (discussed below (§3.4.2)) suggests that adequate vindication of constitutional rights may sometimes require that damages – whether for “pure” constitutional or ordinary torts – take account of more than just what P has *materially* lost as a consequence of the wrong. Internationally, there are some jurisdictions with codified constitutions where nominal damages are awarded for the violation of a constitutional right if that violation does not occasion counterfactual loss (*Memphis Community School v Stachura* (1986) 477 US 299; *New York State Rifle & Pistol Association Inc v City of New York, New York* (2020) 590 US (Alito J, dissenting); *Fose v Minister for Safety and Security* [1997] (3) SA 786) and other such jurisdictions where the fact that the right-holder has not suffered loss does not preclude – but nevertheless does not require – an award of substantial damages (*Attorney General of Trinidad and*

Occasionally, if a little mysteriously, that D's conduct violates a constitutional claim-right has been found to count in favour of an award of *punitive* damages in P's favour in a constitutional tort action.³³

Injunctions, by contrast, operate as remedies for either *ongoing* or *anticipated* constitutional torts: they are awarded in order to ensure that such wrongs either cease or never occur. The best view is that the principles governing the courts' power to grant injunctions for constitutional torts are essentially the same as those governing the courts' power to injunct torts more generally. On two occasions, Finlay CJ expressed a contrary view to the effect that:

Where an injunction is sought to protect a constitutional right, the only matter which could properly be capable of being weighed in the balance against the granting of such protection would be another competing constitutional right.³⁴

On this view, the ordinary "discretionary" factors generally applicable to the grant of perpetual or pre-trial injunctions – clean hands, laches, "balance of convenience", adequacy of damages, and so forth – would be inapplicable where a plaintiff sought to injunct a

Tobago v Ramanoop [2005] UKPC 15; *Taunoa v Attorney General* [2008] 1 NZLR 429; *City of Vancouver v Ward* [2010] 2 SCR 28).

³³ *Conway* (n 27) (Finlay CJ); *Shortt v Commissioner of An Garda Síochána* [2007] IESC 9; *O'Connell* (n 28). "Mysteriously" because, as McMahon and Binchy (n 3) [1.95] observe, "[t]here are difficulties with this approach [because] most torts protect constitutional rights against infringement" and in many cases where such torts are committed no question of awarding exemplary/punitive damages will arise. In *Conway* (n 27), both Finlay CJ and McCarthy J acknowledge this difficulty, without indicating how it might be resolved. Tentatively, at least in the Irish law of (constitutional) torts, I think "punitive" awards can be seen as being made for the dignitary injury occasioned specifically by the defendant's "contumelious disregard...for the plaintiff's rights" (*Conway*) and, in this way, also as giving back to the wronged party something they have lost as a result of the wrong (§2.4.1). That is why, as McCarthy J opined in *McIntyre v Lewis* [1991] 1 IR 121 "the damages reflect the standing of both the abused and the abuser". Consider, too, *Kennedy* (n 15) 594 (Hamilton P); *O'Connell v BATU* [2021] IECA 265 [83]-[84] (Power J). See, suggestively on this point, Scott Hershovitz, 'Treating Wrongs as Wrongs: An Expressive Argument for Tort Law' (2017) *Journal of Tort Law* 1; Robert Stevens, *Torts and Rights* (Oxford University Press 2007), 85-88.

³⁴ *SPUC* (n 24) 765 (Finlay CJ); *Lovett* (n 23) 143 (Finlay CJ): "I am not satisfied that the right of the plaintiff to an injunction in this case, deriving, as I am satisfied it does, from an invasion and threatened continued invasion of his constitutional rights, must be approached in the same manner as may generally apply to the discretion of a court to grant the equitable relief of injunction and the doctrine that a plaintiff seeking that must come to the court with clean hands. Where the court is, as in my view it correctly is in this case, prepared to grant to a plaintiff an injunction in order to protect his constitutional right, the enquiry must rather be as to whether he has got a constitutional right and whether it is that right which is being threatened". Finlay CJ's view is persuasively criticised in Ronan Keane, *Equity and the Law of Trusts in Ireland* (3rd edn, Bloomsbury 2017) [15.92].

constitutional tort. There is, however, scarce evidence of this view being more widely adopted,³⁵ and significant evidence pointing the other way.³⁶ In *Foley v Sunday Newspapers*, Kelly J observed that it could not be of “universal application regardless of the facts” because:

To apply this approach could give rise to injustice and abuses of process. A formulaic assertion of a claim to protect a constitutional right without any analysis of the background against which it was made being open to the court and an ability only to consider on the balance of convenience a competing constitutional right could give rise to considerable injustice.³⁷

This, of course, is not to say that a constitutional right – whether of the plaintiff or defendant – cannot bear on the appropriate exercise of judicial discretion in granting an injunction, on which more below (§3.2.7). It is just to say that it is not invariably a dispositive consideration.

3.2.4. “Pure” Constitutional Torts: Limits

It is very clear – and has been since at least *Hanrahan v Merck Sharp & Dohme* – that the availability of “pure” constitutional tort remedies is exceptional.³⁸ Per *Hanrahan*, it is confined to cases where existing common law, equitable, or statutory causes of action are

³⁵ *DWG v Minister for Justice, Equality, and Law Reform* [2007] IEHC 231 (HC) 9-10 (Birmingham J) (*obiter*).

³⁶ *Wright v Board of Management of Gorey Community School* [2000] IEHC 37; *I (EP) v Minister for Justice* [2008] IEHC 358 [58] (Hedigan J); *Finlay v Laois County Council* [2003] WJSC-HC 4864; *Muwema v Facebook Ireland Ltd* [2018] IECA 104 [32]-[34] (Peart J); *Sullivan (No. 1)* (n 22) [30] (Hogan J) (ordinary principles for interlocutory injunctions applied: *Campus Oil Ltd v Minister for Industry and Energy (No. 2)* [1983] IR 88 *semble*). There is no hint of Finlay CJ’s approach in the developing law of privacy injunctions, where *Foley* is frequently a touchstone – see discussion and citations: §3.4.5. Consider, in a nearby context, the various discretionary exceptions to Henchy J’s “primary rule of redress” applicable where a statute is found constitutionally invalid: *Murphy v Attorney General* [1982] IR 241 (SC) 314 (Henchy J). Finlay CJ’s view is especially problematic when one considers that many ordinary tort actions have been conceptualized as protecting and vindicating constitutional rights (§3.4.2): faithfully applied, the view would therefore bring about a sea-change in the ordinary principles for awarding injunctions for practically all torts, but it is clear no such sea-change has occurred on this basis. For discussion, see: James Roche, ‘The Relevance of Constitutional Rights to the Granting of an Interlocutory Injunction’ (2013) 12 *Hibernian Law Journal* 64.

³⁷ [2005] IEHC 14, 10 (Kelly J).

³⁸ *Hanrahan* (n 1); *North Western Health Board v HW* [2001] 3 IR 622 (Hardiman J) 764; *O’Connell* (n 28) [115] (Peart J); *GE v Commissioner of An Garda Síochána* [2021] IECA 113 [89]-[91] (Murray J).

“plainly inadequate” or “basically ineffective” for the purpose of vindicating a constitutional right. As Barrington J later put the point in *McDonnell v Ireland*:

If the general law provides an adequate cause of action to vindicate a constitutional right, ...the injured party cannot ask the court to devise a new and different cause of action.³⁹

Absent any vindicatory inadequacy, then, a plaintiff’s claim will fall to be analysed under existing common law, statutory, or equitable causes of action. Remedies will be awarded or denied accordingly, rather than on some free-standing constitutional ground.⁴⁰ So, for instance, the courts have held that the right to *bodily integrity* is generally to be vindicated in horizontal contexts through ordinary actions in negligence and trespass to the person (§3.4.2); the right to *property* through ordinary actions in negligence, nuisance, trespass to property, and conversion (§3.4.2); and the right to a *good name* through the ordinary action in defamation (§3.4.6). As explored in more detail below, these actions have consistently been found “basically effective”, just as they are, to vindicate the respective constitutional rights in horizontal contexts. As such, they have neither been replaced nor supplemented by “pure” constitutional tort actions vis-à-vis bodies, property, or reputation. Nonetheless, it is important to see that the courts’ position here is expressly that existing common law actions in this space are fit (“adequate”, “effective”) for constitutional purpose, *not* that those actions are a matter of constitutional irrelevance.

Understandably, *Hanrahan* is often characterised as a substantial qualification or ‘taming’ of *Meskeil*.⁴¹ Certainly, it excludes any possibility that *Meskeil* might precipitate the wholesale replacement of the nominate torts by some innominate constitutional claim for “infringement of personal rights”.⁴² The two cases can nonetheless be cast as the coherent, sequenced elaboration of a single appealing idea,⁴³ one reflective of the proper constitutional limits on the courts’ powers: in our legal system, constitutional right holders are empowered and entitled to obtain (and courts are empowered and obligated to grant)

³⁹ *McDonnell* (n 2) 148 (Barrington J).

⁴⁰ A recent restatement: *Blehein* (n 15) [57] (McKechnie J).

⁴¹ O’Cinneide, ‘Taking Horizontal Effect Seriously’ (n 3); McMahon and Binchy (n 3).

⁴² Cf. Heuston (n 7), 222.

⁴³ As the courts emphasise: *Hanrahan* (n 1); *W v Ireland* (No. 2) [1997] 2 IR 141, 165-169 (Costello P); *McDonnell* (n 2) 158 (Keane J); *Blehein* (n 15) [50]-[51] (McKechnie J).

court-ordered remedies *necessary* – i.e. not superfluous - to vindicate constitutional claim-rights in the face of those rights’ violation. As Ó Dálaigh CJ observed in a slightly different context: “no one can with impunity set [constitutional] rights at nought or circumvent them, and...the courts’ powers in this regard are *as ample* as the defence of the Constitution requires [my emphasis]”.⁴⁴

3.2.5. Legislation

Another way a constitutional right can become significant for a horizontal legal relation is by invalidating legislation that would otherwise govern that relation.

O’Brien v Keogh is an example.⁴⁵ There, a statutory limitation period for ordinary torts claims provided for by s. 49(2)(a)(ii) of the Statute of Limitations, 1957 was found invalid. This was on the basis that it provided infants in the custody of their parents with an unreasonably short period in which to bring a tort action, and was thus inconsistent with their constitutional right to litigate claims. This finding of invalidity was clearly significant for horizontal legal relations. It meant that certain horizontal legal claims that would have been statute barred if the statute were valid were not so statute barred.⁴⁶

Above, we said that “pure” constitutional tort actions manifest direct horizontality: they are actions taken to remedy the breach of a constitutional duty owed by one private person to another. Cases like *O’Brien* – where “private law” legislation is found invalid on constitutional rights grounds – are not best understood on that model, and our courts have

⁴⁴ *State (Quinn) v Ryan* [1965] IR 70.

⁴⁵ [1972] IR 144. See similarly (on limitations statutes): *O’Brien v Manufacturing Engineering* [1973] IR 344; *Moynihan v Greensmyth* [1977] IR 55; *Cahill v Sutton* [1980] IR 269; *Tuohy v Courtney* [1994] 3 IR 1. Consider too, illustratively: *Buckley v Attorney General* [1950] IR 67; *Re Article 26 and the Matrimonial Home Bill, 1993* [1994] 1 IR 305; *Delaney v PIAB* [2024] IESC 10 [82]-[113] (Hogan J, dissenting).

⁴⁶ Just as in other contexts where legislation is found invalid on constitutional grounds, difficult downstream questions arise as to the invalidity’s implications for prior transactions (*A v Governor of Arbour Hill Prison* [2006] IESC 45). As of yet, questions as to the implications of legislative invalidity for prior transactions in horizontal contexts have not been fully judicially explored: in the recent case of *Ooi v Ireland* [2024] IEHC 663, Cahill J expressed the view (surely correct) that there is no “blanket, unswerving rule that declarations that legislation is unconstitutional will never impact on previous decisions or transactions”: [109]. In *Ooi*, D, a private defendant, unsuccessfully sought to invoke such a “blanket, unswerving rule” to obtain an order striking out P’s proceedings against them as stating no reasonable cause of action, in a context where P’s cause of action depended on P proving that (a) s. 2 of the Family Home Protection Act 1976 was invalid on constitutional grounds; and (b) its invalidity could lead to a remedy being ordered against D in P’s favour.

not understood them in anything like that way. Instead, they have found legislation in these cases to be invalid because (a) the Oireachtas can only validly legislate consistently with the Constitution;⁴⁷ and (b) the Oireachtas has a constitutional duty, as a State institution, “in its laws...to respect...the personal rights of the citizen”.⁴⁸ The reason for the invalidity is therefore fundamentally the same as it would be with any other legislation, whether or not it concerns horizontal legal relations. In this way, constitutional rights become significant for horizontal legal relations only indirectly, *by way of* fettering the State’s exercise of legislative power. The horizontal significance of the constitutional right is therefore mediated and explained by a prior, more fundamental, vertical significance. As O’Donnell CJ recently put it in speaking of such cases in *McGee v Governor of Portlaoise Prison*:

These are cases in which the Constitution can be seen to have an indirect, but nevertheless sometimes decisive, effect on private law litigation between individual parties. But the field of application of constitutional law is still public law. In theory, the two claims could be separated and the question of the constitutionality of a provision established in one set of proceedings against the State and Attorney General to which the private law defendant was not a party, and where the outcome would be of general application, and a subsequent, or parallel proceeding to which the Attorney General was not a party, and where the only issue is whether the plaintiff is entitled to damages or other relief against the individual defendant.⁴⁹

Because the legal significance of constitutional rights in these cases is to be understood on the model applicable to *all* legislation – as *vertical* constraints on the State’s law-making powers – these cases are not my focus in this thesis. Arguments over the best justification of the judicial review of legislation on rights grounds are, in this jurisdiction and others, very well-ventilated. There is no suggestion in those debates, nor in the relevant Irish case law, that the judicial review of legislation governing horizontal legal relations raises a wholly distinctive set of legal and moral issues, meriting separate treatment, and either

⁴⁷ Article 15.4.1. Further, Article 50.1 provides that any pre-1937 legislation that is inconsistent with the provisions of the Constitution is not carried over to the extent of any such inconsistency.

⁴⁸ Article 40.3.1.

⁴⁹ *McGee* (n 4) [3].

expanding or contracting the appropriate scope of judicial review.⁵⁰ The question remains a fundamentally vertical one about the laws that the State, through its legislative arm, may impose on its citizens. Irish courts approach them in that way, without modifying the applicable standard of review.⁵¹

3.2.6. Common Law

A constitutional right – or, if one prefers, a value underlying such a right⁵² – might become significant for a horizontal legal relation because it provides a (sometimes conclusive)

⁵⁰ Cf. *Flagg Brothers v Brooks* 436 US 149 (1978) (persuasively criticised on this point in: Johan van der Walt, ‘Abdications of Sovereignty in State Action and Horizontal Effect Jurisprudence’ in Tsvi Kahana and Anat Scolnicov (eds), *Boundaries of State, Boundaries of Rights* (Cambridge University Press 2016).

⁵¹ It is true that legislation bearing on a horizontal relation will often involve the balancing of conflicting constitutional rights, and thus, as per *Tuohy* (n 45), call for “rationality” rather than “proportionality” review. *Tuohy* itself has recently been the object of forceful judicial criticism, and its continued vitality as the basis of a distinct standard of review might therefore be doubted: *Cantrell v Allied Irish Banks* [2020] IESC 71 [151] (O’Donnell J); *Smith v Cunningham* [2023] IESC 13 [24], [27]–[29] (Hogan J); *Delaney v The Personal Injuries Board* [2024] IESC 10 [324] (Collins J). Besides, whilst the *Tuohy* rationality standard has sometimes been applied in the review of private law legislation (see e.g. *Tuohy* itself, *Iarnród Éireann v Ireland* [1996] 3 IR 321 (SC)), it has not invariably been so applied in preference to a proportionality test (see e.g. *Re Article 26 and the Employment Equality Bill 1996* [1997] 2 IR 321; *Iarnród Éireann v Ireland* [1996] 3 IR 321 (HC) (Keane J)). On one level, this position likely reflects an elision between proportionality and rationality review in the case law more generally (see e.g. *King v Minister for the Environment* [2007] IR 296). Furthermore, private law legislation is obviously not the only sort of legislation that might be said to involve the “reconcil[ation of] the interests of different categories of people in society”: *Re Article 26 and the Health Amendment Bill (No. 2) 2004* [2005] 1 IR 205 (SC) 206, thus falling to be reviewed under the *Tuohy* standard. Accordingly, *Tuohy* has often been relied upon outside the private law context too – rationality review is by no means uniquely applied to private law legislation: *Rock v Ireland* [1997] 3 IR 484; *Meagher v O’Leary* [1998] 4 IR 33; *White v Dublin City Council* [2004] 1 IR 545; *King*. For all these reasons, *Tuohy* cannot be said to represent a distinctive standard of constitutional review for private law legislation.

⁵² In the English-speaking world, the distinction between rights and the values underlying them is particularly well entrenched in the horizontality context in the Canadian Charter case law (although, consider also BVerfGE 7, 198 (*Lüth*); *Du Plessis v De Clerk* [1996] (3) SA 850). Drawing the distinction has made it possible to reconcile the Charter’s robust influence on Canadian private law with the foundational position outlined in *Retail, Wholesale & Department Store Union, Local 580 v Dolphin Delivery Ltd* (1985) 33 DLR (4th) 174, 573 (McIntyre J) that only the State is bound by constitutional rights, strictly speaking: *R v Salituro* [1991] 3 SCR 654; *Hill v Church of Scientology of Toronto* [1995] 2 SCR 1130; *M. (A.) v. Ryan* [1997] 1 SCR 157; *Dobson v Dobson* [1999] 2 SCR 753; *RWDSU Local 558 v Pepsi-Cola Canada Beverages (West) Ltd* [2002] 1 SCR 156; *Grant v Torstar Corp* [2009] SCC 61. For academic discussion of the distinction: Slattery, ‘The Charter’s Relevance to Private Litigation: Does Dolphin Deliver?’ (1987) 32 McGill Law Journal 905; Mayo Moran, ‘Authority, Influence, and Persuasion: Baker, Charter Values, and the Puzzle of Method’ in David Dyzenhaus (ed), *The Unity of Public Law* (Cambridge University Press 2004); Matthew Horner, “Charter Values: The Uncanny Valley of Canadian Constitutionalism” (2014), 67 Supreme Court Law Review 361; Thomas Bennett, ‘Privacy, Corrective Justice, and Incrementalism: Legal Imagination and the Recognition of a Privacy Tort in Ontario’ (2013) 59(1) McGill Law Journal 49; Gavin Phillipson, ‘The Human Rights Act, “Horizontal Effect” and the Common Law: a Bang or a Whimper?’ (1999) 62 Modern Law Review 824;

reason for either modifying or preserving a common law (or equitable) rule bearing on such a relation.⁵³ This it can do *without* grounding a “pure” constitutional tort action: “the common law must, where necessary, be remoulded and re-fashioned in order to reflect and to accommodate itself to...basic constitutional values”.⁵⁴ Here, it is clear the *Hanrahan* “basic effectiveness” limitation on constitutional rights’ significance applies again: only where the common law’s realization of constitutional rights is “basically ineffective” in some respect will those rights require a modification to the common law.⁵⁵

McKinley v Minister for Defence provides a clear, and relatively rare, Irish example where a constitutional right grounded a modification to the common law governing horizontal legal relations (§4.5).⁵⁶ In *McKinley*, the Supreme Court held that Article 40.1’s guarantee of equality before the law invalidated the old common law action for loss of consortium insofar as that action only allowed husbands (and not wives) to take a claim. This holding, importantly, was *not* based on Article 40.1’s *direct* horizontal bindingness: the plaintiff’s claim had nothing at all to do with the *defendant* treating her inconsistently with Article 40.1. Instead, the holding was based on the proposition that, by virtue of Article 40.1, the *courts* owed a constitutional duty as public authorities to hold citizens equal as human persons before the law. All judges agreed that this duty was inconsistent with preserving the consortium action in its historical form.⁵⁷ In *McKinley*, then, the constitutional right to equality before the law became significant for horizontal legal relations only indirectly, by

Alison Young, ‘Mapping Horizontal Effect’ in David Hoffman (ed), *The Impact of the UK Human Rights Act on Private Law* (Cambridge University Press 2011).

⁵³ For economy in what follows, I omit the “or equitable” addendum.

⁵⁴ *Carr v O’Las* [2012] IEHC 59 [36] (Hogan J) (cited with approval in *Shaughnessy v Nohily* [2016] IEHC 767); *DPP v Barnes* [2006] IECCA 165, 42 (Hardiman J). See, also, *Irish Life and Permanent v Duff* [2013] IEHC 43 [41]-[52] (Hogan J); *Ogieriakhi v Minister for Justice* [2016] IECA 46 [40] (Ryan J).

⁵⁵ This is clear from *Hanrahan* itself: “A person may of course in the absence of a common law or statutory cause of action, sue directly for breach of a constitutional right; but when he founds his action on an existing tort he is normally confined to the limitations of that tort. It might be different if it could be shown that the tort in question is *basically ineffective* to protect his constitutional right”: *Hanrahan* (n 1) 636. The point is emphasised in *Banda* (n 3). For particularly lucid discussion: *GE* (n 38) [90]-[91] (Murray J).

⁵⁶ *McKinley v Minister for Defence* [1992] 2 IR 333.

⁵⁷ Then, on grounds other than Article 40.1, the Court decided by a 3-2 majority that the common law consortium action should be extended to allow a claim by wives, rather than abolished altogether. This meant that the plaintiff wife could succeed in her action for loss of consortium against her husband’s employer (§4.5). As in *Meskeil* (n 16), the defendant here was, again, a public person; as in *Meskeil*, the analysis clearly does not turn on that fact.

way of imposing a constitutional duty on an organ of the State.⁵⁸ It provided a (conclusive) reason for the Supreme Court to modify the common law, even if it left the precise modification that ought be made open. The Constitution (whether via Article 40.1 or otherwise) has played a structurally similar role in invalidating other common law rules inconsistent with spousal equality.⁵⁹

In other cases, an argument that a constitutional right required the modification of a common law rule has been considered and rejected, in terms which nonetheless envisage the possibility that other such arguments might succeed. In *Hanrahan v Merck Sharp & Dohme*, for instance, P (a farmer) sued D (a pharmaceutical company) in the tort of nuisance, claiming that emissions from D's factory had damaged his land.⁶⁰ P encountered difficulties in proving on the balance of probabilities that D's emissions had caused the relevant damage. In this context, P argued that the onus on him to do so, assigned by the law of nuisance, was inconsistent with his constitutional rights to property under Article 40.3. He contended that, once a plaintiff in a nuisance action showed they had suffered damage to property, adequate vindication of their constitutional right to property required that the onus shift to the defendant to demonstrate that they had *not* caused the damage. If

⁵⁸ Although the distinction between direct and indirect horizontality is drawn in myriad ways, I think the clearest understanding of constitutional rights' "indirect horizontal effect" takes that notion to describe a constitutional right affecting a horizontal legal relation by way of affecting a vertical one (between the State and the citizen). It is tolerably clear that this is how the notion is understood in the foundational German case law: *Lüth* (n 52) 206; Robert Alexy, *A Theory of Constitutional Rights* (trans Julian Rivers, Oxford University Press 2002), 358-9. In the comparative constitutional law literature, a conceivably (although not, I think, necessarily) alternative understanding of what is "indirect" in "indirect" horizontal effect is sometimes adopted: horizontal effect is indirect where constitutional rights do not directly govern private conduct, only private law (and through that medium, indirectly, private conduct): see, influentially, Stephen Gardbaum 'The "Horizontal Effect" of Constitutional Rights' (2003) 102 Michigan Law Review 387, 404. But, whilst there is no difficulty in holding that (constitutional rights) norms might govern the *creation, application, or interpretation* of other (private law) norms by (State) agents, it is mysterious what it could mean for a norm to govern another *norm* other than by way of governing conduct. Reference to constitutional rights governing or "applying to" private law is probably best considered an elliptical allusion to constitutional rights governing the *conduct* of state officials (especially judges) as it pertains to private law's creation, application, and interpretation. Understood in this way, the distinction between Gardbaum's characterisation of indirect effect and my own evaporates.

⁵⁹ *Re Tilson, infants* [1951] IR 1; *The State (DPP) v Walsh* [1981] IR 412; *S v S* [1983] IR 68; *M(C) v M (T)* [1988] ILRM 456; *The People (DPP) v T* (1988) 3 Frewen 141; *CM v TM (No. 2)* [1990] 2 IR 52 (HC) 63; *W v W* [1993] 2 IR 476; *R v R* (2 April 2004) SC, ex tempore (Murray J); *BB v AA* [2013] IEHC 394; *DPP v B* [2009] IEHC 196 (HC) 49 (Feeney J); Keane, *Equity and the Law of Trusts in Ireland* (n 34) [12.48], [12.54]; Hilary Biehler, *Equity and the Law of Trusts in Ireland* (7th edn, Round Hall 2020) 209.

⁶⁰ *Hanrahan* (n 1).

they failed to do so, a remedy in P's favour should follow. Henchy J's rejection of this argument was emphatic:

I find it impossible to hold that Article 40.3.1° means that a plaintiff in an action in nuisance is to be relieved of the onus of proving the necessary ingredients of that tort. Neither, in my view, does Article 40.3.2° warrant such a dispensation, for the guarantee of vindication there given arises only 'in the case of injustice done', so it is for the plaintiff to prove that the injustice relied on was actually suffered by him and that it was caused by the defendant.⁶¹

Finally, in still other cases, constitutional rights provide a reason *against* modifying the common law governing horizontal legal relations in some way: they reinforce the common law position.⁶² The recent case of *GE v Commissioner of An Garda Síochána* is best considered an example of this phenomenon (§3.4.2).⁶³ In *GE*, a unanimous Supreme Court held that P was entitled to substantial damages for the tort of false imprisonment in circumstances where, had P not been *unlawfully* detained by D, P both *could* and as a matter of fact *would* have been *lawfully* detained by D.⁶⁴ After making this finding at common law, Hogan J, writing for the Court, went on to hold that:

In this jurisdiction, this conclusion is, in any event, reinforced by constitutional considerations such as Article 5 (emphasizing the democratic nature of the State), Article 40.4.1 (the protection of personal liberty) and Article 40.3.1 and Article 40.3.2 (which require the judicial arm of the state to "vindicate" constitutional rights such as the right to liberty).⁶⁵

He considered that "[t]he award of nominal damages in respect of anything but the most technical or fleeting instances of false imprisonment would seriously devalue the tort of

⁶¹ *ibid* 636 (Henchy J).

⁶² *Hynes-O'Sullivan v O'Driscoll* [1988] IR 436 (SC) 449 (Henchy J) (§3.4.6); *Vone Securities v Cooke* [1979] IR 59 (SC) 70 (Henchy J) (where the Supreme Court held that "having regard to the guarantees in the Constitution as to property rights," it would be wrong to retrospectively vary the default rule at common law that "month" in a legal document denotes a lunar month of 28 days, not a calendar month).

⁶³ *GE v Commissioner of An Garda Síochána* [2022] IESC 51.

⁶⁴ Cf. *Lewis v ACT* [2020] HCA 26; *Lumba v Secretary of State for the Home Department* [2011] UKSC 12.

⁶⁵ *GE* (n 63) [89] (Hogan J).

false imprisonment and would be inconsistent with the...vindicatory obligations found in Article 40.3.1 and Article 40.3.2".⁶⁶ As such, even if an award of nominal damages in a case like *GE* were thought desirable on other grounds, constitutional rights considerations would preclude such a change to the common law.

The nature and scope of this judicial power to review *common law* rules for their consistency with the Constitution is far less fully considered, in this jurisdiction and others, than is the same judicial power with respect to legislation. I therefore pay more attention to the justification of the former power in this thesis. It might be objected that the source of a rule is of limited relevance to a proper analysis of its consistency with constitutional rights.⁶⁷ Indeed, it might be thought possible to understand all cases involving constitutionally inspired "re-mould[ing] and re-fashion[ing]" of the common law on the same vertical, "public law" model as I suggested was apt for cases in the legislation category: i.e. primarily in terms of the legal relationship between the State and those private persons' subject to its law-making authority. My claim throughout will be that this is often, but not always, true. Whilst the inconsistency of legislation with the Constitution is always, at bottom, a function of vertical limits on the State's treatment of private persons, the (in)consistency of a common law rule with a constitutional one is sometimes, at bottom, a function of what private persons horizontally *owe one another* under the Constitution. As such, in developing the common law in light of the Constitution, courts are often (but not always) engaged in the task of identifying and drawing out those horizontal responsibilities. In assessing the constitutionality of legislation, by contrast, they are always policing the proper boundaries of the State's authority.

⁶⁶ *ibid.* See, also, *ibid* [39], [54]-[59] (Hogan J) and *GE* (n 38) [118]-[139] (Murray J).

⁶⁷ Something like this thought was a popular basis for early academic criticisms of the common law's formal exclusion from Charter scrutiny in *Dolphin Delivery*: Peter Hogg, 'The Dolphin Delivery Case: The Application of the Charter to Private Action' (1987) 51(2) *Saskatchewan Law Review* 273, 277; David Beatty, 'Constitutional Conceits: The Coercive Authority of Courts' (1987) 37 *University of Toronto Law Journal* 83; David Dyzenhaus, 'The New Positivists' (1989) 39(4) *University of Toronto Law Journal* 361, 374-5; Slattery, 'Does *Dolphin* Deliver?' (n 52); See, similarly, Ian Leigh, 'Horizontal Rights, the Human Rights Act and Privacy: Lessons from the Commonwealth?' (1999) 48 *International and Comparative Law Quarterly* 57, 76; Howell, 'The Human Rights Act 1998: Land, Private Citizens, and the Common Law' (2007) 123 *Law Quarterly Review* 618, 627.

3.2.7. Interpretation

Finally, a constitutional right can figure in the judicial *interpretation and application of a legal norm* that governs a horizontal legal relation, by resolving that norm's indeterminacy.

The line between norm interpretation and modification may sometimes be fuzzy. There is, to be sure, an intelligible sense in which a norm is "modified" wherever its indeterminacies are resolved: once a norm is specified in a particular direction, we might want to say that it is no longer the very same norm it was beforehand, having been imbued with new content. Nonetheless, in the cases we are about to consider, any modification occurs by way of constitutional rights inflecting the interpretation and application of a rule applicable quite apart from constitutional rights' intervention. In the examples considered in previous subsections, by contrast, constitutional rights provided reasons for altering, abandoning, or replacing otherwise applicable legal rules *rather than* interpreting and applying them.

Consider, first, judicial interpretation of *legislation* bearing on horizontal legal relations. Constitutional rights might count in favour of particular interpretations of such legislation. Most obviously, they will count *conclusively* against a particular interpretation of legislation wherever the legislation would be unconstitutional (as inconsistent with constitutional rights) on that interpretation: the "double construction" rule requires that a constitutionally conforming interpretation be selected.⁶⁸ More subtly, constitutional rights can favour a particular interpretation of legislation *even if* the legislation would not be invalid on some alternative interpretation.⁶⁹ In the recent case of *H.A. O'Neil Ltd v Unite the Union*, O'Donnell CJ held that, having regard to the constitutional right to form associations and unions, "it would be appropriate to read [statutory trade union immunities] generously".⁷⁰ He need not be read as suggesting that the relevant legislation would be unconstitutional if read otherwise.

The same phenomenon – of constitutional rights bearing on the interpretation of non-constitutional legal norms – also occurs with respect to judge-made rules. *Re Blake* and

⁶⁸ *Educational Company of Ireland Ltd v Fitzpatrick (No. 2)* [1962] IR 345; *Murtagh Properties v Cleary* [1972] IR 330; *Hamilton v Hamilton* [1982] IR 466; *Tanat Ltd v The Medical Council* [2013] IEHC 223.

⁶⁹ Consider, illustratively: *National Union of Journalists v Sisk* [1992] 2 IR 171; *Murphy v Greene* [1990] 2 IR 566; *Grant v Roche Products* [2008] IESC 35.

⁷⁰ *H.A. O'Neil Ltd v Unite the Union* [2024] IESC 8 [59] (O'Donnell CJ).

Burke and O'Reilly v Burke & Quail are both probably best understood on this model.⁷¹ They saw Irish courts interpreting longstanding equitable rules establishing that a trust condition would be void if contrary to “public policy” in light of the particular vision of public policy disclosed by the Constitution. In those cases, testators had sought to leave property on trust for the benefit of children. In *Burke*, the trust was subject to the condition that the selection of the beneficiary’s school should be a matter for the absolute discretion of the trustees. In *Blake*, the gift was subject to the condition that the beneficiaries should be brought up Roman Catholic. Both of these conditions were found to be void. Several earlier English cases had found similar conditions – which tended to interfere with parents’ discretion to provide for their children’s (religious) upbringing as they saw fit – to be void on account of public policy.⁷² The Constitution became relevant in *Burke* and *Blake* only by putting the matter “on a different and higher plane in this country”,⁷³ filling in what “public policy” properly required. Article 42 recognises 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”. As Dixon J put it in *Blake*:

It is clear that any attempt to restrict or fetter that right would be contrary to the solemnly declared policy and conceptions of the community as a whole...The provision in the will...is, therefore, void as against public policy and cannot be given effect to.⁷⁴

The same process of constitutionally-informed interpretation can also occur with respect to the legal norms that private persons generate for themselves via contractual agreement, as

⁷¹ *Burke and O'Reilly v Burke and Quail* [1951] IR 216; *Re Blake* [1955] IR 89. See, similarly, *Re McKenna* [1944] IR 277 (Gavan Duffy J, obiter); *Re Doyle*, High Court 1972 (Kenny J).

⁷² *In re Sandbrook* [1912] 2 Ch 471; *In re Borwick* [1933] 1 Ch 657; *In re Boulter* [1922] 1 Ch 75; *Re Tegg* [1936] 2 All ER 878; *Re Piper* [1946] 2 All ER 503. Cf. *Blathwayt v Cawley* [1976] AC 397.

⁷³ *Blake* (n 71) (Dixon J) 97.

⁷⁴ *ibid.* *HAH v SAA* [2017] IESC 40 saw Article 40.1 and 41 play a similar role in filling out the “public policy” condition on the recognition of the validity of a foreign marriage (that is, a common law rule of our private international law). The Supreme Court held that, even having regard to the Constitution’s conception of marriage as a “partnership based on equality of rights” [113] (O’Malley J), public policy did not require non-recognition of a potentially polygamous marriage’s validity (and, further, did not require that such marriages were deprived of their validity in Irish law if the husband contracted a further marriage). However, recognition of subsequent marriages in a situation of polygamy “would be contrary to a fundamental constitutional principle and therefore contrary to public policy” [116] (O’Malley J), because “[t]o give legal recognition to such a structure would be to give legal effect to discrimination and subordination in a relationship where the principle of equality should hold sway”. Both the conclusion and reasoning here chime nicely with the discussion of spousal equality’s juridical basis in the next chapter (§4.5).

Glover v BLN illustrates.⁷⁵ There, invoking Article 40.3's guarantee of "personal rights", Walsh J held:

[T]he dictates of constitutional justice require that statutes, regulations or *agreements setting up machinery for taking decisions which may affect rights or impose liabilities should be construed as providing for fair procedures* [my emphasis].⁷⁶

On this sweeping basis, he found that D's dismissal of P was in breach of an implied term of his employment contract because "it cannot be disputed, in light of so much authority on the point, that failure to allow a person to meet the charges against him and to afford him an adequate opportunity of answering them is a violation of an obligation to proceed fairly".⁷⁷ Subsequent judicial treatment of *Glover* has tended to confine it narrowly (§6.5.2).⁷⁸ Nonetheless, *Glover* clearly establishes the Constitution's relevance, however attenuated, to the judicial construction of contractual arrangements.⁷⁹

These cases where a constitutional right figures in the interpretation or application of legal norms are closely related – indeed, might usefully be assimilated – to another family of cases: where a constitutional right figures in the exercise of *judicial discretion*.

The constitutional right to freedom of expression, for instance, is generally considered a factor that, in the exercise of judicial discretion, weighs strongly against awarding

⁷⁵ [1973] IR 388.

⁷⁶ *ibid* 425 (Walsh J).

⁷⁷ *ibid*

⁷⁸ *Carna Foods Ltd v Eagle Star Insurance Company (Ireland) Ltd* [1997] 2 IR 193; *Barry v Medical Defence Union Ltd* [2004] IEHC 62 (Carroll J); [2005] IESC 41 (SC) 35 (Geoghegan J); *O'Donovan v Over-C Technology Ltd* [2021] IECA 37; *Nolan v Science Foundation Ireland* [2024] IEHC 368. See, further, §6.5.2.

⁷⁹ In a similar vein, in two cases, Finlay Geoghegan J opined that if a contractual term would constitute a waiver of the constitutional right of access to the courts, a court should insist on particularly good evidence that the relevant constitutional right-holder has consciously elected to waive that right before accepting the term's enforceability: *Treasury Holdings v National Asset Management Agency* [2012] IEHC 297 [160] (Finlay Geoghegan J); *Re KH Kitty Hall Holdings* [2017] IECA 247 [64]-[66] (Finlay Geoghegan J). See, further, §5.3.3.

injunctions that would amount to a prior restraint on speech.⁸⁰ The recent case of *Murtagh v Cooke* provides another example with a similar structure.⁸¹ P, a private owner of land, sought an interlocutory injunction against D, an indigent trespasser living on P's land. Because granting the injunction would have the effect of depriving D of his home, Phelan J considered herself constitutionally obligated to assess the proportionality of the order's effects on P's enjoyment of his rights to "inviolability of the dwelling" under Article 40.5, as part of a broader "balance of convenience" assessment.⁸²

The basis for the Constitution's horizontal significance in these cases is the duty on courts, as State institutions, to respect, defend, and vindicate constitutional rights through and by law, giving those rights "life and reality".⁸³ As such, in *Murtagh*, Phelan J was careful to emphasise that Article 40.5 did not directly modify the underlying horizontal legal relation between P and D – it did not go to whether D was committing the wrong of trespass against P – but only conditioned the *court's* power to order an enforceable remedy for a private

⁸⁰ *Reynolds v Malocco* [1999] 2 IR 203 (HC) 209-10 (Kelly J); *Foley* (n 37); *Cogley* (n 21); *Mahon v Post Publications* [2007] IESC 15; *Murray* (n 21); *X* (n 21); *O'Brien* (n 21). In substance, this mirrors the approach at common law: *Bonnard v Perryman* [1891] 2 Ch 269; *Sinclair v Gogarty* [1937] IR 377; *R v Central Independent Television PLC* [1994] 3 WLR 20, 30 (Hoffmann LJ). The constitution gilds the lily. For discussion: Hilary Delany, 'Prior Restraint Orders and Freedom of Expression' (2005) Irish Jurist 138.

⁸¹ [2022] IEHC 436 [72]-[80] (Phelan J). Cf. *Cluid Housing Association v Whelan* [2022] IEHC 302 [61] (Bolger J); *Pepper Finance Corporation (Ireland) dac v Persons Unknown* [2022] IECA [97] (Whelan J); [2023] IESC 21 [66] (Hogan J); *Verwey v Hogan* [2023] IEHC 574 [17] (Twomey J) which all tend to tell against a proportionality analysis being required before an order is granted depriving someone of their dwelling in a wholly *horizontal* dispute. For discussion, see Jamie McLoughlin, 'The Guarantee of the Inviolability of the "Dwelling" in Article 40.5 of the Irish Constitution: A "Defensive Social Right"?' (2024) 8(2) Irish Judicial Studies Journal 1, 16-19. Consider, too, two judgments of Hogan J – *Albion Properties Ltd v Moonblast Ltd* [2011] IEHC 107; *Wallace v Irish Aviation Authority* [2012] IEHC 178 [25] – in which he considered the fact that a mandatory interlocutory injunction would serve to prevent the violation of a constitutional property right to be a non-dispositive consideration counting in favour of granting such an injunction (presumably as a factor going to the balance of convenience), even given the general principle that a court will only grant *mandatory* interlocutory relief in exceptional circumstances: *Maha Lingam v Health Service Executive* [2006] ELR 137 (SC) 140 (Fennelly J); *Taite v Beades* [2019] IESC 92 [25] (Irvine J).

⁸² On the authority of *Clare County Council v McDonagh* [2022] IESC 2. Ultimately, after conducting the proportionality assessment, Phelan J made an order in P's favour.

⁸³ *Buckley v Attorney General* [1950] IR 67, 80 (O'Byrne J). That general duty's most conspicuous (but non-exhaustive) manifestation is the particular obligation on courts to ensure that remedies for the violation of constitutional rights are effective: *The State (Voza) v O'Floinn* [1957] IR 227 (SC) 250 (Kingsmill Moore J); *Meadows v Minister for Justice, Equality and Law Reform* [2010] 2 IR 701 (SC) 721 (Murray CJ); *Carmody v Minister for Justice* [2010] 1 IR 635 (SC) 668 (Murray CJ); *S v Minister for Justice* [2011] IEHC 31 [10]-[18] (Hogan J); *Efe (A Minor) v Minister for Justice* [2011] IEHC 214 [4]-[7] (Hogan J). Recall, too *The State (Healy) v Donoghue* [1976] IR 325 (SC) 354 (Henchy J): "The guarantee of protection from unjust attack is declared by the Constitution to be given by the State; and the judiciary, no less than the legislature, is an organ of the State".

wrong.⁸⁴ Again, a constitutional right acquired whatever horizontal significance it had from a prior vertical significance.

3.2.8. *Horizontality: Structure and Substance*

When the four modes of significance just surveyed are viewed together, it is difficult to imagine a more “total” constitution than the Irish one – at least as a structural, threshold matter.

The bottom line is that, in principle, *any legal rule*, regardless of its origin - and regardless of whether it is a rule of public or private law - is subject to judicial scrutiny on constitutional rights grounds. More radically, it seems that *any conduct*, regardless of whether it is carried out by a public person or a private person, might also be so subject.⁸⁵ True enough, the Irish constitution “serves as a guide and imposes substantive constraints on the resolution of any and every *political* question”.⁸⁶ But it is *also* apt to serve as a guide and to impose substantive constraints on the resolution by private persons of questions not easily characterised as political (at least in the “public/governmental affairs” sense): questions over what embarrassing personal details we may share about our enemies; how we might encourage our debtors to pay their debts; the tactics we may adopt to gain a competitive advantage for our coach business; and even how we must constrain our conduct in light of others’ bodily and property rights. As I put it above, in Ireland, resort to constitutional rights is always “on the cards” in legal disputes between private persons. Those rights are always at least potentially in play, and, as we have just seen, there are multiple ways to play them.

⁸⁴ See, similarly, *O’Neil* (n 70) [72] (O’Donnell CJ); [3], [53], [56]-[58] (Murray J): “[T]here are cases in which interlocutory injunctions are sought which will impact upon the constitutionally protected interests of the defendant in such a way as to require the Court, in deciding whether to grant that relief, to factor into its decision some assessment of the proportionality of the relief claimed having regard to those interests”.

⁸⁵ Subject to whatever overarching limits on justiciability there are thought to be: Paul Anthony McDermott, ‘The Separation of Powers and the Doctrine of Non-Justiciability’ (2000) 35 *Irish Jurist* 280; Paul Daly, “‘Political Questions’ and Judicial Review in Ireland” (2008) 2 *Judicial Studies Institute Journal* 116. Consider, in the constitutional text itself, Article 13.8.1, Article 15.13 (*Kerins v McGuinness* [2019] IESC 11; *O’Brien v Clerk of Dáil Éireann* [2019] IESC 12), Article 28.3.3.

⁸⁶ Matthias Kumm, ‘Who is Afraid of the Total Constitution? Constitutional Rights as Principles and the Constitutionalization of Private Law’ (2006) 7(4) *German Law Journal* 341, 343.

Nonetheless, as things have turned out, the courts have proved generally reluctant to find that constitutional rights require change to the substance of private persons' legal relations. To be sure, where the legislature has intervened to modify the common law position, the courts will review the legislation for its constitutionality just as they would any other legislation (§3.2.5). Further, the Constitution might sometimes play the limited role of providing resources to assist the judicial interpretation of an otherwise applicable legal norm (§3.2.7). But, by and large, horizontal legal relations in our legal system are still to be determined by the common law of torts, contract, and property. Of course, there are exceptional cases mentioned above where constitutional rights have been taken to ground a change in these rules, or a supplementation of them via a "pure" constitutional tort remedy. But, for most commentators, the most striking feature of the Irish law of horizontality is just how exceptional these cases really are. Across a range of diverse cases, our courts have consistently found existing common law to be a "basically effective" implementation of constitutional rights in the private sphere and thus, absent legislative intervention, properly left as is. Despite the *structural* possibility of horizontality of both the direct and indirect variety, then, the *substance* of private persons' legal relations shows few sure signs of the Constitution's influence.⁸⁷

So, to take some examples I discuss below, it is by now tolerably clear that neither the constitutional right to equality before the law (Article 40.1) nor the constitutional right against religious discrimination (44.2.3) grounds a "pure" constitutional tort of discriminatory treatment actionable against private persons (§3.4.4).⁸⁸ Absent legislation, the victims of discrimination by private persons are thus confined to the limited remedies that would anyway avail them at common law.⁸⁹ Similarly, despite Article 41's solemn reverence for the marital family *and* the significance attached to parent-child relationships in Article 42, the children of a father negligently injured so as to substantially impair his performance of his paternal duties have no "pure" constitutional tort claim against the

⁸⁷ In a relatively recent survey of the position, Oran Doyle (n 8) 185 comments how "somewhat curiously, the horizontal applicability of constitutional rights gained little traction outside the trade union context".

⁸⁸ *McGrath and O'Ruairc v Trustees of Maynooth College* [1979] ILRM 166; *Equality Authority v Portmarnock Golf Club* [2005] IEHC 235.

⁸⁹ On which, see Amnon Reichman, 'Professional Status and the Freedom to Contract: Toward a Common Law Duty of Non-Discrimination' (2001) 14 Canadian Journal of Law and Jurisprudence 79.

injurer (§3.4.2).⁹⁰ Likewise, Irish courts routinely note that the law of defamation involves a “balance” between the constitutional right to freedom of expression and that to a good name, but have consistently held (usually without much argument) that the balance struck by the tort’s traditional structure ought not be disturbed (§3.4.6). The constitutional right to assemble, it seems, will never licence conduct in breach of others’ private common law rights to property and person (§3.4.5).⁹¹ By the same token, the rights to the inviolability of one’s dwelling or to livelihood provide no justification for trespass on another’s property (§3.4.2).⁹² And strikingly, constitutional rights to bodily integrity and property have consistently been found capable of adequate vindication via common law actions to negligence, nuisance, trespass, and so forth, within those actions’ ordinary confines, without much (if anything) in the way of constitutional gloss or supplementation (§3.4.2).

Indeed, one of the criticisms most frequently directed at the Irish law of horizontality targets its “extreme deference towards existing private law”,⁹³ and our judiciary’s “striking reluctance to involve the courts in the role of refashioning [horizontal legal relations], root and branch, in the light of the Constitution”.⁹⁴ The authors of the latest edition of *Kelly*, for instance, consider it “hard to see why the tort law that pre-existed the Constitution should not yield in some substantial ways to constitutional considerations”.⁹⁵ Similarly, McMahon and Binchy remark that “the idea that this corpus of common law is surrounded by a shroud through which the light of the Constitution can penetrate in only narrow shafts is difficult to understand”.⁹⁶ Writing extra-judicially, Gerard Hogan posits the post-*Meskill* decisions

⁹⁰ *PH v John Murphy & Sons Ltd* [1987] IR 621. Cf. *McKinley* (n 56); *Re Blake* (n 71); *Burke & O’Reilly* (n 71).

⁹¹ *Brendan Dunne Ltd v Fitzpatrick* [1958] IR 29; *DPP v Kehoe* [1983] IR 136; *Hyland v Dundalk Racing* [2014] IEHC 60.

⁹² *Casey v Minister for Arts* [2004] IESC 14 (SC) 23 (Murray J). *McDonagh v Kilkenny County Council* [2007] IEHC 350 [35] (O’Neill J); *Dublin City Council v Gavin* [2008] IEHC 444, 23-4 (Peart J); *O’Driscoll v Limerick City Council* [2012] IEHC 594 [6.3]-[6.5] (Feeney J) – although it may be relevant to the question of what remedy it would be appropriate for a court to grant: *Clare County Council* (n 82); *Murtagh* (n 81). See, similarly, on how constitutional rights cannot displace a mortgagor’s obligation to repay the mortgage loan, nor generally insulate them from the consequences of their non-payment: *Launceston Property Finance Ltd v Burke* [2017] IESC 62 [63] (McKechnie J).

⁹³ O’Cinneide, ‘Taking Horizontal Effect Seriously’ (n 3), 90.

⁹⁴ McMahon and Binchy (n 3) [1.54].

⁹⁵ Hogan, Whyte, Kenny, and Walsh (n 3) [7.1.169]

⁹⁶ McMahon and Binchy (n 3) [1.55].

in this area illustrate how “when all is said and done the Constitution was really too radical a document for a legal system based on the common law to absorb fully”.⁹⁷

These authors provide little idea of what a more robust penetration of the Constitution in horizontal legal relations might look like, nor, in particular, why it would be desirable. For their criticisms to convince, they would need to offer a substantive conception of what constitutional rights properly require in the domain of private persons’ legal relations with one another, and show that our law had failed meaningfully to live up to it. Still, even in the skeleton form they are offered, these challenges are troubling. They raise the possibility that our law is only explicable as a product of judicial timidity, or a failure to take the Bunreacht’s rights guarantees “at face value”.⁹⁸ They also cast doubt on the principled consistency of later decisions with earlier ones: our law of horizontality becomes “schizophrenic”;⁹⁹ its development unprincipled and “spasmodic”.¹⁰⁰ The remainder of this chapter looks to provide the beginnings of an answer to this charge of incoherence.

3.3. NEGATIVE STAGE

3.3.1. *Introduction*

In this section, I consider a catalogue of reasons that each hold out some pre-theoretical promise for justifying the Irish law of horizontality, as it has just been presented. These reasons have all found voice in existing judicial or academic treatments of horizontality, whether Irish or international. Indeed, many of them are by now generic, cross-jurisdictional commonplaces in debates over horizontality’s justification.

My objective is to determine what role, if any, each of these candidate reasons might play in making normative sense of the doctrinal data just presented. I argue, in each case, that they are incapable of persuasively accounting for those data by themselves. This is not to deny their possible place as component parts of a more complex account. Nonetheless, in

⁹⁷ Gerard Hogan, ‘The Farthest’ (n 3), 20. See, similarly, Hogan, ‘Mr Justice Brian Walsh’ (n 3), 6: “The full potential of Walsh’s other judgment dealing with this theme, *Meskeil v CIE*, has not, perhaps, been fully realised”.

⁹⁸ Hogan, ‘The Farthest’ (n 3) 20

⁹⁹ O’Cinneide, ‘Taking Horizontal Effect Seriously’ (n 3), 94.

¹⁰⁰ *ibid.*

seeing what that place might be, I consider it instructive to first assess each consideration's explanatory relevance in isolation: seeing where a reason falls short considered by itself helps us figure out what explanatory reinforcements might need to be called in.

In all, this negative stage of our enterprise serves three connected purposes. First, it alerts us to problems in existing, initially attractive answers; revealing the necessity for an alternative approach. Secondly, it helps us to grasp the parameters such an alternative approach must satisfy: the burdens it must meet, the problems it must avoid. Thirdly, it clarifies the precise explanatory relevance of certain facially persuasive considerations.

3.3.2. *Constitutional Supremacy*

Within the Irish legal system, constitutional norms are *normatively supreme*.¹⁰¹ This means that the validity of non-constitutional norms depends on their consistency with constitutional ones, but not vice versa. Where a non-constitutional norm conflicts with a constitutional one, the former is legally invalid to the extent of its inconsistency with the latter.¹⁰²

Ideas of constitutional supremacy very often figure in arguments in favour of constitutional rights' horizontal effects.¹⁰³ Walsh J's reasoning in *Meskeil v CIE* provides a clear example. He described D's dismissal of P as:

¹⁰¹ Subject, of course, to the primacy of EU law: Article 29.4.6. For economy of expression, I omit the qualifier in what follows. Besides, the supremacy of EU law in our legal system derives from the Constitution: properly understood, it is thus an implication, not a qualification, of the account of constitutional supremacy offered in the text.

¹⁰² *Re Article 26 and the Regulation of Information (Services Outside the State for Termination of Pregnancies) Bill* [1995] 1 IR 1 (SC) 43; Brian Walsh, 'The Constitution: a View from the Bench' in Brian Farrell (ed.), *De Valera's Constitution and Ours* (Gill & Macmillan 1988) 191.

¹⁰³ The *locus classicus* must be *Lüth* (n 52). See, further, Gardbaum, (n 58), 418-421; Gerard Whyte, 'Industrial Relations and the Irish Constitution' (1981) 16(1) *Irish Jurist* 35, 74; Andrew S. Butler, 'Private Litigation and Constitutional Rights under Sections 8 and 9 of the 1996 Constitution—Assistance from Ireland' (1999) 116 *South African Law Journal* 77, 81-82; Nolan, 'Holding Non-State Actors to Account' (n 3), 66, 72; Graziella Romeo, 'The Conceptualization of Constitutional Supremacy: Global Discourse and Legal Tradition' (2020) 21 *German Law Journal* 904.

[A]n abuse of the common-law right because it is an infringement, as an abuse, of the *Constitution which is superior to the common law and which must prevail if there is conflict between the two* [my emphasis].¹⁰⁴

Here, Walsh J identifies an unexceptionable, important, upshot of constitutional supremacy for private persons' legal relations in our legal system. Like legal norms more generally, the legal validity of private law norms, whether common law or legislated, depends on their consistency with constitutional rights. As such, where some ordinary norm of private law (here, the "common-law right of dismissal") conflicts with a constitutional right (here, to associate/disassociate), the ordinary norm of private law will fail to validly govern private legal relations. As supreme law, the Constitution must prevail.

By itself, though, the idea of constitutional supremacy discloses very little about horizontality's justification. The fact constitutional rights are supreme to other legal norms implies nothing about their *content* – *what* and *who* they require, prohibit, permit, empower, etc. Constitutional supremacy is just an idea about the *relationship* between different categories of legal norms. It resolves conflicts between constitutional and non-constitutional norms in favour of the former. It does not tell us anything else about the Constitution's content, and thus whether there is a normative conflict with sub-constitutional law in need of any resolution.

By contrast, the question of whether a constitutional right has any horizontal effect *always* depends on that norm's content, and not just its constitutional status. In *Meskill*, for instance, constitutional supremacy only becomes relevant to the horizontal legal relation between P and D once it has already been decided that P's constitutional right to disassociation was directly horizontally binding, and that D's dismissal of P violated it. At *that* point, constitutional supremacy's relevance is clear: once it has been determined that the dismissal violates a (directly horizontally binding) constitutional claim-right, then any common law norm purporting to permit that dismissal must be invalid. But constitutional supremacy can tell us nothing about whether P's constitutional right is directly horizontally binding in the first place, nor whether D's dismissal of P violates it. How could it?

¹⁰⁴ *Meskill* (n 16) 136.

Conceptually, constitutional supremacy is fully compatible with total constitutional verticality.

3.3.3. Rights

The *Educational Company of Ireland v Fitzpatrick* cases are the source of perhaps the closest thing Irish courts have ever come to a general justification for the direct horizontal *bindingness* of constitutional rights.¹⁰⁵ That argument was originally stated (and is only ever recapitulated) in cursory terms that belie the broad sweep and lofty abstraction of its basic premise. It seems to proceed from a claim about a characteristic purportedly shared by *all* rights *qua* rights, or at least rights of which it makes sense to speak of their holders having “liberty to exercise”.

Like *Meskill*, *Fitzpatrick* turned on the implications of the constitutional right to disassociation for the law of dismissal from employment (§6.5.1). As in *Meskill*, a key aspect of *Fitzpatrick*’s *ratio* was that P’s constitutional right to disassociation implied that their employer (a private person) had a constitutional duty to refrain from compelling P to join a particular trade union by (threat of) dismissal. Drawing this implication, Ó Dálaigh J reasoned in his judgment at the interlocutory stage:

I incline to the view that if the employers had attempted to compel their non-union employees to join the Union...they would have acted...in violation of a right which, under the Constitution, the State guarantees liberty to exercise. *Liberty to exercise a right, it seems to me, prima facie implies a correlative duty on others to abstain from interfering with the exercise of such a right* [my emphasis].¹⁰⁶

Apparently picking up on the same idea in *Fitzpatrick* (No. 2), Budd J reasoned in the High Court:

¹⁰⁵ *Educational Company of Ireland Ltd v Fitzpatrick* (No. 1) [1961] IR 323; *Educational Company of Ireland Ltd* (No. 2) (n 68).

¹⁰⁶ *Educational Company of Ireland Ltd* (No. 1) (n 105) 343 (Ó Dálaigh J).

Obedience to the law is required of every citizen, and it follows that if one citizen has a right under the Constitution there exists a correlative duty on the part of other citizens to respect that right and not to interfere with it. To say otherwise would be tantamount to saying that a citizen can set the Constitution at naught and that a right solemnly given by our fundamental law is valueless...If the nine non-union members have the right of free association, then it is the duty of all citizens to abstain from an interference with that right [my emphasis].¹⁰⁷

The basic claim – that one person having a right (or a “liberty to exercise” a right) implies that “every citizen” is under a duty to refrain from interfering with it – has been invoked by Irish courts on several occasions since, cropping up at key junctures in our horizontality jurisprudence.¹⁰⁸ If it were sound as a claim about rights in general, it would clearly have significant upshots for horizontality’s justification. The *universal* bindingness of constitutional rights would become a defeasible justificatory starting point.

The claim might be read in several ways, corresponding to different senses of the word “right”.

Ó Dálaigh and Budd JJ’s talk of “*correlative* duty” initially calls to mind the notion of a Hohfeldian claim-right (§1.2.5). However, the idea that one person having such a *claim*-right implies that all others ought to bear a correlative duty – on the Hohfeldian sense of “correlative” – is not plausible, even as *prima facie* starting point. Contractual claim-rights justifiably correlate with duties exclusively on promisors, and not even *prima facie* on anyone else.¹⁰⁹ A criminal defendant’s constitutional claim-right to have her trial conducted

¹⁰⁷ *Educational Company of Ireland Ltd (No. 2)* (n 68) 368 (Budd J).

¹⁰⁸ Most notably, *Meskill* (n 16). See, also, *Attorney General (SPUC) Ltd* (n 24); *Attorney General (SPUC) v Open Door Counselling Ltd (No. 2)* [1994] 2 IR 333; *CK v JK and F McG* [2004] IESC 21 (Murray J); *Burke v an Adjudication Officer* [2023] IEHC 360 [28] (Bolger J).

¹⁰⁹ In our legal system, contractual claim-rights also give rise to associated duties on third parties (of non-procurement): *Lumley v Gye* (1853) 2 E and B 216; *Ianród Éireann v Holbrooke* [2000] ELR 109. These third-party duties are not the Hohfeldian correlatives of the contractual claim-rights themselves, but are instead correlative to *another* claim-right (in tort) not to have breach of the initial contractual claim-right procured. I take it as read that the horizontally binding constitutional duties Irish courts have identified are not generally capable of being understood as duties on private persons to avoid procuring the breach of some *other* duty. However, as discussed later (§6.5.1), the Irish law of horizontality *has* had occasion to address situations where one party seeks to procure the breach of *someone else’s*

with reasonable expedition justifiably correlates with a duty on only *the State* to conduct such a trial.¹¹⁰ In neither case is the inference from the existence of a claim-right to a correlative duty on all others (to render performance; to conduct a trial) morally attractive, much less conceptually necessary. Nor are the examples at all exceptional: it is a commonplace of both legal and moral life that certain of our claim-rights *bind selectively, not universally*. Our legal, moral, and constitutional relationships are diverse; different people owe us different things.

As such, Ó Dálaigh and Budd JJ must have had a different, non-Hohfeldian, sense of “right” and “correlative duty” in mind.

Perhaps, owing to Ó Dálaigh J’s mention of “liberty to exercise”, his claim ought be read as one about rights in the nature of *freedoms*: roughly, entitlements to a sphere of unimpeded self-directed action in some domain, of which the constitutional rights of assembly, association, and expression seem paradigmatic examples.¹¹¹ It is certainly *conceptually* possible to conceive of such freedoms narrowly as being entitlements only to a sphere of action unimpeded by *State* activity.¹¹² The point, though, might be that such a narrow conception of legal freedoms is invariably inconsistent with their best moral justification. Indeed, if one accepts the natural thought that these freedoms are instruments in service of whatever value there might be in persons having the capacity to live self-directed lives,¹¹³ the *source* of the impediment to self-direction can easily look beside the point.¹¹⁴ On this ground, a defeasible moral case for imposing some duty of non-

horizontally binding constitutional duty: *Educational Company (No. 2)* (n 68); *Cotter* (n 31); *Murtagh Properties* (n 68).

¹¹⁰ *The State (O’Connell) v Fawsitt* [1986] IR 362.

¹¹¹ Consider, similarly, Hart’s notion of a “general right”: Herbert L.A. Hart, ‘Are There Any Natural Rights?’ 64(2) *The Philosophical Review* 175, 187-8. These are not liberties (or privileges) in the Hohfeldian sense (§1.2.5). On that sense, a liberty is a mere *permission*, and it is clearly conceptually possible to be permitted to ϕ without any other person (let alone *all* other persons) having any duty to abstain from interfering with your ϕ ing: consider, starkly, a legal system in which everything is permitted and nothing prohibited.

¹¹² Consider, for instance, US First Amendment orthodoxy: *Public Utilities Comm’n v Pollak* 343 US 451 (1952); *CBS v Democratic National Committee* 412 US 94 (1973); *Hudgens v NLRB* 424 US 507 (1976); *Hurley v Irish-American Gay, Lesbian and Bisexual Group of Boston Inc* 515 US 557 (1995); *Denver Area Ed. Telecommunications Consortium, Inc v FCC* 518 US 727 (1996); *Manhattan Community Access Corporation v Halleck* 587 US (2019).

¹¹³ See, generally, Kai Möller, *The Global Model of Constitutional Rights* (Oxford University Press 2012).

¹¹⁴ *Marsh v Alabama* 326 US 501 (1946), 507 (Black J): “[W]hether a corporation or a municipality owns or possesses the town the public in either case has an identical interest in the functioning of the

interference on *all* persons might seem to arise. In this way, “[l]iberty to exercise a right [would] *prima facie* impl[y] a correlative duty on others to abstain from interfering with the exercise of such a right”.

An alternative, overlapping reading takes the Ó Dálaigh-Budd claim to be a still more expansive one about a “right” as *a morally or legally important value or individual interest*. The language of “rights” is, of course, sometimes used in this way: think, for instance, of the German FCC’s claim in *Lüth* that the Constitution’s rights’ provisions erect an objective “order of values” lying at the apex of the legal system, radiating throughout it.¹¹⁵ On this picture, as the FCC emphasised, constitutional rights are not just *subjective entitlements* held by one person against another, but also *values* impersonally calling for realization by anyone.¹¹⁶ They are not just *constraints* on one person’s treatment of another, but also *goods* to be pursued, advanced, and even maximized. The question of who owes what constitutional duties therefore becomes an essentially instrumental one about how best to realize a set of sometimes competing values and goods. The starting point, on this approach, is that it is valuable to have more “privacy”, “equality”, “dignity”, “free association”, and so on (whatever that is to mean). Duties are to fall on whoever they must in order to realize that value, having regard to costs with respect to other values. Because those values are themselves impersonal, we might say they ground a *prima facie*, defeasible duty on the part of *all* others to “respect” or “not to interfere with” them.

Glossed in these ways, Ó Dálaigh and Budd JJ’s claims might be thought appealing as claims about rights. Nonetheless, they transparently lack much power to account for the Irish law of horizontality in all its particularity, at least without much more filling out.

community in such manner that the channels of communication remain free”; Oliver Gerstenberg, ‘Private Law and the New European Constitutional Settlement’ (2004) 10(6) *European Law Journal* 766, 10.

¹¹⁵ *Lüth* (n 52); Kai Möller, ‘*Lüth* and the “Objective System of Values”: From “Limited Government” towards an Autonomy-based Conception of Constitutional Rights’ in Sujit Choudhry, Michaela Hailbronner, and Matthias Kumm (eds), *Global Canons in an Age of Contestation: Debating Foundational Texts of Constitutional Democracy and Human Rights* (Oxford University Press 2024); Alexy, (n 58) 354.

¹¹⁶ Frances Raday, ‘Privatising Human Rights and the Abuse of Power’ 13(1) *Canadian Journal of Law and Jurisprudence* 103, 106: “From the perspective of the individual, it seems almost a legal and ethical platitude to say that it would be desirable to increase one’s enjoyment of the right to equal treatment, human dignity, privacy, freedom of expression, religion, conscience and movement. If it is desirable to protect such rights against infringement by the state then it would seem, patently, desirable to protect them against infringement by other individuals”.

Everything will turn on (a) what, precisely, “respect” for values/interests/freedoms is taken to require of private persons; (b) which “interferences” they must abstain from; and (c) when “prima facie” duties will fall short of being all things considered ones. In itself, the claim under consideration offers no clues as to how those questions are to be answered. On its own terms, it is compatible *both* with a view on which private persons’ are saddled with exceptionally onerous constitutional duties, *and* a view on which the “prima facie” case for the imposition of a duty on private persons is always defeated by competing considerations. Accounting for the Irish law of horizontality as we find it will require adjudicating between these positions, or finding some more attractive middle-ground that separates them. It will require, in Jean Thomas’s phrase, locating some “principled limitation for the applicative scope of these rights”.¹¹⁷ That will require looking beyond the confines of the Ó Dálaigh-Budd claim, inevitably to engage in difficult argument of political morality.

For just the same reason, we cannot content ourselves with the thought that if constitutional rights’ “overriding aim is to protect the victims’ dignity, then that victim has to be protected from everyone, state and non-state actors” alike.¹¹⁸ That intuition only raises the question of what victims’ dignity requires of other private persons who possess the same dignity, and the role constitutional law is to play in realizing such requirements. Irish law answers that question in a specific way. It is that specific answer I am concerned to account for in this thesis.

3.3.4. *Judicial Restraint*

Above (§3.2.8), I suggested that our courts’ development of the law of horizontality was often characterised by marked judicial *restraint*: a tendency to conserve existing law, and a cautious circumspection about grand innovation. As such, those reasons *generically* counting in favour of judicial restraint – across legal contexts – might seem a promising resource for explaining the particulars of Irish law in this area.

Those generic reasons are well-rehearsed. They are mainly of four sorts. First, there are *rule of law* reasons. If legal subjects are to guide their conduct by law, they must generally

¹¹⁷ Jean Thomas, *Public Rights, Private Relations* (Oxford University Press 2015) 17.

¹¹⁸ Andrew Clapham, *Human Rights Obligations of Non-State Actors* (Oxford University Press 2006) 546.

be able to rely on the law's *stability*, *predictability*, and *certainty*.¹¹⁹ Judicial innovation can make it more difficult for them to do so, especially because such innovation is piecemeal; its full implications becoming clear only gradually, iteratively. Second, reasons of *democratic legitimacy* tell against unelected judges taking on muscular innovatory functions, especially (but not exclusively) where this would undercut an elected legislature's law-making authority. Third, judges operate under *epistemic limitations* that make reform risky. Judges' narrowly legal expertise, reliance on litigants' submissions, and constraints on their time all make it difficult for judges to reliably assess arguments for changing the law. This is especially so where such assessment would require predicting the future social consequences of legal change beyond the case at bar. Many legal problems are, of course, polycentric: they implicate "a large network of interlocking relationships, such that a change to any one relationship causes a series of complex changes to other factors".¹²⁰ Those problems are usually hard for judges to smoothly navigate within the confines of their institutional role, all the more so where they look to change existing law. Fourth, all else being equal, fairness requires that courts treat like cases alike over time: if they have consistently decided certain cases in one way in the past, an about-face undermines fairness.¹²¹

Outside of extreme cases, reasons like these combine to make heeding closely to the legal status quo an attractive, morally defensible option for judges as a general matter: they ground a *pro tanto* principle of judicial restraint. In the present context, such a principle has a natural affinity with the position articulated by Henchy J in *Hanrahan*, which we saw above is orthodoxy (§3.2.8). On that position, the "implementation of [constitutional rights] is primarily a matter for the State",¹²² such that judges ought be slow to effect change in horizontal legal relations on constitutional rights grounds absent "plain" or "basic"

¹¹⁹ Joseph Raz, 'The Rule of Law and its Virtue' in his *The Authority of Law: Essays on Law and Morality* (Oxford University Press 1979). Cf. Joseph Raz, 'The Law's Own Virtue' (2019) 39(1) Oxford Journal of Legal Studies 1.

¹²⁰ Jeff King, *Judging Social Rights* (Cambridge University Press 2012) 190.

¹²¹ Scott Hershovitz, *Law Is A Moral Practice* (Harvard University Press 2023) 34. Consider, too, the (plausibly) distinct value of integrity: Ronald Dworkin, *Law's Empire* (Harvard University Press 1986) 176-225; Scott Hershovitz, 'Integrity and Stare Decisis' in Scott Hershovitz (ed), *Exploring Law's Empire* (Oxford University Press 2008).

¹²² As pointed out by the authors of *Kelly* (n 3) [7.1.165], the "[t]he reference to the State in this context is not entirely clear" and the best view, given the context, is probably that Henchy J was "using the term as a synonym for the legislature"

constitutional inadequacy.¹²³ In *Blehein v Minister for Health and Children*, Charleton J offered an extended restatement and defence of that position, relying expressly on the notion of judicial restraint.¹²⁴

With a principle of judicial restraint in clear view, our law of horizontality begins to look more attractive; its relative conservatism no longer so “difficult to understand”,¹²⁵ and its rational basis no longer so “hard to see”.¹²⁶

By itself, however, a principle of judicial restraint cannot distinguish between cases where a judge ought to innovate, and those where they ought to conserve. Indeed, considered apart from all other considerations, such a principle has “no natural stopping point”.¹²⁷ It suggests judges ought always to stay their hand. Unless one is happy to embrace that conclusion, restraint is therefore not a principle “one can be faithful to all the way down”.¹²⁸ As we have seen, the Irish law of horizontality includes cases *both* of judicial innovation and conservation. If reasons for restraint are to figure in accounting for that law, then, they must be supplemented with reasons favouring innovation to which they will sometimes yield, and an account of how the two sorts of reason interact. Put differently, whilst a principle of restraint tells a judge she must be highly confident that the Constitution requires innovation before innovating (“*plain*” inadequacy, “*basic*” ineffectiveness, “*absolute*” necessity), it cannot tell her how to determine what the Constitution requires in the first

¹²³ The *Hanrahan* position is thus a close analogue of James Bradley Thayer’s view – highly influential in the United States – that judges ought not strike down an Act of Congress unless its unconstitutionality was “so manifest as to leave no room for reasonable doubt”: James Bradley Thayer, ‘The Origin and Scope of the American Doctrine of Constitutional Law’ (1893) 7 Harvard Law Review 129, 132. The *Hanrahan* position’s scope of application is, however, broader: the principle of restraint extends to govern judicial development of the common law too.

¹²⁴ *Blehein* (n 15) [15] (Charleton J): “Judicial restraint and the duty not to legislate requires any such resort [to the Constitution] to be only where it is absolutely necessary...The principle of legal certainty which is the foundation of a system of justice requires this, and that any constitutional tort adheres to precedent and thus to intelligibility. While freedom of judicial action may be alluring, resort to the “Chancellor’s foot” to decide cases can erode the rule of law”.

¹²⁵ McMahon and Binchy (n 3) [1.55].

¹²⁶ Hogan, Whyte, Kenny, and Walsh, *Kelly* (n 3) [7.1.169]

¹²⁷ As Richard Posner said of Thayerian deference, “[o]nce you embraced it, you could not explain why a law would ever be declared unconstitutional”: ‘The Rise and Fall of Judicial Self-Restraint’ (2012) 100(3) California Law Review 519, 522.

¹²⁸ David Kenny, ‘Merit, Judicial Diversity, Interpretative Communities: the (non-)party Politics of Judicial Appointments and Constitutional Adjudication’ in Laura Cahillane, James Gallen, and Tom Hickey (eds) *Judges, Politics, and the Irish Constitution* (Manchester University Press 2017) 143.

place – the standard by which inadequacy, ineffectiveness, or necessity are to judged. It is, at best, an incomplete theory of constitutional meaning.¹²⁹

There is another, more subtle difficulty with relying on a generic reasons for judicial restraint in making sense of the Irish law of horizontality. It is this: although they are not deprived of all their force, certain of the reasons favouring judicial restraint operate far less forcefully in the sphere of horizontality than they might elsewhere. This is because the existing framework governing horizontal legal relations in Ireland is largely a product of judge-made common law. For the most part, it was *not* constructed by a representative, democratically elected legislature with expert, state-of-the-art, policy support. Instead, it was fashioned long ago by the (white, male, unelected) courts of an imperial power, in light of social mores sharply different from our own, and without the Bunreacht anywhere in view.¹³⁰ As such, the democratic and epistemic reasons supporting a deferential presumption of constitutionality do not operate as clearly as they might with post-1937 Acts of the Oireachtas. The position more closely resembles that of *pre*-1937 legislation, in respect of which no such presumption applies.¹³¹

It would, furthermore, be imprudent *always* to read legislative silence as tacit endorsement of the common law's content remaining fixed.¹³² With respect to private law, that silence often more plausibly indicates a legislative preference for leaving the gradual development of some areas of law to the courts, on the basis of judges' own special expertise and close focus on bilateral questions of commutative justice.¹³³ In effecting that gradual development, to be sure, judges must refrain from *legislating*: Article 15.2.1 confers the

¹²⁹ Cass Sunstein, *How To Interpret the Constitution* (Princeton University Press 2023) 48-56.

¹³⁰ William Binchy 'Constitutional Remedies and the Law of Torts' in James O'Reilly (ed), *Human Rights and Constitutional Law: Essays in Honour of Brian Walsh* (Round Hall 1992); McDonnell (n 2) 159 (Keane J).

¹³¹ In relation to which it is clear no such presumption applies: *The State (Sheerin) v Kennedy* [1966] IR 379; *Educational Company (No. 2)* (n 68) 368 (Budd J); *Carrigaline Community Television Co Ltd v Minister for Transport and Energy* [1997] 1 ILRM 241 (HC) 288 (Keane J); *Haughey v Moriarty* [1999] 3 IR 1; *Laurentiu v Minister for Justice* [1999] 4 IR 26. Cf. *Pigs Marketing Board v Donnelly* [1939] IR 413; *Macauley v Minister for Posts and Telegraphs* [1966] IR 345 (HC) 359 (Kenny J). On the (limited) significance of the absence of this presumption in relation to such statutes, however: *Norris v Attorney General* [1984] IR 36 (SC) 54 (O'Higgins CJ); *Douglas v DPP* [2013] IEHC 343.

¹³² Hogan, Whyte, Kenny, and Walsh, *Kelly* (n 3) [3.2.123]. Cf. *Blehein* (n 15) [6] (Charleton J); *GE* (n 38) [90]-[91] (Murray J).

¹³³ *H v H* [2015] IESC 7 [32]-[33] (O'Donnell J).

“sole and exclusive power of making laws for the State” on the Oireachtas.¹³⁴ However, it is difficult to maintain that *all* judicial departures from existing common law rules usurp that power.¹³⁵ In particular, Article 50 carries over common law rules only “to the extent to which they are not inconsistent” with the Constitution.¹³⁶ Minimally then, the text necessarily contemplates the possibility of some judicial adaptation of the common law on constitutional grounds.¹³⁷ Where the common law’s compatibility with the Constitution *itself* is at issue – as, of course, it will be in the horizontality cases we are considering – the Constitution cannot easily be read as “freezing our common law...in the condition in which it was to be found at the coming into force of the Constitution...so that it could never be departed from save by enactment of the Oireachtas”.¹³⁸ Again, we must look beyond a principle of judicial restraint to satisfactorily account for the law we have.

3.3.5. Text

In other jurisdictions, judges have located answers to important horizontality questions through careful inquiry into a constitutional text’s language, or the history of its drafting and ratification.¹³⁹ By contrast, the Irish courts’ development of horizontality doctrine has

¹³⁴ *Re Green Dale Building Co* [1977] IR 256 (SC) 266 (Henchy J); *Attorney General v Paperlink* [1984] ILRM 373 (HC) 389 (Costello J); *MM v PM* [1986] ILRM 515 (HC) 517 (McMahon J); *Hynes-O’Sullivan* (n 62); *UF v JC* [1991] 2 IR 330; *BL v ML* [1992] IR 116; *AD v Ireland* [1994] 1 IR 369; *North Western Health Board* (n 38); *Re Flightlease* [2012] IESC 12; *R v An tÁrd Chláraitheoir* [2014] IESC 60 [2.5] (Clarke J); *H* (n 133) [2.1]-[2.9] (Clarke J); *Blehein* (n 15) [15] (Charleton J).

¹³⁵ *RT v VP (or se VT)* [1990] 1 IR 545 (HC) 558 (Lardner J); *Iarnród Éireann* (n 51) (HC) 366-7 (Keane J).

¹³⁶ *Mayo-Perrott v Mayo-Perrott* [1958] IR 336; *Vone Securities v Cooke* [1979] IR 59; *People (Director of Public Prosecutions) v JT* (1988) 3 Frewen 141; *McKinley* (n 56); *W v W* [1993] 2 IR 476; *ACW v Ireland* [1994] 3 IR 232 (HC) 243 (Keane J); *Iarnród Éireann* (n 51) (SC) 366 (Keane J); *McDonnell* (n 2) 147 (Barrington J); *GMcG v DW (Divorce: Recognition)* [2000] 1 IR 96 (HC) 104 (McGuinness J); *Healy v Stepstone Mortgage Finance Ltd* [2014] IEHC 134. Cf. *Gaffney v Gaffney* [1975] IR 113 (SC) 151 (Walsh J).

¹³⁷ *Healy v Stepstone Mortgage Finance Ltd* [2014] IEHC 134 [8]-[9] (Hogan J); *Blehein* (n 15) 208 (Hogan J). Cf. *McGee* (n 4) (O’Donnell CJ) [72]-[74] (for an apparently more expansive view of the judicial power to adapt the common law on grounds *other* than constitutional).

¹³⁸ *Gaffney* (n 136) (SC) 151 (Walsh J).

¹³⁹ Consider, in the English speaking world, *Dolphin Delivery (X)*; *Du Plessis v De Clerk* [1996] (3) SA 850 (CC), and the *Civil Rights Cases* 109 US 3 (1883), all of which saw general principles of horizontality turn on close textual analysis. The early academic debate of the horizontal effect of the Human Rights Act 2003 was also marked by close engagement with the statutory text. See, for instance: Murray Hunt, ‘The “Horizontal Effect” of the Human Rights Act’ [1998] Public Law 423; Nicholas Bamforth, ‘The Application of the Human Rights Act 1998 to Public Authorities and Private Bodies’ (1999) 58(1) Cambridge Law Journal 159; William Wade, ‘Horizons of Horizontality’ (2000) 116 Law Quarterly Review 217; Richard Buxton, ‘The Human Rights Act and Private Law’ (2000) 116 Law Quarterly Review 48; Anthony Lester and David Pannick, ‘The Impact of the Human Rights Act on Private Law: the King’s Move’ (2000) 116 Law Quarterly Review 380.

seldom turned on close textual or historical exegesis. In two cases, Irish judges have *declined* to give a right some particular horizontal significance expressly on account of that right’s textual formulation.¹⁴⁰ But it seems the courts have never *justified* recognising some right’s horizontal significance on narrowly textual grounds.¹⁴¹ Notably, many – perhaps even most – of the cases where constitutional rights have substantially altered horizontal legal relations have concerned *unenumerated* constitutional rights.¹⁴² Textual guidance was therefore in large part unavailable. In other cases, Irish courts have found a constitutional right to be directly horizontally binding (and directly horizontally enforceable) even where its textual formulation seemed to pick out *only the State* as duty-bearer.¹⁴³

In all, the best view is probably that the constitutional text itself is too ambiguous – in the intent of the People objectively disclosed by its linguistic meaning¹⁴⁴ – to furnish clear answers to many horizontality questions. There is certainly nothing so clear as Article 8(2) of the South African Constitution by which “[a] provision of the Bill of Rights binds a natural or juristic person if, and to the extent that, it is applicable, taking into account the nature of the right and the nature of any duty imposed by the right”.¹⁴⁵ It is thus probably

¹⁴⁰ *McGrath* (n 88); *PH* (n 90). Detailed below at §3.4.4; §3.4.2.

¹⁴¹ Note, however, Hogan J’s emphasis on the Irish language version of the text of Article 40.5 in *Sullivan (No. 1)* (n 22) [24] (Hogan J): “The Irish language text of Article 40.5 (‘Is slán do gach saoránach a ionad cónaithe...’) captures and expresses the essence of the English language word (‘inviolability’) by stressing the concepts of safety and security of the dwelling. Here again all of this was compromised by the actions of Mr McCartan”). Quite properly, there is no indication that Hogan J thought that textual point conclusive of the horizontality question (§4.4).

¹⁴² *Murtagh Properties* (n 68) (livelihood); *Glover* (n 75) (fair procedures); *Parsons* (n 23) (livelihood); *Lovett* (n 23) (livelihood); *Herrity* (n 20) (privacy); *O’Connell* (n 28) (livelihood).

¹⁴³ *Crowley* (n 26); *Coogan* (n 24); *Grogan* (n 24) (Brian Wilkinson, ‘The Irish Industrial Relations Act 1990 – Corporatism and Conflict Control’ (1991) 20 *Industrial Law Journal* 21, 32).

¹⁴⁴ As powerfully argued in Conor Casey and Oran Doyle, ‘Foreword: The Constitution under the New Supreme Court’ (2024) 44(1) *Dublin University Law Journal* 5, recent jurisprudence of the Supreme Court tends consistently to cast this notion of popular intent (i.e. as objectively disclosed by the text’s linguistic) as lodestar in constitutional interpretation: *O’Meara v Minister for Social Protection* [2024] IESC 1 [146] (O’Donnell CJ); *Heneghan v Minister for Housing, Planning and Local Government* [2023] IESC 7 [35], [57] (Murray J), [36] (Hogan J), [22] (Charleton J).

¹⁴⁵ Nor Article 20(1) of the Constitution of Kenya: “The Bill of Rights applies to all law and binds all State organs and *all persons* [my emphasis],” nor Articles 15(2) (prohibition of discrimination), 17 (abolition of untouchability), 23 (prohibition of human trafficking and forced labour), and 24 (prohibition of employment of children in factories) of the Indian Constitution. Consider, too, Article 118 of the 1919 Weimar Constitution, which clearly contemplates the horizontal significance of the right to free expression: “Every German has the right, within the limits of the general laws, to express his opinions freely in speech, in writing, in print, in picture form or in any other way. *No conditions of work or employment may detract from this right and no disadvantage may accrue to him from any person for making use of this right* [my emphasis]”. The Weimar Constitution was, of course, highly influential on the drafting of the 1937 Irish one: see, generally, Gerard Hogan, *Origins of the Irish Constitution 1928-41* (Royal Irish Academy 2012), but the express horizontality of Article 118 has left no obvious textual trace.

too quick to suppose, with Gerard Hogan, that decisions like *Meskeil* follow from taking the Constitution's "fundamental rights guarantees at face value".¹⁴⁶ At the same time, there is no obvious indication in the constitutional text that the People were concerned to *preclude* constitutional rights having horizontal effects. On the contrary, plausible arguments can be made that the constitutional text envisages *some* genre of horizontality.

- *Protect, Defend and Vindicate*: Article 40.3 describes the State's relationship to the citizen's personal constitutional rights in terms implying that the State is not the only person bound by those rights. By Article 40.3.1, the State guarantees not only to "respect" personal rights, but also to "*defend and vindicate*" them. By Article 40.3.2, it guarantees "by its laws [to] *protect* as best it may *from unjust attack* and, *in the case of injustice done, vindicate* the life, person, good name, and property rights of every citizen".¹⁴⁷ It might be thought odd, as a matter of ordinary usage, to speak of the State "protecting", "vindicating", or "defending" citizens' rights against *itself* and its *own* "unjust attacks".¹⁴⁸ The oddity subsides somewhat if the State is conceived as comprising several separate branches, charged with keeping one another in check. Still, to the extent any oddity is thought to persist, we might think Article 40.3's wording suggests that persons *other* than the State can violate constitutional rights, and that it is against these (non-State) persons that Article 40.3 contemplates "protecti[on] and...vindicat[i]on", perhaps through direct horizontal enforcement.¹⁴⁹
- *Passive Voice*: In several places, the Constitution speaks in the passive voice with regard to constitutional rights: the citizen is identified as grammatical patient (and so the holder of the relevant right) but the grammatical agent (and so whom the

¹⁴⁶ Hogan, 'The Farthest' (n 3), 20.

¹⁴⁷ Article 42A also now speaks of "vindication": "The State recognises and affirms the natural and imprescriptible rights of all children and shall, as far as practicable, by its laws protect and vindicate those rights".

¹⁴⁸ Binchy, '*Meskeil*' (n 3), 345; *Iarnród Éireann* (n 51) (HC) 367 (Keane J): "[W]hen they spoke of 'injustice done', they must surely have had in mind, not simply the right of the citizens to protection against oppression by the organs of the state, but also their right to a remedy if they became the innocent victims of the blameworthy conduct of others, the historic province of the law of tort".

¹⁴⁹ John Temple Lang, 'Private Law Aspects of the Constitution' 6(2) *Irish Jurist* 237, 246. Cf. Anthony M. Collins and James O'Reilly, *Civil Proceedings and the State* (3rd edn, Round Hall 2019) [7.88] who observe that Article 40.3.1 expressly mentions the State only and conclude that "[t]he language of Article 40.3.1 is pregnant with a State action requirement". They do not address the argument in the text, which appears to provide a rather more complete rendering of the constitutional provision.

right binds) is left ambiguous. Article 40.4 says that “[n]o citizen *shall be deprived* of his personal liberty save in accordance with law”. Article 40.5 says that “[t]he dwelling of every citizen *is inviolable and shall not be forcibly entered* save in accordance with law”. Article 44.2.1 says that “[f]reedom of conscience and the free profession and practice of religion *are...guaranteed* to every citizen”.¹⁵⁰ On their own terms, the passive formulation of these provisions at least appears compatible with – indeed, plausibly *invites* – horizontality, even *direct* horizontality.¹⁵¹ Moreover, given some rights provisions in the text *do* explicitly restrict their scope to State activity,¹⁵² the absence of any such restriction in these other provisions might be taken to imply their horizontal effect.

- “*Antecedent to all Positive Law*”: The Constitution recognises certain rights of the marital family under Article 41.1.1, and the right to the “private ownership of external goods” under Article 43.1.1 as “antecedent to all positive law”.¹⁵³ If one grants the assumption that the State is an entity constituted by positive law and so cannot exist without it, how could rights antecedent to positive law (and thus antecedent to the *State*) bind only the State? For them to exist at all, there must have been *someone* or *something* for them to bind. On the assumption that a State is impossible in the absence of positive law, this could not have been the State. At the same time, one might argue that these provisions, whilst acknowledging the existence of moral or (non-posit) legal rights antecedent to positive law, only impose *constitutional* constraints on the State, for which the pre-existing moral/legal rights furnish a justificatory ground.

Even assuming arguments like these successfully suggest the *possibility* of constitutional rights becoming (directly) horizontally significant, none of them indicate *how*, precisely,

¹⁵⁰ Temple Lang (n 149), 247.

¹⁵¹ More tenuously, the same might be said of Article 40.6.1, by which the “State guarantees liberty for the exercise” (vis-à-vis *whom*?) of the “right of citizens to express freely their convictions and opinions...to assemble peaceably and without arms...[and] the right to form associations and unions”.

¹⁵² For instance, Article 44.2.3 provides: “The State shall not impose any disabilities or make any discrimination on the grounds of religious profession, belief or status”, and Article 44.2.4 provides: “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”.

¹⁵³ See also Article 42A which speaks of “*natural* and imprescriptible rights of all children [my emphasis]”.

those rights are to be so significant. All (or, at least, *almost* all) of the normatively interesting details are left to be filled out. The relevant provisions are, of course, all cast in majestically general terms.¹⁵⁴ Taken at face value, they raise the possibility of normative conflict without obviously suggesting how it is to be resolved. When, if ever, ought the inviolability of one's dwelling yield to competing claims to property? Or one person's free profession of religion to another's equality before the law? The text, it seems, discloses few obvious answers.¹⁵⁵

One might look to infer answers about horizontality from the text's evident roots in the natural law tradition – which tradition “regarded [people] as having inherent rights and responsibilities by virtue of their humanity rather than as a consequence of State decree”.¹⁵⁶ However, even if such a proposition about inherent *moral* or even *legal* rights and responsibilities is to be accepted, it surely does not decide how, precisely, these ought to be reflected in law. In particular, it does not decide whether *constitutional* rights ought to be horizontally significant, nor precisely what those horizontal significances will be. Indeed, an argument from natural law premises for a US-style “state action” doctrine is imaginable: here, as elsewhere, that tradition is sufficiently rich and varied to suggest multiple inconsistent approaches. And it is difficult to see how our constitutional text could reasonably be taken to evince a popular commitment to a *particular strand* within that tradition so precise as to favour a *particular doctrine* of horizontal effect. The Constitution's natural law roots therefore cannot eliminate resort to substantive argument of political morality, nor – in light of the natural law tradition's great diversity – does it do much to constrain the shape such argument might take.

¹⁵⁴ *West Virginia State Board of Education v Barnette* 319 US 624, 639 (1943) (Jackson J); *McGee* (n 4) [1] (O'Donnell CJ).

¹⁵⁵ There is, furthermore, no direct evidence (of which I am aware) that the Constitution's drafters ever considered the matter of horizontality in detail, nor that it arose in the public debate surrounding the Constitution's ratification. Understandably, focus fixed instead on how the Constitution's rights provisions regulated the State's relationship to its citizens. In *Iarnród Éireann* (n 51) (HC) 367, Keane J made the reasonable observation that those who “gave their assent” to the constitutional text would have understood the common law of tort as “the system of civil justice which was envisaged in Article 40, s. 3, sub-s. 2 as providing for the protection and vindication of the rights of the citizen”. This provides, perhaps, a further reason supporting the exercise of judicial restraint in the common law's modification on constitutional rights grounds (§3.3.4) but, aside from having that negative significance, it is difficult to see how it could decide the substance of horizontality questions. And the negative significance cannot be dispositive either: Keane J's observation cannot reasonably be taken to imply that the People did not intend the Constitution to have any horizontal significances, direct or otherwise.

¹⁵⁶ Binchy, ‘Meskell’ (n 3) 346.

3.3.6. *State Action*

One important set of justifications for constitutional rights' horizontal significance goes through their vertical significance: if constitutional rights are adequately to constrain *state* action, the thought goes, they must also have some significance for private legal relations. On this justificatory strategy, horizontality figures as a means for a “vertical”, State-regarding end. It is justified if and to the extent it remedies what would otherwise be an “inadequate [constitutional] constraint” of the *State's* activities.¹⁵⁷

The strategy's appeal is clearest where the boundary separating public from private conduct is fuzziest: that is, where the State might intelligibly be said to be acting *through* a private person, such that (certain of) that private person's activities can be characterised as “emanating from the State”,¹⁵⁸ and in that way as “public” rather than “private”. Consider, for instance, cases where the State exercises close control over some private body's activities: providing its finances, designating its leadership, setting its objectives, directing how those objectives will be pursued, etc.¹⁵⁹ Or, similarly, cases where the State has delegated, contracted-out, or otherwise ceded control over the performance of some core governmental activity or public function – policing, say – to a private body.¹⁶⁰ Any position on which the State might successfully circumvent its constitutional duties by the formal expedient of having a private person do its dirty work is widely thought unattractive.¹⁶¹ To avoid that absurdity, legal systems devise doctrines under which certain activities of private persons can be characterised as “public” for certain purposes, and subjected to constitutional rights-based constraints on that ground.

¹⁵⁷ Thomas, *Public Rights* (n 117) 10. For an excellent discussion of this justificatory strategy, and its limits, see Chapter 2 of Gautam Bhatia, *Horizontal Rights: An Institutional Approach* (Bloomsbury 2023).

¹⁵⁸ In the EU lawyer's terminology: *Foster v British Gas plc* (1990) C-188/89.

¹⁵⁹ *Burton v Wilmington Parking Authority* 365 US 715 (1961) (Cf. *Moose Lodge No 107 v Irvis* 407 US 163 (1972)); *Douglas/Kwantien Faculty Association v Douglas College* [1990] 3 SCR 570 (Cf. *McKinney v Guelph* [1990] 3 SCR 229); *Pradeep Kumar Biwas v Institute of Chemical Biology* (2002) 4 SCC 111.

¹⁶⁰ *Marsh* (n 114); *Evans v Newton* 382 US 296 (1965) 299 (Douglas J); *Logan 590 v Logan Valley* 391 US 308 (1968); *Jackson v Metropolitan Edison Co* 419 US 345, 352 (1974).

¹⁶¹ *Lebron v National Railroad Passenger Corporation* 513 US 374 (1995), 397 (Scalia J): “It surely cannot be that government, state or federal, is able to evade the most solemn obligations imposed in the Constitution by simply resorting to the corporate form”; *AAA Investments (Proprietary) Ltd v Micro Finance Regulatory Council* (2006) (11) BCLR 1255 (CC) [40] (Yacoob J): “Our Constitution ensures, as in Canada and the United States, that government cannot be released from its human rights and rule of law obligations simply because it employs the strategy of delegating its functions to another entity”.

The basic thought here is unimpeachable, but its power to account for the current state of the Irish law of horizontality is limited. Whilst questions of private actors' public character have been judicially engaged in other contexts (and the courts' answers there surely have some bearing here),¹⁶² Irish courts have not yet had occasion to determine in detail what constitutes "State" action insofar as questions of constitutional rights' violation are concerned.¹⁶³ Indeed, in Ireland, private persons might sometimes be bound by constitutional duties even where any thought that they are somehow (acting as) State agents is wholly unappealing. If the defendants in *Sullivan* (a debt collector), *Herrity* (a newspaper), or *Parsons* (unlicensed coach operators) were to be classified as "public", and the imposition of constitutional duties on those defendants justified on that ground, it becomes difficult to see how *anyone* could reasonably be classified as private.¹⁶⁴

There is, however, another way of prosecuting this "state action" strategy, on which it is more ambitious and expansive, and so can be extended to cover more of the Irish law. This version of the strategy begins with the thought that, in municipal legal systems, *wherever* there is law, there is state action.¹⁶⁵ As such, if State action is to be properly constrained by constitutional rights, all legal rules must be subject to constitutional scrutiny. Importantly, this includes all *judge made* rules governing horizontal legal relations. That is, despite its occasional self-presentation, the law of contract, tort, and property is no neutral, natural, pre-political sphere of State *inaction*. It is created, applied, and enforced by state institutions. As such, even if we hold fast to the thought that only the *State* is bound by constitutional rights, constitutional rights are appropriately "on the cards" in any *legal* dispute between private persons. Private persons can always claim that the rules that would otherwise govern their dispute are unconstitutional, as inconsistent with *the State's* duties under the Constitution.

¹⁶² Most conspicuously, in determining amenability to judicial review: on which, see generally, Gerard Hogan, David Gwynn Morgan, and Paul Daly, *Administrative Law in Ireland* (5th edn, Round Hall 2019) [19.26]-[19.83].

¹⁶³ It is, however, clear from *McGrath* (n 88) that the provision of State funding to a private person cannot by itself be enough to make a private person an emanation of the State.

¹⁶⁴ For completeness, it is worth noting that the question of whether a private actor is somehow acting as an "emanation of the State" has not so far been determinative (or, indeed, even *at issue*) in cases where courts inquire into whether the common law governing horizontal legal relations ought to be modified on constitutional rights grounds, nor in cases where the validity of private law legislation or the Constitution's influence on legal interpretation is assessed.

¹⁶⁵ Cass R. Sunstein, *The Partial Constitution* (Harvard University Press 1993); Cass R. Sunstein, 'State Action is Always Present' (2002) 3(2) *Chicago Journal of International Law* 465.

There are two reasons why this observation cannot solve our explanatory problem.

First, the fact that, as “state action”, all legal norms are properly the subject of constitutional scrutiny tells us nothing, substantively, about any given legal norm’s constitutionality. As we saw above when considering constitutional supremacy, questions of a constitutional right’s horizontal effect *always* depend on its content, not just its constitutional status. Accepting the observation that all law is “state action” is therefore compatible with a very wide range of views as to constitutional rights’ appropriate horizontal effects: it is compatible with holding that *no* existing rule of private law is unconstitutional, or that *all* of them are. As acknowledged by those who centre this observation in their treatment of horizontality, it can provide little more than an analytical starting point.

Second, it is unlikely to be a particularly helpful starting point in making sense of the Irish law in this area. Recall that, in Ireland, private persons owe one another constitutional duties: in *Herrity*, *Sullivan*, and *Lovett*, it was a private person who *themselves* committed a constitutional wrong, and it was this wrong that justified the remedy in the plaintiff’s favour. Because of its exclusive focus on unconstitutional conduct by *the State*, this strategy cannot make sense of Irish law’s characterization of what is constitutionally problematic in these cases. That is, we need an explanation for why private persons might appropriately come to hold constitutional duties, and be made personally liable for their breach, not just why the law applicable to them is appropriately subject to constitutional scrutiny.

3.3.7. *Private Power; Public Ends*

Another strategy for justifying horizontality focusses on imbalances of power between private persons. The strategy is appealing, not least because it seems merely to extend to its logical conclusion the standard case for constitutional rights’ *vertical* operation.

That standard case proceeds by pointing to the immense power wielded by public authorities, and moves to identify a need to constrain that power so as to protect citizens vulnerable to its improper exercise. On this view, constitutional rights are a species of such

constraint.¹⁶⁶ From here, it is easy to observe that great imbalances of power also persist between private persons, and to argue that these imbalances require that constitutional rights operate horizontally, not just vertically.¹⁶⁷

Three recent monograph accounts of horizontality's justification are all animated by a concern for imbalances in private power, glossing and developing that concern in subtly different ways. Jean Thomas argues that human rights norms should bind a private actor, D, only where both (a) a "core interest" of the right-holder is at stake; and (b) there is an imbalance of power between D and the right-holder, approximating the "moral context" of the State-citizen relationship – such that D substantially controls the right-holder's enjoyment of the core interest.¹⁶⁸ Gautam Bhatia articulates what he calls an "institutional approach" to horizontality.¹⁶⁹ It is motivated by a similar concern for differentials in private power. He contends that constitutional rights' horizontal operation is justified as a mechanism for addressing the risks to individual rights posed by imbalances of power that obtain within and because of "social institutions". Bhatia's notion of a social institution is wide, but he takes race, caste, patriarchy, the labour market, and the family as his paradigmatic examples. In a similar vein, Johan van der Walt argues that "[t]he *horizontal* effect of constitutional rights concerns the *horizontalizing* application of constitutional rights".¹⁷⁰ In contemporary constitutional democracies, he says, legal relations between private persons are anything *but* horizontal. Instead, they are marked by social and economic hierarchy – race-based, class-based, gender-based, etc. On van der Walt's view,

¹⁶⁶ John Locke, *Two Treatises of Government* (1689), Chapter 2: "As if when men quitting the state of nature entered into society, they agreed that all of them but one should be under the restraint of laws, but that he should still retain all the liberty of the state of nature, increased with power, and made licentious by impunity. This is to think that men are so foolish that they take care to avoid what mischiefs may be done them by polecats or foxes, but are content, nay, think it safety, to be devoured by lions."

¹⁶⁷ In this way, the reasoned basis for horizontal operation can be seen as derived, by extrapolation, from the reasoned basis for constitutional rights' vertical operation. Of the approaches I consider in the text, only Thomas explicitly argues in this "extrapolative" way. Bhatia and Van der Walt disclaim doing so, although it is notable that both of their accounts operate on the unspoken assumption (or, at least, end up concluding) that much the same considerations that justify constitutional constraint of the State – hierarchy and power imbalance – will also justify constitutional constraint of private persons. Consider, similarly, in a German context: Franz Gamillscheg, 'Die Grundrechte in Arbeitsrecht' (1964) 164 *Archiv für die civilistische Praxis* 385, discussed (in English) in Kenneth M. Lewan, 'The Significance of Constitutional Rights for Private Law: Theory and Practice in West Germany' (1968) 17(3) *International and Comparative Law Quarterly* 571, 578-9.

¹⁶⁸ Thomas, *Public Rights* (n 117).

¹⁶⁹ Bhatia (n 157).

¹⁷⁰ Johan van der Walt, *The Horizontal Effect Revolution and the Question of Sovereignty* (De Gruyter 2014).

horizontality is concerned to eliminate these hierarchies: “[horizontality] concerns the constitutionally required levelling and horizontalization of these hierarchies”.¹⁷¹ For him, a legal dispute between private persons only acquires the sort of constitutional significance warranting horizontal effect where that dispute has “broader social political significance,” because it relates to “some or other significant social minority-majority dispute”.¹⁷²

These accounts, for all their differences, insightfully characterize a feature of contemporary constitutional democracy that, for many, is all too obvious: citizens’ place in social and economic hierarchies undermines their equal standing, upsets their freedom, frustrates their welfare, and imbalances our politics. We are not all on one plane, and we do not “share one another’s fate”.¹⁷³ A polity that did not respond to these problems in some way would be seriously defective.

Nonetheless, if leveraged to account for the Irish law of constitutional horizontality, views like these will invariably come up short. As we will see later (§6), there certainly are cases in the sphere of labour relations where the Irish law of horizontality is attentive to imbalances of power between private persons or social groups. Otherwise, it seems the law in this area must be explained in different terms.

Most strikingly, consider the examples given above of cases where “pure” constitutional tort liability is imposed on private persons (§3.2.3). It is difficult to explain cases like *Herrity*, *Sullivan*, and *Parsons* in terms of any “relational context of dependence” (Thomas), “institutional” imbalance of power (Bhatia), or manifestation of social hierarchy (Van der Walt). The constitutional wrongs recognised in those cases can all be committed by *any* private person against any other, irrespective of their respective social positions. Indeed, they could imaginably be committed in a society where all imbalances in social and economic power were somehow eliminated. Far more than the abuse of power by public officials, these constitutional torts resemble the paradigmatically private wrongs of battery, negligence, nuisance, and defamation – private wrongs, incidentally, which the Irish courts have *also* cast as violations of constitutional rights (§3.2.3), and to which they are quick to

¹⁷¹ *ibid* 288.

¹⁷² *ibid* 21.

¹⁷³ John Rawls, *A Theory of Justice* (Harvard University Press 1971) 102.

analogise (horizontal) constitutional torts.¹⁷⁴ And it is surely no compelling part of the reason for liability in battery that the defendant has been assigned an outsize position of power in a hierarchical social or economic institution. It is wrong for one person to commit battery against another irrespective of their social position. The same must go for harassing someone else in their home (*Sullivan*). Or publicising all the most intimate details about someone's sex life (*Herrity*). Or out-competing them by the deliberate use of unlawful means (*Parsons*).

In still other respects, Irish courts' conservatism must look problematic on an "imbalance of power" theory of constitutional horizontality. Perhaps most strikingly, as we will see, Irish courts appear to have held that constitutional duties of non-discrimination bind *only the State*, without any suggestion that the point depends on the social or economic power of the private parties to a discriminatory relation (§3.4.4). Relatedly, the approach to constitutional freedom of association has been strikingly "voluntarist": in elaborating that right's requirements in private relations, the courts' concern has overwhelmingly been to safeguard each persons' freedom to associate on consensual terms, rather than to empower trade unions in their relations with employers (§3.4.3). Moreover, the constitutional liberties of assembly and free expression have each been found sharply limited by the pre-existing private rights of others, especially those to property and good name (§3.4.5). So too the constitutional rights to livelihood and the inviolability of the dwelling (§3.4.2). These, of course, are all positions that tend to *preserve* existing power imbalances between private persons, rather than to correct for them.

A similar point can be made about a related set of views understanding horizontality in terms of *public* or *community-oriented* interests, values, or ends. On these views, horizontality reflects a morality of *social*, rather than interpersonal, justice. It sees private law becoming conditioned by the requirements of the common good, rather than being

¹⁷⁴ *Schmidt v Home Secretary of the Government of the United Kingdom* [1995] 103 ILR 322; *Tate v Minister for Social Welfare* [1995] 1 IR 418; *Murphy v Ireland* [1996] 3 IR 307; *McDonnell* (n 2); *Minister for Finance v Civil and Public Service Union* [2006] IEHC 14; *Mulligan v Governor of Portlaoise Prison* [2010] IEHC 269; *Kenny v The Minister for Agriculture* [2013] IEHC 520; *Dineen v Depuy International Ltd* [2017] IEHC 723; *Savickis v Governor of Castlereagh Prison (No. 2)* [2016] IECA 372; *Bailey v Commissioner of An Garda Síochána* [2017] IECA 220 [37] (Hogan and Birmingham JJ); *Blehein* (n 15); *Simpson v Governor of Mountjoy Prison* [2019] IESC 81; *McGee* (n 4). Judicial dicta going the other way – suggesting constitutional torts are of a fundamentally different nature than common law torts – are far more limited, far more equivocal, and generally obiter: *Kearney* (n 31); *Hayes v Ireland* [1987] ILRM 651 (not obiter: §6.5.3); *Kemmy v Ireland* [2009] IEHC 178.

animated entirely by the interplay of private interests. At the same time, it sees *constitutional* law outgrow its preoccupation with the risks posed to private interests by the demands of the community, evolving to recognise responsibilities of “solidarity” on private individuals to serve that community’s benefit.¹⁷⁵ As Christina Bambrick puts it, “[h]orizontality requires the suspension of private interests in the explicit service of public ends”.¹⁷⁶ Similarly, Eleni Frantziou contends:

It is the non-individualistic aspect of the breach of a fundamental right, i.e. the fact that such a breach raises issues of public order that go beyond a legal dispute between private parties, that renders it relevant from the perspective of constitutional law.¹⁷⁷

Again, it is very difficult to see how the Irish law of horizontality – and in particular its “pure” constitutional tort jurisdiction – could be understood on this basis. In applying constitutional norms to horizontal legal relations, Irish courts seem to have been concerned to protect certain *private* interests deemed constitutionally significant, rather than to suspend those interests for reasons of public order. The leading cases have not seen courts analogize private persons to public officials, nor identify particular public ends private persons must serve. To the contrary, when deciding private disputes on constitutional grounds, courts have overwhelmingly been focussed on the bilateral relationship between the parties before them, and not on the condition of the polity more broadly. If we are to make sense of horizontality’s particular manifestation in our legal system, *that* is the judicial posture we need to find some framework for explaining. The non-subordination principle, I will suggest, provides just such a framework.

That is not to deny the very great importance of the law robustly tackling imbalances in private power. Nor is it to deny the obvious necessity of the law requiring private persons sometimes to act in pursuit of public ends. It is just to deny that our *constitutional* law of

¹⁷⁵ Mark Tushnet, ‘The Issue of State Action/Horizontal Effect in Comparative Constitutional Law’ (2003) 1(1) *International Journal of Constitutional Law* 79, 90.

¹⁷⁶ Christina Bambrick, ‘A Republican Vein in Liberal Constitutionalism’ (2020) 52(3) *Polity* 401.

¹⁷⁷ Eleni Frantziou, *The Horizontal Effect of Fundamental Rights in the European Union: A Constitutional Analysis* (Oxford University Press 2019). See, similarly, Eleni Frantziou, ‘The Horizontal Effect of the Charter of Fundamental Rights of the EU: Rediscovering the Reasons for Horizontality’ (2015) 21(5) *European Law Journal* 657.

private interaction performs those functions. Its concerns, I will suggest, are different. It seems to it that no private person is in charge of any other.

3.4. NON-SUBORDINATION

3.4.1. *Introduction*

In the last chapter, I sketched the non-subordination principle as an abstract *moral* idea about the respective interpersonal standing of free, equal, and independent persons. By the lights of that idea, we ought to interact with one another each our own masters, neither one of us in charge of the other. Each one of us is entitled to make use of our own powers – whether separately or cooperatively – to pursue our own purposes, compatibly with other persons’ entitlement to do the same (§2.2).

This section begins the case – prosecuted over the rest of this thesis – for the non-subordination principle as a basic *constitutional* principle of private interaction. As a matter of constitutional right, no private person is the subordinate of any other. Correlatively, other private persons commit constitutional wrongs against us where they subordinate us to their determining choice. Furthermore, the ideal of a community of non-subordinates informs the interpretation of the legal norms comprising horizontal legal relations. These, I will suggest, are the ideas around which the case law coheres.

In this section, my focus is on cases where Irish courts have found that ordinary common law rules adequately implement the Constitution’s rights guarantees in horizontal legal relations. I offer an account of that adequacy in terms of the non-subordination principle. Whilst that idea sometimes requires judicial departures from common law orthodoxy, it by no means invariably does so. To a large extent, it is already captured in the common law position on our legal relations *inter se* (§2.3). Where this is so, no judicial variation of the common law position on constitutional rights’ grounds is constitutionally required. Instead, the Constitution leaves it to the Oireachtas – operating within broad parameters – to tackle the many pressing problems of social justice and the public good that are raised by private interaction. Here, as elsewhere, a just polity needs much more than its constitutional law

and *far* more than its law of private wrongs. In accounting for Irish law of horizontality as it is, I consider the non-subordination principle's austerity to be a virtue, not a bug.

I divide the discussion thematically, beginning with an analysis of private wrongs to bodies and property (§3.4.2), before turning to consider the horizontal operation of constitutional rights to association (§3.4.3), equality (§3.4.4), assembly and expression (§3.4.5), and good name (§3.4.6). In each case, my primary objective is to explain our courts' rejection of particular constitutional rights-based arguments for modifying horizontal legal relations from the common law position. I argue these rejections need not be understood as a product of courts' knee-jerk conservatism, overabundant caution, limited imagination, or unthinking deference to the common law. They can instead be considered a reflection of the constitutional significance of the ideal of interpersonal non-subordination introduced earlier. On that view, they are coherent with the cases of *change* considered in later chapters. In this way, the non-subordination principle fills the gaps left by the candidate reasons examined in the last section.

3.4.2. *Bodies, Property, Liberty*

In the last chapter (§2.3), we saw how the non-subordination principle can be seen to normatively undergird, animate, and condition various common law torts to bodies and property. From the standpoint of that ideal, our bodies and property are significant as means through which we can pursue our own purposes, free from the determining choice of others. Wrongs to them involve others determining the purposes our bodies and property are used to pursue. The common law, I suggested, adopts just this standpoint in delineating rights to person and property, and providing mechanisms for their enforcement. Some of its torts to body and property are therefore *use-based*: the torts of trespass to person, land, and chattels all involve taking up someone else's body or property for the pursuit of purposes that are yours, but not theirs (§2.3.2). Others are *damage-based*: the torts of negligence and nuisance each involve rendering another's body or property less usable by using one's own body or property in a manner irreconcilable with other's equal entitlement to do the same (§2.3.3). In each case, the victim's remedy against the wrongdoer is a continuation of their underlying right to body or property, which right survives its own violation (§2.4.1).

I posit that our *constitutional* rights to bodily integrity, property, and liberty are best understood, in horizontal operation, in precisely the same way: that is, as constraints on others determining the purposes we pursue with our bodies and property. Hence the Irish courts' overwhelming reluctance to modify the common law position on these matters on constitutional grounds. Hence, too, consistent judicial affirmation that the common law position not only enjoys a constitutional imprimatur but, more than that, adequately serves an important constitutional purpose: it effectively "regulates the exercise and enjoyment of...basic rights, protects them against attack and provides compensation for their wrongful infringement".¹⁷⁸ Indeed, the case law variously characterises the common law of torts as a "mechanism",¹⁷⁹ "method",¹⁸⁰ "means",¹⁸¹ "vehicle",¹⁸² or "tool"¹⁸³ through which the State "implements",¹⁸⁴ "effectuates",¹⁸⁵ "performs",¹⁸⁶ "realises",¹⁸⁷ or "discharges"¹⁸⁸ its constitutional obligations to protect, defend, and vindicate citizens' constitutional rights to their bodies – that is, the spatial manifestation of their person – their property, and their liberty.¹⁸⁹ My claim is that, so far as our horizontal legal relations are concerned, it is adequate for that purpose because, as against other private persons, those rights are claim-rights not to have the purposes we pursue with our rightful powers decided for us by others. To the extent the common law already secures those entitlements, modification or supplementation of the common law on constitutional grounds would be "otiose".¹⁹⁰ Whilst it might therefore be "theoretically"¹⁹¹ true to say that a person, whether private or public,

¹⁷⁸ *W* (n 43) (HC) 164 (Costello J). In passing, it is worth noting a number of *other* contexts in which common law norms have acquired an analogous constitutional status and role: consider the relation between the constitutional right to fair procedures and the common law principles of natural justice (*Dellway Investments v National Asset Management Agency* [2011] 4 IR 1 (SC) 322 (Fennelly J), or the common law of habeas corpus and the procedure provided for by Article 40.4.2-5, or how common law norms fill out Article 38.1's notion of a trial in "due course of law" (*Heaney v Ireland* [1994] 3 IR 593 (HC) 605 (Costello J)).

¹⁷⁹ *Carr* (n 54) [36] (Hogan J).

¹⁸⁰ *McDonnell* (n 2) 148 (Barrington J).

¹⁸¹ *Blehein* (n 15) [53] (McKechnie J).

¹⁸² *ibid* [53], [57] (McKechnie J).

¹⁸³ *Grant* (n 68) 38-9 (Hardiman J).

¹⁸⁴ *Hanrahan* (n 1) (SC) 636 (Henchy J).

¹⁸⁵ *ibid*.

¹⁸⁶ *Clarke v O'Gorman* [2014] IESC 72 [33] (O'Donnell J).

¹⁸⁷ *PR v KC* [2014] IEHC 126; *DF v Commissioner of An Garda Síochána (No. 3)* [2014] IEHC 213 [27]-[29] (Hogan J).

¹⁸⁸ *Comcast International Holdings v Minister for Public Enterprise* [2012] IESC 50 (Hardiman J).

¹⁸⁹ On the constitutional right to the "person" more generally: §4.4.

¹⁹⁰ *W* (n 43) 167 (Costello J).

¹⁹¹ *Walsh v Family Planning Services Ltd* [1992] IESC 3 (SC) 14 (McCarthy J).

violates another's constitutional claim-rights by committing the common law torts of negligence,¹⁹² nuisance,¹⁹³ or trespass (whether to person or property),¹⁹⁴ there is:

...no need to construe the Constitution as conferring a new and discrete cause of action for damages in those cases in which the acts or omissions which constitute the alleged infringement also constitute an actionable wrong at law for which damages are recoverable.¹⁹⁵

To do so would merely be to “replicate”¹⁹⁶ or “recast”¹⁹⁷ a cause of action that already empowers a person adequately to vindicate their constitutional right in the face of its violation: it would be, superfluously, to create another way “of seeking the same relief”.¹⁹⁸ Nonetheless, because those entitlements are *constitutional* and not mere creatures of the common law, if the relevant common law forms of action “were not...available, the State would have to make some other mechanism available to vindicate those rights”.¹⁹⁹ So too, if those forms of action took a different form that made them unfit for their constitutional purpose, viz. securing each persons' rightful standing as their own master. On this view,

¹⁹² See e.g. *Hanrahan* (n 1) 636 (Henchy J); *W* (n 43) (HC) 165 (Costello J); *Sweeney v Duggan* [1991] 2 IR 274; *McDonnell* (n 2) (SC) 148 (Barrington J); *Atlantic Marine Supplies Ltd v Minister for Transport* [2010] IEHC 104 [5.1]-[5.2] (Clarke J).

¹⁹³ *Hanrahan* (n 1) 635-6 (Henchy J); *W* (n 43) (HC) 165 (Costello J); *Smyth v Railway Procurement Agency* [2010] IEHC 290 [32.3] (Laffoy J).

¹⁹⁴ *Re a Ward of Court* (No. 2) [1996] 2 IR 79 (SC) 156 (Denham J); *W* (n 43) (HC) 165 (Costello J); *Shortt v Commissioner of An Garda Síochána* [2007] IESC 9; *DPP v Barnes* [2007] 3 IR 130; *Raducan v Minister for Justice, Equality, and Law Reform* [2011] IEHC 224; *Clarke* (n 186) [33] (O'Donnell J); *DPP v JC* [2015] IESC 31 [33] (O'Donnell J); *McNulty v Commissioner of An Garda Síochána* [2016] IEHC 632 [75] (Baker J); *Walsh v Ireland* [1994] WJSC-SC 4279; *Conway* (n 27) (SC) 320 (Finlay CJ); *PR* (n 187) [34]-[36] (Baker J); *DF* (No. 3) (n 187); *Shaugnessy v Nohilly* [2016] IEHC 767 [125]-[127] (Barton J); *Savickis v Governor of Castlereagh Prison (No. 1)* [2016] IECA 310 [36] (Hogan J); *Savickis v Governor of Castlereagh Prison (No. 2)* [2016] IECA 372 [13] (Hogan J); *GE* (n 63); *GE* (n 38); *Donoghue v Connolly* [2022] IEHC 386 [3.1]-[3.3] (Gearty J). See, too, cases where crimes corresponding to torts are characterised as the violation of constitutional claim-rights (whether to person or bodily integrity) by those who commit them: *DPP v JT* (1988) 3 Frewen 141 (crime of sexual assault); *DPP v Tiernan* [1988] IR 250 (crime of rape); *DPP v M* [1994] 3 IR 306 (child abuse); *AD v Ireland* [1994] 1 IR 369 (rape); *JG v Judge Kevin Staunton* [2013] IEHC 533 [15] (Hogan J) (physical and sexual abuse of children); *MS v DPP* [2015] IECA 309 [13] (Hogan J) (sexual assault of a minor); *DPP v O'R* [2016] IESC 64 [30] (Charleton J). In *A v Refugee Appeals Tribunal*, Hogan J expressed the view (quashing a decision to deport a non-citizen) that “[t]he subjection of any female to FGM is an open assault on her person, the very right which by Article 40.3.2° of the Constitution the State expressly undertakes to defend and vindicate in so far as it is practicable to do so”: [2011] IEHC 373 [15].

¹⁹⁵ *W* (n 43) (HC) 167 (Costello J).

¹⁹⁶ *DF* (No. 3) (n 187) [24] (Hogan J).

¹⁹⁷ *Clarke* (n 186) [27], [33] (O'Donnell J).

¹⁹⁸ *PR* (n 187) [36] (Baker J).

¹⁹⁹ *Comcast* (n 188) (Hardiman J); *Mongan v Mongan and MIBI* [2020] IEHC 262 [97] (McDonald J).

the non-subordination principle furnishes the standard by which “basic effectiveness” is to be judged.²⁰⁰

Leaving aside the last chapter’s analysis of those common law torts our courts have cast as effectively realizing the constitutional position (§2.3), the view just outlined might further be supported by the following four doctrinal observations.

First, it is perfectly clear that to *use* another’s body or property – that is, to subject it to one’s own purposes – can constitutionally wrong that other person even where it causes them no harm, and even where it is not blameworthy.

In *PR v KC*, for instance, Baker J held that P’s claim against D for sexual assault and abuse was an “action by which the plaintiff seeks to vindicate his personal and constitutional right to bodily integrity and the person [and] is accordingly an action which is founded in a tort which is actionable *per se* and without proof of damage or injury”.²⁰¹ She also said of the tort of trespass to the person that it is “not one which requires actual physical injury but which is actionable merely on account of the happening. In that respect the common law may be regarded as a realisation of the constitutional command in Article 40.3.2 that the State must protect and vindicate the person”.²⁰² In *Re a Ward of Court (withholding medical treatment) (No. 2)*, Denham J opined that for D to give medical treatment to P without their

²⁰⁰ The standard of “*basic*” ineffectiveness or “*plain*” inadequacy, in turn, reflects the non-subordination principle’s significant (not unlimited) indeterminacy (§2.4.1): generally, multiple more-or-less adequate specificity rules are compatible with the principle (and thus with the Constitution) without any specification being clearly or demonstrably preferable by its lights. As such, the right question for a reviewing court to ask – which is the one the “basic ineffectiveness” standard directs them to ask – is whether a given common law rule falls somewhere in a range the principle permits. The “basic ineffectiveness” language therefore merely emphasises that it would be wrong for a Court to suppose the Constitution dictates only one constitutionally adequate rule (i.e. a “fully effective” rule) that a judge must find in every case, whilst also priming the values of judicial restraint enumerated above (§3.3.4); requiring that the basis for judicial modification to the common law on constitutional grounds be clearly established: cf. *vc v Minister for Children and Youth Affairs* [2012] IESC 53 [35] (O’Donnell J) (for a parallel conception of the “clear disregard” test in judicial review of the Executive’s conduct in the course of referendum campaigns). Properly understood, the standard does not contemplate the legal validity of lots of *unconstitutional* common law rules that are, as it were, just about unconstitutional, but not *basically* unconstitutional: cf. McMahon and Binchy, (n 3) [1.54]. If it did so, it would be incompatible with constitutional supremacy as it is understood in our legal system (3.3.2).

²⁰¹ *PR* (n 187) [38] (Baker J).

²⁰² *ibid* [27] (Baker J). Although the conclusion that Baker J drew from these twin observations – that P’s claim did not require authorisation under PIAB – was (appropriately) rejected by the Supreme Court in *Clarke* (n 186), the Court cast no doubt whatsoever on her characterisation of D’s trespass as a violation of P’s constitutional right.

consent will generally amount to a “breach of the individual’s constitutional rights”, whilst acknowledging that this proposition holds true even where P refuses for “other than medical reasons, or reasons most citizens would regard as [ir]rational” such that the battery might leave P much better off.²⁰³ Similarly, in a number of false imprisonment authorities, courts have emphasised that the strict liability and *per se* actionability of that tort – both characteristics of use-based wrongs (§2.3.2) – mean that it gives “full effect” to the constitutional right to liberty.²⁰⁴ In *McNulty v Commissioner of An Garda Síochána*, trespasses to property described as both “short-lived” and “technical”, and involving no *mala fides* on the part of D, were cast as violations of the owner’s constitutional property rights.²⁰⁵

Second, and by contrast, to cause someone great harm *without* determining any of the purposes for which some means of theirs are used will not constitutionally wrong them. This is so even where the conduct at issue is very blameworthy, and *even where* it is otherwise legally wrongful. This suggests that one’s body and property are not constitutionally significant as aspects of one’s well-being, but instead as means through which one is entitled to pursue purposes.

Hence, Costello J’s holding in *Kerry Co-Operative Creameries v An Bord Bainne* that:

²⁰³ *Re A Ward of Court* (n 194) 156. Insofar as parents with custody ought be understood as exercising a child’s bodily rights on the child’s behalf, the conclusion and analysis in *North-Western Health Board* (n 38) further indicates this position (although note §1.3).

²⁰⁴ *DF (No. 3)* (n 187) [21]-[23] (Hogan J), with citation to *Dullaghan v Hillen* (1957) IrJurRep 10, 15 (Fawsitt J); *GE* (n 63). In *DF (No. 3)*, whilst Hogan J held that “the tort of false imprisonment provides a full and complete protection for the constitutional right of personal liberty and the claim based on breach of constitutional rights adds nothing to that claim” ([64]) and accordingly struck out P’s claim for damages based on Article 40.4.1 of the Constitution, he did not strike out P’s Article 40.3 claim, considering it “just possible” that P would be able to demonstrate a constitutional inadequacy in the tort of assault insofar as that tort “requires a prior apprehension of a battery before it actually takes place” which prior apprehension P might not have been able to satisfy due to his mental condition ([65]). Whilst the refusal to strike out is probably defensible, it is difficult to see how such an Article 40.3 argument could go through: what wrong might P have suffered on *DF*’s facts that is not captured by the torts of assault, battery, or false imprisonment? The apprehension of a future battery is a necessary condition of the tort of assault because, without touching or confining P, it is only through the mechanism of generating the apprehension that D subjects P’s body to D’s own purposes

²⁰⁵ *McNulty* (n 194) [75] (Baker J).

If X does an act which causes a reduction in the value of property owned by Y (whether corporeal or incorporeal) the diminution in value does not in itself establish that X has infringed Y's property rights.²⁰⁶

Costello J took this point to be sufficient by itself to hold that the defendant registered society did not violate P's constitutional property rights by taking action that (P alleged) would foreseeably decrease the value of P's shareholding: whilst he was satisfied that "no diminution in value of their shareholding...as [P] alleged w[ould] in fact occur...even if it did no property of [P] would be thereby expropriated".²⁰⁷ In the language of the last chapter, in itself, decreasing the value of someone's property, without determining the purposes for which it is used, at most frustrates another's purpose: it changes the environment within which P enjoys what they already have, but does not involve D in using or destroying it (§2.3.4). Although it may therefore appear both blameworthy and harmful, or offensive to ordinary moral sensibility, it does not constitute subordination – there is no constitutional wrong.

PH v John Murphy & Sons, decided by the same judge, vividly illustrates the same point.²⁰⁸ Ps were infants (suing by their mother) whose father had suffered severe brain damage via electric shock whilst in the employment of D, a private company. The father's own claim against D was settled. Subsequently, Ps sought compensation from D, partly on the basis that D's negligent injuring of their father violated Ps' constitutional rights. In this connection, Ps relied on both Article 41's recognition of the "inalienable and imprescriptible rights" of the Family, and Article 42's recognition of the "inalienable right and duty of parents to provide...for the religious and moral, intellectual, physical and social education of their children". Ps argued that, by negligently injuring their father, D had deprived them of the parental love, affection, and guidance that these Articles contemplated him providing.

Costello J held that D had committed no constitutional wrong to P. This was so even though (a) Ps had clearly suffered a (desperate) set-back to their well-being; (b) the constitutional text recognises parents' role as educators of their children in robust terms; and (c) D's

²⁰⁶ [1991] WJSC-HC 775 (HC) 89-90 (Costello J).

²⁰⁷ *ibid.*

²⁰⁸ *PH* (n 90).

conduct (we can assume) evinced blameworthy disregard for the father's safety. Furthermore, because D's conduct in *PH* was anyway unlawful as a private wrong against Ps' father – and this could have been articulated as a necessary condition for recovery in future cases – imposing liability in Ps' favour for their loss of his love, affection, and guidance would only increase the *extent* of D's liability, but would not impose liability on D where none existed before.

Costello J's own justification for the absence of constitutional liability is difficult to accept. He starts from the premise that *the State* could not be liable under the Constitution for the *negligent* (as opposed to deliberate) destruction of the "constitution and authority" of P's family – e.g. for killing P's parents through the careless driving of an army lorry. This, he reasoned, was because the Constitution's "primary purpose in the field of fundamental rights is to protect [citizens] from unjust laws enacted by the legislature and from arbitrary acts committed by State Officials".²⁰⁹ From there, Costello J held that because *the State* would not commit a constitutional wrong by negligently destroying a family unit, private persons like D would not either. It is very clear, however, that the legal significance of constitutional rights in Irish law sometimes extends beyond serving the "primary purpose" identified for them by Costello J: consider, most obviously, the various categories of horizontal significance enumerated above (§3.2). To persuasively justify *PH*, we therefore need another reason why the Constitution does not extend so far as to give P a claim against D.²¹⁰

A non-subordination analysis of horizontal constitutional wrongs suggests such a reason. The relationship you have with your parents is (often) a crucial aspect of your well-being. However, unlike your body or items of your property, your parents are not a *means* of yours you take up in pursuit of your purposes. Nor is your relationship with them such a means. One's parents are their own persons. They owe certain (constitutional) duties to you,²¹¹ but

²⁰⁹ *ibid* 626 (Costello J).

²¹⁰ Cf. Gerard Hogan, 'The Farthest' (n 3) 13-14: "...Article 42.1 speaks of the 'inalienable right and duty of parents' to provide for the education of their children. These are important rights which the children in *PH* foreseeably lost through the negligence of another and yet the law of tort did not provide them with a remedy. How, then, could it be said that the ordinary law of tort was not 'basically ineffective' for this purpose unless we retreat to the circular argument that the traditional law of tort itself provides the yardstick by which this basic ineffectiveness is to be judged?" In the text, I have argued that the non-subordination principle suggests an answer.

²¹¹ *G v An Bord Uchtála* [1980] IR 32 (SC) 55-56 (O'Higgins CJ), 69 (Walsh J); *North Western* (n 38); *In re Baby AB, Children's University Hospital, Temple St v D* [2011] IEHC 1.

are not legally available for your generalised use. Where others wrong *them*, you will likely be made worse-off; your purpose of carrying on an enriching family life frustrated. But none of the purposes you pursue with your rightful means are determined for you by reason of that loss alone. Hence, on the view being advanced here, there is no constitutional wrong.

Third, it is clear that the Constitution does not generally impose affirmative duties on private persons to make their bodies or property available for others' assistance. This is so even where the cost of such assistance for the defendant is low relative to its benefits for the plaintiff, and even where the plaintiff seeks assistance *with respect to the safety of their own body or property*.²¹² The point is therefore a categorical one, and not well understood as one about the balancing of the plaintiff's and defendant's interests: as their own master, no private person has a constitutional duty to use their means in pursuit of the particular purpose of benefitting another, so balancing does not enter the picture.²¹³

Accordingly, even where P has nowhere else to lawfully go, D has no constitutional duty to accommodate them on their property – whether by virtue of Article 40.5's guarantee of “inviolability of the dwelling” or otherwise: per O'Neill J in *McDonagh v Kilkenny County Council*:

Like all human beings the applicants are entitled to the protection of Article 40.5 of the Constitution which protects the inviolability of the dwelling. However, this protection does not entitle the applicants individually or as a family group to invade somebody else's land and establish their dwelling upon it. In other words, the protection given by Article 40.5 cannot be used simply to shield against an unlawful infringement of someone else's rights.²¹⁴

For the same reason, P's constitutional right to earn a livelihood cannot impose a duty on D to make their property available for use by P – no matter how much P might be reliant on that property for their economic well-being:

²¹² On the general position in our law of tort: *McCarthy v Kavanagh* [2020] IECA 344 [41] (Murray J).

²¹³ Arthur Ripstein, *Private Wrongs* (Harvard University Press 2016) 62.

²¹⁴ *McDonagh* (n 92) [35] (O'Neill J); *Gavin* (n 92) 23-4 (Peart J); *O'Driscoll v Limerick City Council* [2012] IEHC 594 [6.3]-[6.5] (Feeney J); *Launceston Property Finance Ltd* (n 92) [63] (McKechnie J). As we have seen, this need not preclude the possibility of these constitutional rights having significance on the question of remedies (§3.2.7).

To engage in...a lawful business activity for the purpose of earning a livelihood is something which a citizen is entitled to do as of right. It is self-evident that the right to carry on such a business does not entitle the citizen to have access, as of right, to the property of third parties and use it for business purposes.²¹⁵

Sweeney v Duggan illustrates the same point in a different, more complex context.²¹⁶ P suffered an injury to his leg at work. He obtained judgment for £20,866 in damages against his employer – a company called K.L. Ltd. However, after P had instituted proceedings (but before he had obtained judgment), K.L. Ltd. had entered voluntary liquidation. K.L. Ltd had not taken out a policy of employers' liability insurance. As such, as a preferential creditor, P could only hope to receive a dividend amounting to some £4,500 on his claim of £20,866.

In these circumstances, P sought damages for loss of judgment from D, who was K.L. Ltd's primary shareholder. One of P's arguments was that, as primary shareholder, D had a constitutional duty under Article 40.3.2 to "ensure that any bodily injuries suffered by [P] arising out of or in the course of his employment...would be duly compensated by or on behalf of [D]". This duty, P claimed, required D either to have K.L. Ltd take out employer's liability insurance or, alternatively, to warn P of K.L. Ltd.'s financial difficulties so that P could purchase their own insurance policy. It is, again, conceivable that the costs to D of conforming to any such constitutional duty would have been meagre, certainly relative to the potential costs of non-conformity to P and other of K.L. Ltd's employees. Moreover, Barron J accepted that P's loss of judgment was foreseeable by D.²¹⁷ Nonetheless, in dismissing P's Article 40.3.2 argument, Barron J observed only that:

²¹⁵ *Casey v Minister for Arts* [2004] IESC 14 (SC) 23 (Murray J). Consider, similarly, *Burns v BATU* (HC, 21 July 2004): D (a trade union) did not violate P's constitutional right to earn a livelihood by insisting on its policy that bricklayers should be employed as PAYE workers because "[w]hile the plaintiff c[ould] choose the tax categorisation under which he wishe[d] to work he [was] not entitled to work on any site of his choosing".

²¹⁶ [1991] 2 IR 274. The constitutional point was not addressed on appeal to the Supreme Court: [1997] 2 IR 531).

²¹⁷ *ibid* 283.

[T]here is nothing in that provision to assist him. It gives him no more than a guarantee of a just law of negligence, which in the circumstances exists.²¹⁸

The above analysis illuminates the absence of the relevant constitutional duty. The constitutional duty on D for which P contended would *not* have been one to refrain from determining the purposes P pursued with their rightful means. It would instead have been an affirmative duty on D to serve P's purpose of maintaining a certain level of (economic or physical) well-being.²¹⁹ Across a range of otherwise diverse cases, the Constitution does not impose such duties on private persons.

Fourth, the Constitution buttresses aspects of the common law of *remedies* for private wrongs to person and property reflective of those remedies' nature as continuations of underlying rights not to be subjected to others' purposes (§2.4.1).

So, because P's constitutional right to person or property remains P's in the face of its violation, P must generally be entitled to stand on and enforce it against D for their own purposes: for this reason, securing monetary compensation is not the *only* purpose for which a claim to enforce a constitutional right might properly be brought. In *Grant v Roche Products*, the Supreme Court held that those purposes might also include that of securing a judicial finding that D committed a (constitutional) wrong.²²⁰ As such, in *Grant*, Hardiman J invoked Article 40.3 in finding that P's claim against D under a wrongful death statute was not an abuse of process even though court-awarded damages could not serve to confer any pecuniary benefit on P (because D was willing to settle for the full value of the claim, as capped by statute). He situated this conclusion in a more general conception of tort law's constitutional role:

There is thus authority both judicial and academic for the proposition that the law of tort is, at least in certain circumstances, an important tool for the vindication of constitutional rights, and no authority whatever for the

²¹⁸ *ibid* 285.

²¹⁹ As emphasised by Murphy J in the Supreme Court appeal: (n 216) 545-6.

²²⁰ *Grant* (n 68) itself was not a constitutional tort case, but instead concerned a claim under a wrongful death statute, cast as a claim to vindicate the constitutional right to life (that is, continued purposiveness) of the deceased in circumstances where they could not themselves take a claim.

proposition that it is concerned exclusively for the allocation of damages and with nothing else whatsoever.²²¹

The recent case of *GE v Commissioner of An Garda Síochána* illustrates a closely related point.²²² There, as mentioned earlier, the Supreme Court held that P was entitled to substantial damages for false imprisonment *even* where, had P not been *unlawfully* detained by D, he both could and *would* have been lawfully detained by D.²²³ On such facts, it might seem as though P has suffered no normatively significant loss of liberty as a result of D's wrong, and that nominal damages should follow. If P would *inevitably* have been detained, they would always have had the same very limited set of options available to them: D's wrong did not restrict where P could go, who P could meet, the opportunities P could exploit, or otherwise exacerbate P's suffering. Nonetheless, writing for the Court, Hogan J considered that P had nonetheless suffered a "real loss of liberty" as a result of their unlawful detention and that "[t]he award of nominal damages in respect of anything but the most technical or fleeting instances of false imprisonment would seriously devalue the tort of false imprisonment and would be inconsistent with the...vindicatory obligations found in Article 40.3.1 and Article 40.3.2".²²⁴

This conclusion is illuminated by the account of false imprisonment sketched in the last chapter (§2.3.3). On that account, recall, the wrong of false imprisonment consists in D subordinating P's body to their will by confinement. It does *not* consist in D closing off options that P might otherwise have autonomously pursued: in itself, that would just amount to frustration of P's purposes. Hence it is tortious for D to confine P as she sleeps,²²⁵ even if P remains unaware of the confinement: although the confinement does not affect P's capacity to live autonomously, it subordinates P's body to D's ends. Hence, further, why D must *intend* to confine P to commit false imprisonment (negligence will not

²²¹ *ibid* 38-9 (Hardiman J).

²²² *GE* (n 63).

²²³ In *GE*, as in *Lumba* (n 64) and *Lewis* (n 64), this question arose because (a) a defect in the procedure pursuant to which D detained P rendered the resulting detention unlawful, but (b) D contended that, had they not detained P pursuant to the defective procedure, they both could and (as a matter of fact) *would* have lawfully detained P by following the correct procedure. For more detailed discussion of *GE*: Daniel Gilligan, 'Damages and the "Essence" of False Imprisonment: *GE v Commissioner of An Garda Síochána* [2022] IESC 51' (2024) 44(3) Legal Studies 560.

²²⁴ *ibid* [76].

²²⁵ *Meering v Graham-White Aviation* (1919) 122 LT 44.

suffice),²²⁶ because only then will P’s purposes be subordinated to D’s determining *choice*, rather than to its side-effects. Hence, finally, why even if D’s wrong in *GE* did not frustrate any of P’s purposes – even if, materially, P would have been in an identical position regardless – that did not entail that D’s wrong should be classed as trifling, especially from the perspective of Article 40: D had subordinated P to their own purposes, absent lawful authorization. As such, by seeing how the normative significance of the false imprisonment in *GE* was not exhausted by its impact on P’s autonomy, we can see how a legal system concerned with remedying it might have more than the very shortest (‘nominal’) distance to travel. This does not mean a substantial award is required in all cases. Instead, we end up where *GE* does: to find an award appropriately reflective of the wrong done, factors such as P’s awareness of the detention, its impacts on P’s autonomy/well-being, and D’s blameworthiness will be relevant, but cannot be exhaustive.²²⁷

These four points all suggest that, in horizontal operation, our constitutional rights to body and property manifest a more general constitutional entitlement not to have the purposes we pursue with our rightful means subordinated to other private persons’ pursuit of purposes. None of the foregoing, importantly, precludes the possibility that the Oireachtas might validly modify horizontal relations from this constitutional starting point where it is necessary to do so in proportionate pursuit of a properly public purpose: for instance, by engaging in economic redistribution that modifies horizontal private property rights in the

²²⁶ *Iqbal v Prison Officers Association* [2010] QB 732.

²²⁷ Consider, too, *Iarnród Éireann* (n 51) where the Supreme Court endorsed Keane J’s conclusion in the High Court that the constitutional right to property was compatible with the common law rule (which the Oireachtas had since codified) by which P, who suffers damage as a result of concurrent torts by D1 and D2, may recover for all of that damage against either D1 or D2, regardless of D1 and D2’s respective degrees of fault. Keane J had reasoned (at 368) that “it cannot have been the intention of the framers of the Constitution, in providing protection for the property rights of the citizen” that a plaintiff should be prejudiced by the fact they had *two* wrongs committed against them, where one of the wrongdoers happened to be impecunious. Instead, as between P and *each of* D1 and D2, P is entitled to be put back into the position they would have been in as a matter of their underlying right before the wrong (here, negligence) occurred (§2.4.1). As O’Flaherty J put the point in the Supreme Court (at 376), “[t]he wrong done to the plaintiff is regarded as indivisible”. That it is so regarded can be seen to reflect *both* (a) private rights’ nature as bilateral constraints on the conduct of particular others, each accountable independently for those constraints’ violation, *and* (b) the fact that if P is to be entitled to determine the purposes they pursue with their means as against each of D1 and D2, P’s rights to those means must survive their own violation in full as against each of D1 and D2: P’s right cannot be defeated by the fortuity of how the blameworthiness of D1 and D2 happen to compare.

service of the common good;²²⁸ or by permitting the creation of (what would otherwise be) a nuisance against another's property so that public works may be carried out.²²⁹ In Hohfeldian terms, then, P's constitutional claim-right against D does not come coupled with an *absolute* immunity against any alteration by the legislature. That a special demand for justification arises where legislative interference occurs nonetheless confirms the constitutional status of the pre-existing horizontal entitlement. This is a pattern to which we shall return.

3.4.3. Association

Article 40.6.1.iii guarantees "the right of citizens to form associations and unions". In horizontal operation, that right is best understood as an aspect of one's more general right as against other private persons to determine the purposes one pursues with one's rightful powers.²³⁰ By associating with another, one elects to use one's powers in pursuit of a purpose one shares with them. Insofar as your association does not involve determining the purposes anyone pursues with what is theirs, that association cannot itself be constitutionally wrongful. For the same reason, other private persons cannot place you under an affirmative constitutional obligation to associate with them: *you* are constitutionally entitled to determine the purposes you pursue, associative and otherwise, not them. "Each of us is sovereign over our powers, and the power to decide who to cooperate with is a basic expression of that sovereignty".²³¹ All the important features of Article 40.6.1.iii's significance for horizontal legal relations (including the limits to that significance) can be read as expressions of this more basic idea.

First, although Article 40.6.1.iii makes special reference to unions (on which more in a moment), it is engaged by voluntary associations, both formal and informal, directed towards an indefinite variety of particular purposes. In the foundational authority of

²²⁸ On which see generally: Rachael Walsh, *Property Rights and Social Justice: Progressive Property in Action* (Cambridge University Press 2021).

²²⁹ *Smyth* (n 193) [32.1]-[32.7] (Laffoy J).

²³⁰ In that sense, Article 40.6.1.iii does not "purport to create the right to freedom of association but merely guarantee liberty for its exercise": *Equality Authority v Portmarnock Golf Club* [2009] IESC 73 (SC) 50-1 (Hardiman J); *Murphy v Independent Radio and Television Commission* [1997] IEHC 71 (HC) 9 (Geoghegan J).

²³¹ Arthur Ripstein, *Force and Freedom* (Harvard University Press 2009) 47.

National Union of Railway Men v Sullivan, Murnaghan J held that the Article’s language indicates that, as a matter of constitutional law, “each citizen is free to associate with others of his choice for any object agreed upon by him and them”.²³² A similarly expansive reading has consistently found judicial favour ever since.²³³

Second, Article 40.6.1.iii implies a constitutional claim-right *not* to be compelled to become the member of an association or union – to disassociate.²³⁴ You are under no constitutional obligation to associate with anyone, and other private persons constitutionally wrong you by determining that you will pursue their associative purpose, irrespective of whether that purpose is noble or socially valuable. From here, the difficult question is only what conduct on their part will amount to impermissible “compulsion”, overbearing your will and determining your pursuit of purposes rather than merely changing the context in which you pursue them (§2.3.4). That question is engaged in a later chapter (§6.4).

Third, outside of one special circumstance discussed later (§6.5.3),²³⁵ no one has a constitutional claim-right that a particular association admit them.²³⁶ To say things from the opposite direction, an association and its members are under no constitutional duty to admit anyone, and are to that extent free as against other private persons to establish their own conditions for membership. The contrary position would empower prospective members to unilaterally obligate existing members to pursue the particular purpose of admitting them just by their say-so.

²³² *NUR v Sullivan* [1947] IR 77 (SC) 101 (Murnaghan J).

²³³ *Equality Authority* (n 230) 64, 87 (Hardiman J); *Irish Times Ltd v Ireland* [1998] 1 IR 359 (SC) 406 (Barrington J) (“any particular purpose”); *CMC Medical Operations Ltd v Voluntary Health Insurance Board* [2015] IECA 68 [6] (Hogan J); *Mohan v Ireland* [2019] IESC 18 [33] (O’Donnell J); *O’Doherty v Minister for Health* [2022] IESC 32 [105], [108], [111] (Hogan J) (guarantee engaged by inviting visitors or guests into one’s home); *MK (Albania) v Minister for Justice and Equality* [2022] IESC 48 [15]–[20] (Hogan J); [25], [34] (O’Donnell CJ) (Cf. [179]–[195] (MacMenamin J); *O’Neil* (n 70) [59] (O’Donnell CJ). (Cf. [179]–[195]).

²³⁴ *Educational Company (No 1)* (n 105); *Educational Company (No 2)* (n 68); *Crowley v Cleary* [1968] IR 261; *Meskeel* (n 16); *Cotter* (n 31); *Association of General Practitioners v Minister for Health* [1995] 1 IR 382; *Nolan Transport (Oaklands) Ltd v Halligan* [1999] 1 IR 128; *Dunne v Mahon* [2014] IESC 24.

²³⁵ *Murphy* (n 29) (SC) 117 (Walsh J); *O’Connell* (n 28). See, too, s. 3(1)(b) of the Trade Union Act 1913 and s. 13 of the Employment Equality Acts 1998–2015.

²³⁶ *Tierney* (n 29); *Murphy* (n 29); *Clancy* (n 29); *O’Donohoe* (n 29).

Fourth, the constitutional right to associate implies no constitutional duty on any private person to engage with, recognise, or negotiate with a particular association.²³⁷ If I am to be the one who determines the purposes I pursue, the fact that some other private persons have elected to associate for some purpose cannot place me under an affirmative obligation to assist them. It is for this reason that “[t]here is no [constitutional] duty placed on any employer to negotiate with any particular citizen or body of citizens”, and why the contrary position would be an impermissible “extension of the principle that a citizen must not be coerced into joining an association or union against his will”.²³⁸ Importantly, although other persons (who have elected to associate) could never unilaterally place you under a constitutional obligation to do their bidding, they do you no constitutional wrong just by making it (much) more attractive for you to assist them, through lawful inducements consistent with your independence: altering the option-set from which you choose, but without *determining* any of the purposes you pursue with means to which you have an antecedent right (§2.3.4). Much industrial action is best understood as amounting only to inducement of this sort, and as such involves no constitutional wrong (§6.5).²³⁹ Besides, it is perfectly clear that the Oireachtas may, in proportionate pursuit of a public purpose, empower trade unions to act in ways *inconsistent* with other private persons’ independence from them: hence the general statutory immunity against liability in tort enjoyed by trade unions acting “in contemplation or furtherance of a trade dispute” (§6.4).²⁴⁰

²³⁷ *El Co Ltd v Kennedy* [1968] IR 69 (SC) 89 (Walsh J); *Dublin Colleges Academic Staff Association v City of Dublin VEC* (HC, 31 July 1981) 5 (Hamilton J); *Abbott and Whelan v ITGWU* (1982) 1 JISSL 56 (HC) 59 (McWilliam J); *Inspector of Taxes v Minister of Public Services* (HC, 24 March 1983); *Association of General Practitioners* (n 234); *Nolan* (n 21); *Ryanair v Labour Court* [2007] IESC 8 [35], [48] (Geoghegan J). See too, to similar effect, the earlier decision of Gavan Duffy J in *Federation of Irish Rail and Road Workers v Great Southern Railway* [1942] IrJurRep 33 (the Constitution is not cited), and also the Constitution Review Group’s recommendations on the point (recommending that no obligation of an employer to negotiate with a union or particular employee be expressly inserted into the Constitution): *Report of the Constitution Review Group* (Pn 2632, 1996) 316.

²³⁸ *Abbott* (n 29) 59-60 (McWilliam J).

²³⁹ Consider, for instance, Supreme Court dicta suggesting that strike action preceded by due notice *suspends* the contract of employment without breaching it, and so does not deprive anyone of anything to which they had a pre-existing private right: *Becton Dickinson Co Ltd v Lee* [1973] IR 1; *Bates v Model Bakery* [1993] 1 IR 359. Cf. *Talbot v Merrigan* (SC, 30 April 1981).

²⁴⁰ s. 13 of the Industrial Relations Act 1990. For the same reason, Geoghegan J’s dicta in *Ryanair* (n 237) [36] that “*Ryanair is perfectly entitled not to deal with trade unions nor can a law be passed compelling it to do so* [my emphasis]” goes too far, even though an employer’s “right to operate a non-unionised company” might intelligibly be understood as an aspect of private persons’ general entitlement as against other private persons to determine the purposes they pursue for themselves. As we have seen in other contexts, that entitlement cannot be absolutely immunised from all legislative modification.

Fifth, the constitutional right to dissociate could not, in itself, empower a member of an unincorporated association to unilaterally dissolve it. The point arose in *Dunne v Mahon*.²⁴¹ A majority of the members of an unincorporated association – a golf club – wanted to dissolve it. The rules of the association made no express provision for the club’s dissolution. In the High Court, Hogan J held, by reference to ordinary common law principles of contractual interpretation, that a power to dissolve the association through majority vote should be implied into the club’s rules. He considered this conclusion reinforced by constitutional considerations: in light of Article 40.6.1.iii, he thought, “the Court cannot effectively compel an unwilling majority to associate with a minority”.²⁴² This conclusion was properly overturned by the Supreme Court on appeal.²⁴³ As Clarke J pointed out, individual members of unincorporated associations who wish to cease associating with its other members are at legal liberty to resign: to that extent, *pace* Hogan J, they are not *compelled* to associate with anyone – none of their associative purposes are determined for them – even though their resignation might cause them loss (i.e. frustrate a purpose of theirs).²⁴⁴ Indeed, absent prior agreement, a majority of members could not have the power to non-consensually modify the contractual relationships obtaining severally between each of the association’s *other* members, by dissolving the association altogether. That would put the majority’s members in charge of the minority.

Sixth, D will not violate a constitutional duty owed to P just in virtue of making it (much) more difficult or costly for P to associate with X or disassociate from them. Associating with (or dissociating from) X is just a particular purpose P might have, and so mere frustration of it by D does not in itself subordinate P to D’s determining choice. In Kingsmill Moore J’s telling:

The Constitution guarantees my right to join an association, no matter how extreme its tenets may be, provided it is not illegal. Nevertheless my membership may involve me in unpopularity, loss of friendship, social ostracism, all designed to make me forgo my right. An employer may hesitate to engage me anticipating that my membership will cause trouble. These forms

²⁴¹ [2012] IEHC 412.

²⁴² *ibid* [29].

²⁴³ *Dunne v Mahon* [2014] IESC 24

²⁴⁴ *ibid* [6.7]-[6.9] (Clarke J).

of pressure may coerce me to resign my membership against my desires, but they are not restrainable by the law.²⁴⁵

The point is further illustrated by authority implying the constitutional permissibility of *pre-employment* closed shop arrangements (§6.3.3),²⁴⁶ which arrangements can clearly involve employers and unions frustrating P's particular purpose of obtaining (particular) employment whilst remaining out of a (particular) union. Again, D's conduct can sometimes be such that it is aptly characterised as *determining* P's choice over association or disassociation, rather than merely altering the environment in which P makes that decision (§6.4). Absent such determination, frustration of (dis)associative purpose is not constitutionally wrongful.

Seventh, Article 40.6.1.iii guarantees "the right of citizens to form associations *and unions*". The provision can thus reasonably be construed as according special constitutional recognition to trade unions' role in securing a social world in which working people are not rendered *systemically* subordinate by the combined choices of the economically powerful – Marx's "dull compulsion of economic relations" (§6.4).²⁴⁷ That nerve of the Article 40.6.1.iii guarantee (properly) furnishes no freestanding constitutional permission for unions to determine others' pursuit of purposes – the mere fact of combination for a noble end, as a product of members' unilateral initiative, could not itself alter the constitutional rights of a non-cooperating third-party. Nonetheless, trade unions' constitutionally envisaged role might otherwise bear on the judicial interpretation and application of law governing horizontal legal relations. It plausibly favours capacious interpretations of *statutory* immunities from civil liability.²⁴⁸ At the remedial stage, it tells against ordering interlocutory injunctions on industrial action: in the exercise of judicial discretion, trade unions' constitutionally recognised social function as a bulwark against the threat of a

²⁴⁵ *Educational Company of Ireland (No. 2)* (n 68) (SC) 396 (Kingsmill Moore J).

²⁴⁶ *Murphy* (n 29) (HC) 107 (Murnaghan J); *Becton Dickinson* (n 239) (SC) 48 (Henchy J) (Cf. 40-1 (Walsh J)); *O'Connell v BATU* [2014] IEHC 360 [106], [131] (Ryan J); *O'Connell* (n 28) [21], [89] (Peart J); *McGee* (n 4) [37].

²⁴⁷ Karl Marx, *Capital: A Critique of Political Economy: Volume 1* (Lawrence and Wishart 1970) 737; *In re Certification of the Constitution of South Africa* (1996) (4) SA 744 [66]; *Mounted Police Association of Ontario v Canada* [2015] 1 SCR 3 [58]: "The guarantee functions to protect individuals against more powerful entities...In this way, the guarantee of freedom of association empowers vulnerable groups and helps them work to right imbalances in society"; *O'Neil* (n 70) [59] (O'Donnell CJ).

²⁴⁸ *O'Neil* (n 70) [57]-[59] (O'Donnell CJ); [7]-[8] (Hogan J).

systemically subordinating economy appropriately factors into any “balance of convenience” assessment.²⁴⁹

3.4.4. *Discrimination*

The constitutional position on private discrimination permits of much the same analysis. Although that position awaits full judicial resolution, existing authority points in one direction: whilst the Oireachtas may validly legislate to prohibit discrimination by private persons,²⁵⁰ the Constitution does not itself impose freestanding constitutional duties of non-discrimination on those persons.²⁵¹ The position is clearest with respect Article 44.2.3’s prohibition on religious discrimination,²⁵² which provides:

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

In *McGrath and O’Ruairc v Maynooth College*,²⁵³ P had been dismissed by D, a seminary and higher education institution, partly on the basis that P had been laicised as a Catholic

²⁴⁹ *ibid* [72] (O’Donnell CJ); [3], [53], [56]-[58] (Murray J).

²⁵⁰ Employment Equality Acts 1998-2015; Equal Status Acts 2000-2018. For judicial acceptance of the Oireachtas’s power to validly legislate in this connection: *In Re Article 26 and the Employment Equality Bill 1996* [1997] 2 IR 321 (SC) 349-50; *Equality Authority v Portmarnock Golf Club* [2005] IEHC 235.

²⁵¹ For academic discussion, which uniformly adopts the same view on what the positive law is as I do here, but with lots of different views on what it ought to be, see Temple Lang, (n 149); John Kelly, ‘Equality Before the Law in Three European Jurisdictions’ (1983) 18(2) *Irish Jurist* 259, 267; Siobhán Mullally, ‘The Myth of Constitutionalism and the “Neutral State”’ in Tim Murphy and Patrick Twomey (eds.), *Ireland’s Evolving Constitution 1937-1997* (Hart Publishing 1998); Siobhán Mullally, ‘Substantive Equality and Positive Duties in Ireland’ (2007) 23(2) *South African Journal on Human Rights* 291; Nolan, (n 3). See also, for an argument that the constitutional idea of dignity might provide a justificatory ground for judicial development of private duties of non-discrimination: William Binchy, ‘Dignity as a Constitutional Concept’ in Eoin Carolan and Oran Doyle (eds), *The Irish Constitution: Governance and Values* (Thomson Round Hall 2008).

²⁵² The authors of *Kelly* (n 3) [7.9.55] consider it “*beyond argument* that the prohibitions of religious endowment and religious discrimination have no application to private parties and are binding on the State only [my emphasis]”. This is perhaps too strongly put: the authors’ view seems to depend on a mistake as to Griffin J’s position on the constitutional point in *McGrath* (n 88): Griffin J says only that he agrees with the judgment of *Henchy J*, not *Kenny J* (contrary to what *Kelly*’s authors suggest). Although they do not mention it in this context, the authors might draw further support for their view from the infamous *Schlegel v Corcoran and Gross* [1942] IR 19 where Gavan Duffy J commented (at 25) in the context of a dispute between a (private) landlord and tenant: “I fail, by the way, to see the supposed connection between the problem before Mrs. Schlegel and the constitutional veto upon any discrimination by the State on the ground of religious belief”. As a general matter (if not on the constitutional point), *Schlegel* is now an authority surely of questionable precedential value. See (n 263) below for citations and discussion.

²⁵³ *McGrath* (n 88).

priest. P argued that this amounted to a constitutionally wrongful discrimination by D on the grounds of religious status. In the Supreme Court, P's argument was unanimously rejected, with different judges offering subtly different reasons, but all seeming to assume that Article 44.2.3 prohibited discrimination by the State only. Kenny J's judgment (with which Parke J agreed) was clearest in this respect, but the other judgments strongly suggest the same position.²⁵⁴ He reasoned from the text's plain meaning:

The prohibition imposed by the sub-section is confined to the State: it does not apply to bodies which receive public moneys from the State whether they be grants for income or capital purposes. The argument that the sub-section applies to any such institution is not supported by its words which confine the prohibition to the State and do not extend it to other institutions and I see no reason why the ordinary grammatical meaning should be so greatly extended.²⁵⁵

Kenny J went on to hold that although D was in receipt of State funding, it was not an agent of the State. It therefore was not bound by Article 44.2.3.

The position with respect to other forms of discrimination, which fall to be analysed (at least in the first instance) under Article 40.1, is likely similar. That Article provides:

²⁵⁴ For his part, O'Higgins CJ rejected P's argument on the basis that any discrimination by D against P was *justifiable* on the facts. He expressly left open the question of whether D was acting as an agent of the State, in terms indicating that he considered it a necessary condition of Article 44.2.3's binding D that D *was* such an agent. Henchy J (with whom Griffin J agreed on the constitutional point) seemed to be of a similar view. He considered (at 187) that the "primary aim" of "proscribing disabilities and discriminations *at the hands of the State* on the ground of religious profession, belief or status...is to give vitality, independence and freedom to religion [my emphasis]". As such, discriminations that are not "imposed or made" by the State but "part of the texture and essence of [a] particular religion" cannot "be blamed on the State as an unconstitutional imposition". Indeed, "in order to comply with the spirit and purpose of the constitutional guarantee, [the State] may justifiably lend its weight to what may be thought to be disabilities and discriminations deriving from within a particular religion". As such "[e]ven if it be said that the [College] statutes [were], by recognition or support, an emanation of the State [my emphasis]", they amounted "to an implementation" of the constitutional guarantee of religious freedom, not a violation of Article 44.2.3. Unlike Kenny J's, Henchy J's reasoning does not necessarily foreclose the possibility of private persons holding constitutional non-discrimination duties under Article 44.2.3: on Henchy J's view, that question might turn in part on how such duties would impact religious *freedom*. Nonetheless, as the passages just cited suggest, his understanding of religious discrimination both centres the State as duty-bearer *and* strongly emphasises the constitutional necessity of a certain private freedom to discriminate, at least on the part of religious bodies. It thus points in much the same direction as does Kenny J's argument from the text's plain meaning.

²⁵⁵ *McGrath* (n 88) 214.

All citizens shall, as human persons, be held equal before the law.

As with Article 44.2.3, the wording here is suggestive. A guarantee that citizens shall “be held equal before the law” implies that its addressees are those State officials who make, administer, and apply the law before which citizens are to be held.²⁵⁶ Further, in light of religion’s special place in the constitutional scheme more generally, it might be thought anomalous if private persons were *not* constitutionally prohibited from discriminating on religious grounds (per *McGrath*), but *were* constitutionally prohibited from discriminating on grounds of say, gender, race, class, sexual orientation, and so forth. Nonetheless, in *Re Article 26 and the Employment Equality Bill 1996*, the Supreme Court expressly left open “to what extent, if any, the provisions of [Article 40.1] may be applicable in the area of private law”.²⁵⁷ In the later case of *Equality Authority v Portmarnock Golf Club*, however, O’Higgins J was clear (albeit obiter):

I accept the plaintiffs’ submission that as interpreted by the courts Article 40.1 of the Constitution guarantees process equality and does not impose obligations on citizens in their private relationships.²⁵⁸

Although O’Higgins J’s view in this passage was not expressly mentioned by the Supreme Court on appeal,²⁵⁹ Hardiman J’s treatment of freedom of association captures much the same thought, again in clear terms:

²⁵⁶ John Kelly considered the constitutional wording inconclusive: ‘Equality Before the Law’ (n 251), 262.

²⁵⁷ *Re Article 26 and the Employment Equality Bill 1996* [1997] IESC 6 (SC) 33.

²⁵⁸ [2005] IEHC 235. In this connection, O’Higgins J also cites with approval several authorities he was referred to by counsel demonstrating that US constitutional law adopts a similarly public-oriented conception of constitutional equality law: *Bell v Maryland* 378 US 226 (1963); *Moose Lodge* (n 159); *Evans* (n 159). In *Quigley v Minister for Education* [2012] IEHC 414, O’Higgins J’s view was mentioned but not questioned by Laffoy J in the High Court: on the facts, the question did not need to be decided, as the defendant was, to adopt the EU law language the Court itself employed, an “emanation of the State”. As the authors of *Kelly* (n 3) [7.2.29] note, in two earlier cases, the question as to whether Article 40.1’s imposed duties of non-discrimination on private – as opposed to public – actors seems not to have been noticed: *Murtagh Properties* (n 68); *Kerry Co-Operative Creameries Ltd v An Bord Bainne Co-Operative Ltd* [1990] ILRM 664, 717. In both cases, the private person against whom the Article 40.1 argument was raised was considered not to have violated any constitutional duty under that Article.

²⁵⁹ [2009] IESC 73.

There is a constitutionally recognised right to freedom of association. At least in the private sphere one may associate with whom one likes and need not associate with those with whom one does not wish to associate. Thus, one may have a ladies' club, a gentlemen's club, a gay club, a Catholic club, an Africans' club and so on. And if one forms such a body, one may exclude from it those who do not meet the basic criterion for membership.²⁶⁰

Interestingly too, in 1996, the Constitution Review Group was of the view that private discrimination ought not to be constitutionally wrongful.²⁶¹ Its reasons were: (a) a constitution regulates the relations between an individual and the State; (b) a constitutional prohibition on private discrimination would unjustifiably intrude on individual autonomy; (c) there was a possibility of conflict with *other* constitutional rights (in particular, to freedom of association and expression); (d) it would be difficult to identify whom besides the State a constitutional non-discrimination duty ought to bind; (e) it is preferable that the Oireachtas determines to which areas of activity constitutional guarantees should apply.

In themselves, these reasons (a)-(e) all prove too much. Each seems capable of counting with more or less equal force against *any* constitutional right directly binding private persons.²⁶² In light of the direct horizontal bindingness of *other* constitutional rights, we need an account of what might set private duties of non-discrimination apart from those constitutional duties that *are* privately held.

Again, the foregoing picture of our horizontal constitutional relations provides resources for such an account. Although discriminatory treatment is (often) blameworthy, harmful, and socially corrosive, the fact that D's reasons for treating P in a certain way are discriminatory vis-à-vis P can never *make it the case* that D's treatment of P determines the purposes P pursues with their rightful powers. If D's conduct determines the purposes P pursues, it is constitutionally wrongful apart from its discriminatory motivation or impact. By contrast, if I refuse to associate with you – by refusing to employ you, lease you my

²⁶⁰ *ibid* 3-4 (Hardiman J).

²⁶¹ *Report of the Constitution Review Group* (n 237) 264.

²⁶² A point which, as O'Connell notes, 'A Successful Experiment' (n 3), the Review Group appears to concede by citing the same reasons, with minimal modification, in support of its more general argument against expressly incorporating direct horizontal bindingness of constitutional rights into the constitutional text: *ibid* 267.

property, or admit you to my club – that refusal does not determine the purposes for which any of your means are used: it frustrates them, but leaves you open to keep pursuing them (however doomed you are to fail). The (discriminatory) motivation for my refusal can make no difference, nor can your very great need. Our interaction, considered bilaterally, leaves our respective use of means independent.

Importantly, this analysis does not imply that Article 40.1's guarantee of equality before the law is altogether irrelevant to horizontal legal relations. Indeed, as mentioned above, there are several cases where constitutional equality norms have operated to invalidate, modify, or condition the interpretation of legal rules otherwise governing those relations (§4.5).²⁶³ None of these cases, however, involve private persons bearing constitutional non-discrimination duties directly: instead, the Constitution becomes significant as a source of a vertical duty on *the State* to hold its citizens as equals before the law, which duty in turn constrains courts' development and application of the law governing horizontal relations (§3.2.6).

Nor does our analysis preclude the possibility of D, *by way of a special relationship with P*, coming under a constitutional duty not to disadvantage P on the basis of certain (discriminatory) reasons. In such cases, the presence of the special relationship is essential to the existence of D's constitutional duty (§6.4).²⁶⁴

Finally, the analysis casts no doubt whatever on the power of the Oireachtas, in proportionate pursuit of properly public purposes, to legislate so as to prohibit private discrimination. Under current social conditions, the justification for such legislative prohibitions is, in many spheres, dramatically overdetermined: they are necessary if citizens are to make their way in the world on their own terms, enjoy a minimally decent

²⁶³ *Gaffney* (n 136); *KD* (n 59); *CM* (n 59); *McKinley* (n 56); *JW* (n 59). Although there is no authority on the point, there is no reason in principle that a parallel phenomenon could not operate with respect to Article 44.2.3's prohibition on religious discrimination. Consider, for instance, how, even besides the Equal Status Act 2000-2018, *Schlegel* (n 252) would almost certainly be decided differently today. And although it might not prove necessary, Article 44.2.3 (or perhaps Article 44 more broadly) could count persuasively in favour of a judge reading s. 56 of the Landlord and Tenant Act 1931 (providing that a landlord's consent to assignment of a lease by a tenant must not be "unreasonably" withheld) so that a landlord's refusal would be "unreasonable" if grounded in racial prejudice: Ruth Cannon, 'The Bigoted Landlord: A Re-Examination of *Schlegel v Corcoran and Gross*' (2005) 12 *Dublin University Law Journal* 248, 251; James Casey, *Irish Constitutional Law* (3rd edn, Thomson Round Hall 2000) 701. Cf. BVerfGE 90, 27 (*Parabolantenne I*) (1994).

²⁶⁴ *Meskeil* (n 16); *Murtagh Properties* (n 68).

and dignified quality of life, and if public institutions are to be meaningfully representative. The only point being made concerns the constitutional starting point, which is that private persons' interactions with one another are to be consensual, with none unilaterally determining the purposes anyone else pursues with what is theirs. Legislative variations from that starting point, although properly the object of strong judicial deference,²⁶⁵ require justification by reference to a public purpose.

3.4.5. *Expression, Communication, Assembly*

Although authority remains very sparse, the horizontal operation of constitutional rights to freedom of assembly, expression, and communication can be understood on the same model.²⁶⁶ That is, so far as they bear on our horizontal relations, those rights are usefully understood as particular instantiations of a more general claim-right not to have the purposes we pursue with our means determined for us by others.

On the picture we are working with, *assembly* is just one of the many uses you might decide to make of your body: it is the occupation of space in pursuit of a given purpose in (loose or close) cooperation with others. The same goes for *expression* and *communication*: communicating facts and opinions is, again, another way in which you might pursue your purposes by taking up your means – your voice and rhetorical flair, pens, paper, paints. In itself, expressing facts and opinions tends to leave others' use of means independent: when “someone merely says what he thinks, another always remains free to take it as he pleases” and so the expressive activity “does not in itself diminish what is theirs”.²⁶⁷ Put differently: *words*, unlike force, generally leave my reciprocal non-subordination with others intact; never depriving anyone of the opportunity to make a decision that it was up to them, rather than me, to make. It is for that reason that “the public expression and manifestation of different and dissenting views must – in general, at least – be tolerantly accepted by all”.²⁶⁸ That feature of our horizontal legal relations is properly seen as a constitutionally basic

²⁶⁵ *In Re Article 26 and the Employment Equality Bill 1996* [1997] 2 IR 321 (SC) 349-50.

²⁶⁶ On the distinction between the Article 40.6.1 right to freedom of expression (concerned with the “public activities of the citizen in a democratic society”) and the Article 40.3 right to communicate (a more general right to communicate information and “convey one’s needs and emotions by words or gestures as well as by rational discourse”) see: *Murphy v Independent Radio and Television Commission* [1999] 1 IR 12.

²⁶⁷ Immanuel Kant, *Metaphysics of Morals*, 6:238.

²⁶⁸ *Hyland* (n 91) [81] (Hogan J).

aspect of our shared political project: it is a precondition (but no guarantee) of a polity organising itself around something besides “the right of the stronger”.²⁶⁹

We, accordingly, do no constitutional wrong by pursuing our own purposes through speech or assembly, so long as this does not involve us in *determining* the purposes anyone else pursues with their rightful means. The general liberty to express oneself and assemble with others thus extends to permit the pursuit of an indefinite variety of particular purposes,²⁷⁰ including purely “private” commercial purposes with no broader social or political significance,²⁷¹ and even purposes that are “worthless, prurient, and meretricious”.²⁷² Moreover, it extends to “strong and forceful language”,²⁷³ permitting conduct that (greatly) inconveniences, offends, shocks, upsets,²⁷⁴ annoys – and in all those ways *frustrates others’ purposes* – so long as it does not *determine* others’ pursuit of purposes.²⁷⁵

²⁶⁹ Jean Jacques Rousseau, *The Social Contract* (1762) Book 1, Chapter 3: “Force is a physical power, and I fail to see what moral effect it can have”.

²⁷⁰ That the purposive activity of expressing facts, thoughts, and opinions need not be public-directed or public-regarding to acquire constitutional protection is confirmed by the existence of the constitutional right to *communicate* (alongside the constitutional right to freedom of expression): *Murphy* (n 266); *Attorney General v Paperlink Ltd* [1984] ILRM 373.

²⁷¹ *Hyland* (n 91) [74] (Hogan J); *Mahon* (n 80) [86] (Fennelly J): “The media are not required to justify publication by reference to any public interest other than that of freedom of expression itself. They are free to publish material which is not in the public interest. I have no doubt that much of the material which appears in the news media serves no public interest whatever”.

²⁷² *Mahon* (n 80) [87] (Fennelly J): “Publication may indeed be prompted by less noble motives. So far as the facts of the present case are concerned, the decision of [D] was disgraceful and served no identifiable public interest. On the other hand, that does not mean that it was unlawful”. In support of this view, Fennelly J cited Hoffmann LJ’s famous dictum in *R v Central Independent Television* (n 80), which has become a frequent touchstone for Irish courts in elucidating the constitutional guarantee of freedom of expression (*M v Drury* [1994] 2 IR 8; *Herrity* (n 20); *Hickey* (n 21); *X* (n 21)): “Newspapers are sometimes irresponsible and their motives in a market economy cannot be expected to be unalloyed by considerations of commercial advantage. Publication may cause needless pain, distress and damage to individuals or harm to other aspects of the public interest”.

²⁷³ *Marine Terminals v Loughman* [2009] IEHC 620 (Feeney J); Cf. *EI Co Ltd v Kennedy* [1968] IR 69 (SC) 91 (Walsh J).

²⁷⁴ *M* (n 21) 17 (O’Hanlon J): “In the present case, the court is asked to intervene to restrain the publication of material, the truth of which has not as yet been disputed, in order to *save from the distress* that such publications is sure to cause, the children of the marriage who are all minors [my emphases]. This would represent a new departure in our law, for which, in my opinion, no precedent has been shown, and for which I can find no basis in the Irish Constitution, having regard, in particular, to the strongly expressed guarantees in favour of freedom of expression in that document”.

²⁷⁵ In this respect, Hogan J’s *obiter* view in *Hyland* (n 91) [82] that “*any* effort [my emphasis] to dissuade an individual (by, e.g., verbal abuse directed at such an individual) from exercising their lawful right to attend the race meeting would have been plainly unlawful” must be doubtful (Hogan, Whyte, Kenny, and Walsh (n 3) [7.6.138]). Considered just as such, of course, wholly effective efforts at dissuading somebody from exercise a (Hohfeldian) constitutional liberty of theirs in a particular way will amount only to *frustration*, not *determination*: e.g. where I dissuade you from publishing a statement by alerting you to how it might end up causing you more trouble than it’s worth. The focus must therefore instead be on whether the means of dissuasion are permissible (not on the impropriety of the end of dissuasion). On that point, the precise basis for the unlawfulness of verbal abuse as a means is left mysterious:

However, it cannot permit conduct that, by way of such determination, compromises others' standing as independent persons.²⁷⁶ Defamation is discussed in a moment (§3.4.6). As explored in the next chapter, certain *private* information about a person is amongst that person's rightful means, and therefore unavailable for others' use through speech: its non-consensual disclosure involves determining the purposes pursued with what is someone else's (§4.4). The same thought explains why one's constitutional right to assembly or expression will not function to permit conduct otherwise constituting trespass to land,²⁷⁷ nuisance,²⁷⁸ or trespass to the person:²⁷⁹ such conduct, irrespective of its expressive dimension, determines the purposes for which another's person or property are used, and is constitutionally wrongful for that reason. Just as others are under no affirmative constitutional duty to make their person or property available to you for your economic purposes (§3.4.2), they are under no such duty to make their person or property available to you for your expressive purposes by furnishing you with a platform to make yourself heard.²⁸⁰ For just the same reason, whilst the "balance of convenience" will generally tell

perhaps Hogan J had in mind a civil wrong of harassment or (given the hypothesised abuse would occur in the vicinity of private property) nuisance (§4.4).

²⁷⁶ In addition to the examples enumerated in the text, consider, on deceit, *CK v JK and F McG* [2004] IESC 21 (SC) 194 (Murray J): "[It was] a direct attack on the constitutional rights of a person for another to induce them or cause them to enter into a duly solemnised marriage contract by deceit when the latter knows that he lacks the capacity to enter into a valid marriage by reason of a pre-existing and subsisting marriage." The point was not addressed by the other members of the Supreme Court. Still, the thought that getting somebody to do as you please via deception, thus necessarily depriving them of the opportunity to consent to your way of treating them, chimes with the picture of rightful interpersonal interaction presented here, on which consent is central (§5).

²⁷⁷ *Hyland* (n 91) [82] (Hogan J): "It would have been likewise unlawful had the protesters committed any acts of trespass or obstructed the entrance to the premises. Here the evidence was that the protesters remained in a public place and it has not been suggested that they committed any acts of trespass on Dundalk's property (or that of other parties) or that they attempted to obstruct any public thoroughfare"; *Appleby v UK*. App No 44306/98 (ECHR, 6 May 2003).

²⁷⁸ *Brendan Dunne Ltd* (n 91); *Kehoe* (n 91); *Hyland* (n 91) [76] (Hogan J); *O'Doherty* (n 233) (Hogan J) [105]: "[subject] only, perhaps, to the *general law of nuisance*, the decision to invite visitors or guests to the family home is usually entirely a matter for the householders concerned [my emphasis]." Article 40.6.1.ii itself provides that "provision may be made by law to prevent or control meetings which are determined in accordance with law to be calculated to cause a breach of the peace or to be a danger or *nuisance* to the general public." On its face, the text seems to be referring to *public* rather than private nuisance. However, in *Hyland*, Hogan J interprets the text's reference to "nuisance" to encompass private nuisance: "'Nuisance' in this sense refers to activities which make it difficult or impossible for the general public to use their own amenities, by, e.g., blocking access to a private dwelling or by holding late night protests in a purely residential area".

²⁷⁹ *Foley* (n 37); *Murray* (n 21).

²⁸⁰ In light of the considerations gestured towards (but not fully ventilated) in §6.5.3, I do not mean to exclude the possibility that a private person may, exceptionally, acquire a sufficiently public character so as to justify the imposition of a constitutional duty to provide a platform to another: consider *Marsh* (n 14).

against ordering “prior restraints” on speech,²⁸¹ if a plaintiff “demonstrates by proper evidence a convincing case” that the defendant’s speech endangers the plaintiff’s constitutional right to life – that is, their ongoing capacity for purposiveness – an interlocutory injunction on that speech will appropriately be granted.²⁸²

3.4.6. *Good Name*

By Article 40.3.2 of the Constitution, the State guarantees “by its laws to protect as best it may from unjust attack and, in the case of injustice done, vindicate the...*good name*...of every citizen”.

That guarantee has had little discernible effect on horizontal legal relations.²⁸³ To be sure, Irish courts have cast instances of the tort of defamation as violations of P’s constitutional right to a good name by D,²⁸⁴ and (more often) have said that the law of defamation “protects” or “vindicates” that constitutional right.²⁸⁵ They have also frequently observed

²⁸¹ *Foley* (n 37); *Cogley* (n 21); *Mahon* (n 80); *Murray* (n 21); *X* (n 21); *O’Brien* (n 21).

²⁸² *Foley* (n 37); *Murray* (n 21). As is well known, at one time, Article 40.3 contained a provision “acknowledg[ing] the right to life of the unborn and, with due regard to the equal right to life of the mother, guarantee[ing] in its laws to respect, and, as far as practicable, by its laws to defend and vindicate that right.” On the basis of this provision, in several cases (n 24), Irish courts granted injunctions against private persons – counselling services and students unions – restraining them from distributing information as the availability of abortion services abroad (i.e. the locations, addresses, and contact details of clinics). The duties on private persons recognised in those cases no longer form any part of our law, after a series of constitutional amendments. Even from a starting point on which abortion itself was understood as an unconstitutional destruction of the constitutionally guaranteed right to life of an unborn child, the decisions were, as O’Cinneide, ‘A Successful Experiment’ (n 3) notes, astonishing in providing absolutely “no guidance as to the limits of the obligations that could be imposed upon private persons in the name of securing respect for the right to life of the unborn child”. In light of the point in the text, it is notable that in cases, conduct that fell far short of *procuring* or *encouraging* abortion was classed as constitutionally wrongful, a point later emphasised by the European Court of Human Rights in *Open Door Counselling Ltd v Ireland* (1993) 15 EHRR 244.

²⁸³ The leading cases on the constitutional right to a good name concern (vertical) duties on public authorities to act in accordance with fair procedures in making “a determination adverse to the reputation of a citizen in a manner which is immune from action [in defamation]”: *Shatter v Guerin* [2019] IESC 9 [45] (O’Donnell J); *Re Haughey* [1971] IR 217.

²⁸⁴ *Hanrahan* (n 1) 636 (Henchy J); *Conway* (n 27) 320 (Finlay CJ); *Walsh* (n 191) (SC) 14 (McCarthy J); *McDonnell* (n 2) 148.

²⁸⁵ *Kennedy v Hearne* [1987] IR 120 (Murphy J); *Tolan v An Bord Pleanála* [2008] IEHC 275 (Hedigan J); *Burke v Associated Newspapers* [2010] IEHC 447 [23] (Hogan J); *Shatter* (n 283) [36], [45] (O’Donnell J); *Bleheine* (n 15) [78] (MacMenamin J), [6] (Charleton J).

that the law of defamation,²⁸⁶ and its particular component rules,²⁸⁷ must reflect a “balance” between the constitutional right to a good name and the constitutional right to free expression.²⁸⁸ In doing so, however, they have consistently concluded – generally without much analysis – that the law of defamation, whether common law or statutory, strikes that balance in a constitutionally adequate place.²⁸⁹ Certainly, the constitutional right to a good name has not grounded a horizontal constitutional tort claim separate from the tort of defamation.²⁹⁰ Nor, for that matter, have constitutional rights to free expression or good name ever clearly grounded a substantive modification to our law of defamation.²⁹¹

²⁸⁶ *de Rossa v Independent Newspapers* [1999] 4 IR 432; *Foley v Independent Newspapers* [1994] 2 ILRM 61 (HC) 67 (Geoghegan J); *O’Brien v Mirror Group Newspapers* [2001] 1 IR 1 (Denham J pp. 32-3); *Hunter v Gerald Duckworth* [2003] IEHC 81; *Burke* (n 285) [23] (Hogan J); *McDonagh v Sunday Newspapers* [2015] IECA 225 [57]-[61] (Hogan J), [2017] IESC 46 [28]-[30] (Charleton J); *Watson v Campos* [2016] IEHC 18 [28] (Barrett J); *Ryanair v Channel 4 Television* [2017] IEHC 651 [49]-[52] (Meenan J); *Jones v Coolmore Stud* [2017] IECA 164 [52] (Ryan P); *Higgins v Irish Aviation Authority* [2022] IESC 13 [27] (Hogan J).

²⁸⁷ *Hynes-O’Sullivan* (n 62) (SC) 449-450 (Henchy J) (qualified privilege); *Dawson v Irish Brokers Association* (SC, 27 February 1997) 700 (O’Flaherty J) (proportionality of damages); *Reynolds v Malocco* [1999] 2 IR 203 (interlocutory injunction); *de Rossa* (n 286) (proportionality of damages); *O’Brien v Mirror Group Newspapers Ltd* [2000] IESC 70 [31], [75] (proportionality of damages); *Hunter* (n 286) (qualified privilege); *Leech v Independent Newspapers (No. 2)* [2014] IESC 79 (proportionality of damages); *Rooney v Shell E&P Ireland* [2017] IEHC 63 [31]-[32] (Ni Raifeartaigh J) (one year limitation period); *Christie v TV3 Television Networks* [2017] IECA 128 [34] (Hogan J) (proportionality of damages); *McDonagh v Sunday Newspapers (No. 2)* [2017] IESC 59 [38]-[40] (O’Donnell J) (proportionality of damages); *Kinsella v Kenmare Resources* [2019] IECA 54 [125] (Irvine J) (proportionality of damages); *Nolan* (n 21); *Gordon v Irish Racehorse Trainers Association (No. 2)* [2020] IEHC 425 [22], [70] (Barton J) (qualified privilege).

²⁸⁸ Eoin O’Dell, ‘Striking the Balance of the Constitutional Protections of Free Speech and Good Name in Irish Defamation Cases – corrected, revised, and updated’ (*Cearta.ie*, 14 September 2020) <<http://www.cearta.ie/2020/09/striking-the-balance-of-the-constitutional-protections-of-free-speech-and-good-name-in-irish-defamation-cases/>> accessed 18 December 2024.

²⁸⁹ Invocation of the Constitution in this context has thus understandably been criticised as possessing merely rhetorical, rather than analytical, significance: Brian F. Conroy, ‘Constitutionalising the Tort of Defamation – Bunreacht na hÉireann as a Framework for the Reform of Ireland’s Libel Laws’ (2002) 5 *Trinity College Law Review* 1.

²⁹⁰ In *Ogiereiakhi v Minister for Justice (No. 2)* [2014] IEHC 104, Hogan J found the *State* liable for a violation of P’s constitutional right to a good name in circumstances where P had been dismissed owing, ultimately, to the State’s failure to transpose an EU Directive in breach of EU law. On the facts, this (vertical) constitutional tort conclusion was overturned by the Court of Appeal (with which the Supreme Court agreed: [2017] IESC 52) on the basis that “there [was] no evidence or suggestion in this case that there was anything defamatory in the manner of the dismissal” ((n 54) [34] (Ryan J)). See further consideration at §6.4.3.

²⁹¹ In *Hunter* (n 286), Ó Caoimh J rejected D’s argument that the constitutional guarantee of free expression required that liability for defamation depend on fault (bad faith or negligence) by the publisher. He nonetheless expressed sympathy (obiter) for the House of Lords decision in *Reynolds v Times Newspapers* [2001] 2 AC 127, reasoning that “the flexible approach adopted in *Reynolds*...is the best way in which the Courts, in the absence of legislative reform in this area, can protect the constitutional rights of parties coming before the Court where the rights such as those at issue in these proceedings are at issue”.

Overall, then, whilst courts are keen to emphasise that constitutional rights are *engaged* on both sides where one private person defames another, they have done little to elaborate those rights' precise implications for how such horizontal disputes should be resolved. Instead, they have been happy to resolve those disputes by reference to existing common law or statutory rules, despite acknowledging the constitutional considerations at play. In part, that practice reflects proper judicial caution about innovation in an area of private law with complex social and political dimensions; best dealt with by a legislature well positioned to adopt a systemic rather than merely bilateral perspective, and with a track record of robust intervention in this domain (§3.3.4).²⁹² On the view being advanced here, it can also be seen to reflect the fact that an ideal of non-subordination – whilst speaking clearly on some matters – offers only very imprecise guidance on how the law of defamation might appropriately be organised.

The high-level starting point must be that, as an independent person entitled to make your own way in the world, you can only properly be made accountable to others for what *you* have done in an exercise of your purposiveness. In that way, your standing in the eyes of others is to be determined by you, not for you: you are not born having to clear your own name; nor can others unilaterally require you to clear your own name by making untrue statements that tend to lower your reputation in others' eyes.²⁹³ Others' general constitutional liberty to pursue their purposes through expressive activity thus could not extend to defamatory speech consistently with your independence from them: hence, the classification of defamation as constitutionally wrongful. The same basic thought – others cannot require you to clear your name, only your deeds can – can also be seen to lie behind Henchy J's rejection of P's constitutional argument in *Hanrahan v Merck Sharpe & Dohme*.²⁹⁴ In *Hanrahan*, recall (§3.2.6), P argued that, in a nuisance action (or, at least, *their* nuisance action), once P showed damage to their property, the constitutional right to

²⁹² See, today, the Defamation Act 2009. *Hynes-O'Sullivan* (n 62) (Henchy J) 450: "The public policy which a new formulation of the law would represent should more properly be found by the Law Reform Commission or by those others who are in a position to take a broad perspective as distinct from what is discernible in the tunnelled vision imposed by the facts of a single case...The articulation of public policy on a matter such as this would seem to be primarily a matter for the legislature"; *McDonagh* (No. 1) (n 286) [30] (Charleton J); *Higgins* (n 286) [117] (MacMenamin J).

²⁹³ Ripstein, *Private Wrongs* (n 213) 216-7: "Truth is ordinarily a complete defense to a defamation action. A true statement may lower the opinion of others about you, and so in that sense it is defamatory. It is not wrongful as against you because a right to your own good name is not a right that others think well of you, but only that what others think of you depend on what you have done, not on what someone has said you have done".

²⁹⁴ *Hanrahan* (n 1).

property required that the onus shift to D to prove they had *not* caused the damage. But such a reversal of the onus of proof would render D accountable for P's losses *not* on the basis of anything D had done, but only on the basis of damage P had suffered. Because independent persons are accountable to others only for what they have done, as Henchy J emphasised, in a claim for violation of a constitutional right to property "it is for the plaintiff to prove that the injustice relied on was actually suffered by him and that it was caused by the defendant".²⁹⁵

The positive law of defamation, however, is necessary to specify the sort of statements that can properly be said to *require* you to clear your name in this way. Because of reputation's social nature, that can only be done in light of prevailing social norms. Further, and importantly, the law must find some way of reconciling each person's *private* constitutional right to a good name (i.e. a right not be put in the position of needing to clear your name) with the *public* constitutional value of the free exchange of ideas in a free and democratic society. As the courts emphasise, there are various ways that might sensibly be done: the relevant constitutional ideas are not determinate in their application to particulars,²⁹⁶ and are already accommodated to one another to some degree by the relevant common law and statutory rules. As a general matter, then, it will be sensible for a court to conclude that, whilst constitutional considerations are invariably in play in defamation cases, they are not themselves invariably *decisive* in any direction. Overwhelmingly, that has been the approach our judiciary has adopted.

Nonetheless, a non-subordination analysis *can* account for Henchy J's view, in *Hynes-O'Sullivan v O'Driscoll*,²⁹⁷ that the constitutional right to a good name decisively counted *against* expanding the defence of qualified privilege to encompass cases where the speaker honestly, but both unreasonably and mistakenly, believed they were speaking on an occasion of qualified privilege:

²⁹⁵ *ibid* 636 (Henchy J).

²⁹⁶ See, to this effect, Law Reform Commission, *Report on the Civil Law of Defamation* (LRC – 1991) 122-124; *Report of the Constitution Review Group* (n 237) 295; *Hunter* (n 286). Cf. Eoin O'Dell, 'Does Defamation Value Free Expression?' (1990) 12 *Dublin University Law Journal* 50, arguing that the constitutional right to free speech required a move towards fault-based, rather than strict, liability in defamation on the textual ground that Article 40.6.1(i) refers to "convictions", so liability must turn on the state of mind of the speaker. With respect, it is difficult to see how this follows.

²⁹⁷ *Hynes -O'Sullivan* (n 62).

The constitutional priorities would be ignored if the law considered an occasion of qualified privilege to depend *only on the honest opinion* of the communicator as to the existence of a right of duty in the other person to receive the communication [my emphasis]. The constitutional right to one's reputation would be of little value if a person defamed were to be deprived of redress because the defamer honestly but unjustifiably believed that the person to whom the words were published had a right to receive the communication.²⁹⁸

The constitutional problem with a liberty to “defame with impunity” on “such a purely subjective basis”²⁹⁹ must be that it involves D *unilaterally* setting the limits of P's right to their good name.³⁰⁰ P's standing in the eyes of others could come to depend purely on D's judgment that they were speaking on an occasion of privilege, rather than on anything P had done, or on objectively ascertainable circumstances giving rise to an occasion of privilege at law. D's beliefs alone would determine how it was they could treat P.³⁰¹ P's rightful standing would be wholly in D's charge.

3.5. CONCLUSION

This chapter began by recapitulating the familiar observation that the Irish law of horizontality exhibits a *radicalism of structure* and *conservatism of substance*. The object of the foregoing has been to argue that these two general features of our law can be seen to cohere around an ideal of non-subordination. Constitutional rights are “on the cards” in horizontal legal relations just because those relations are to reflect private persons’

²⁹⁸ *ibid* 449 (Henchy J).

²⁹⁹ *ibid*.

³⁰⁰ Ripstein, *Force and Freedom* (n 231) 171: “Objective standards are required because a subjective standard would entitle one person to unilaterally determine the limits of another person's rights. If I could avoid liability by trying my best, your right to my forbearance would depend on my abilities and judgments, and so be inconsistent with a system of equal freedom... [O]bjective standards of conduct are required by a system of equal freedom, in which no person's entitlements are dependent on the choices of others”.

³⁰¹ Consider s. 20 of the Defamation Act 2009 (defence of honest opinion), in particular s. 20(3): “Although the defence is entitled “honest opinion” in the Act, and the emphasis is clearly on the expression of an opinion, it seems that one cannot have an opinion which is protected unless it is based on a substratum of fact. An opinion which is not to some extent anchored on facts, an opinion which floats in a factless vacuum, is not protected by s 20. This to some extent ensures that the “opinion” voiced bears some connection with reality”: McMahon and Binchy, *Law of Torts* (n 3) [34.255].

constitutional standing as their own masters in their interpersonal transactions. They are not “wild cards” just because that idea has certain sharp limits.

