INTERPRETATIVE AND DEFERENCE BASED MODELS OF JUDICIAL RESTRAINT IN THE IRISH CONSTITUTION

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Introduction

There is a considerable disagreement over the extent to which British courts may legitimately defer to legislative or executive interpretation of the European Convention on Human Rights. This disagreement is not limited to the law-journals,¹ but weaves throughout Britain’s burgeoning human rights jurisprudence.² However, very few seem to believe that deference is illegitimate per se. Rather, the disagreement centres on the extent of its practice. So, within the disagreement one can find a very important consensus – most agree that, in principle, some degree of deference is legitimate and therefore that authority over Convention interpretation can be apportioned between the legislature or executive and the courts. The disagreement focuses on how it should be apportioned. Of course, one can disagree with this consensus. One can believe that the very notion of “sharing” constitutional labour with the legislature or executive is wrong, plain and simple. On

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Interpretative and Deference Based Models of Judicial Restraint In The Irish Constitution

this view, authoritative reading of the Convention is (or should be) the sole preserve of the judiciary.

The debate over deference in Irish constitutional jurisprudence, however, is nowhere near as advanced as in the British context. In fact, it is nearly non-existent. As Margulies has noted in a related context; “Irish standard of review analysis is – as Americans say colloquially – ‘all over the ball park’. Many Irish judges do not even bother to announce a standard”. In particular, the courts rarely, if ever, offer any express discussion of deference to the same degree that their British (or indeed Canadian) counterparts do. However, irrespective of whether the courts realise it or not, the British debate over deference poses an important question for Irish constitutional law – is it better to recognise that, in principle, constitutional labour can be shared between the organs of State, or is it better to concentrate constitutional responsibility entirely on the judiciary?

In this short essay, I attempt to argue that a mindset which is open to the idea of deference (whether or not you have a fully worked out theory about how deferential a court should be) can provide a better foundation to approach the general question of judicial restraint than a mindset which sees the Constitution or equivalent supra-legislative norm as the sole preserve of the judiciary. In this respect, the simple fact of the debate in Britain should at least teach us, here in Ireland, that deference is not some pedantic game about differentially weighting evidence or about messing

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5 That is not to say that Irish courts never address the question of deference. There is, for example, a reasonable amount of case-law which supports a deferential application of the Heaney v Ireland [1994] 3 IR 593 proportionality test. See eg Re Article 26 and the Illegal Immigrants (Trafficking) Bill, 1999 [2000] 2 IR 360; Rock v Ireland [1997] 3 IR 474. There are also cases which support a less deferential application. See eg D.K. v Crowley [2002] 2 IR 744. Indeed, in more recent times some judges have expressly referred to deference qua a concept or the notions of variable standards of review in their decisions. See eg King v Minister for the Environment [2004] 3 IR 345, p 375; Re Article 26 and the Health (No.2)(Amendment) Bill, 2004 [2005] 1 IR 105, p 143, pp 182-183. Equally, the presumption of constitutionality, a staple of our constitutional jurisprudence since Pigs Marketing Board v Donnelly [1939] IR 413 is, itself, a principle of deference. See eg Colgan v The Independent Radio and Television [2000] 2 IR 490, p 512. The difficulty however, is that courts have rarely expressly addressed questions of deference in any prolonged and overt manner. The presumption tends to be applied in a relatively mantra-like fashion, and those cases which do seem to address issues of deference or the standards of review tend to be the exception rather than the norm. This point is discussed in more detail in Foley, “Diceyan Ghosts: Deference Rights, Policy and Spatial Distinctions” (2006) 28 Dublin University Law Journal (ns) 77, pp 87-92.
around with empty legal formulae, but rather that one’s position on deference (whatever it is) reflects a vision about how power is distributed within a constitutional order, and that is something which requires serious judicial attention.\(^6\)

It must be noted, however, that the argument offered in this essay is quite limited. I do not propose that deference provides a magic answer to all problems of constitutional theory such as, for example, the appropriate method of constitutional interpretation or the legitimacy of judicial recognition of enforcement of socio-economic rights. I simply wish to argue that there is a range of cases where it is far more reasonable to pursue judicial restraint through deference than through “interpretative” models of restraint which read-down the text of the Constitution to meet concerns about the institutional competence of the judiciary.

This argument can be explained as follows: The text of the Irish Constitution supports certain types of claims which, although fairly rooted in the text, raise reasonable concerns about the ability of courts to adjudicate thereupon. One may, for example, believe that whereas the rights of the child as established in the *F.N. v Minister for Education*\(^7\) have a reasonable constitutional grounding, the vindication of those rights (perhaps entailing decisions about how to accommodate “children-at-risk”) entails very complex decisions which may be beyond the capacity of the courts.\(^8\) Equally there are others spheres of constitutional protection or governance which may produce claims which require the constitutional decision-maker to make quite complex decisions which, one may think, may be best made with the benefit of very specific information and facts. Examples of these types of claims include aspects of equal protection which raise the spectre of judicial interference in policy-based classifications\(^9\) or claims that limitations on ones property rights are not “in the common good” or are disproportionate to the aims sought to be achieved.\(^10\)

If one believes that only the judiciary may perform constitutional labour, then one may run into a problem because in these kinds of cases one may believe that the court are simply unable to adjudicate. To put this quite colloquially, if one thinks that the court is the only institution which can “do” constitutional law, but, in a given case, it is unable to do it, then constitutional law does not get “done” at all. The logic here is simple. If one believes that the constitutional decision-making power belongs exclusively to the courts, one may find that there are constitutional questions which the courts cannot deal with. Part of the argument advanced in this essay is that Irish

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\(^6\) Mendes, “In Search of a Theory of Social Justice; The Supreme Court Reconceives the Oakes Test” (1990) 24 Revue Juridique Thémis 1, p 15.

\(^7\) In *F.N. v Minister for Education* [1995] 1 IR 409 Geoghegan J held that a child had constitutional rights to particular types of accommodation necessary to ensure its safety.

\(^8\) See *Sinnott v Minister for Education* [2001] 2 IR 545; *T.D. v Minister for Education* [2001] 4 IR 259.

\(^9\) See eg *Lowth v The Minister for Social Welfare* [1998] 4 IR 321 (High Court); [1999] 1 ILRM 552 (Supreme Court) (raising issue of complexity in examining whether plaintiff and comparator are factually alike or not). For a case with a similar factual matrix, but different result in the British context see *R (Hooper) v Secretary of State for Work and Pensions* [2003] 3 All ER 673 (CA); [2006] 1 All ER 487.

Interpretative and Deference Based Models of Judicial Restraint in The Irish Constitution

courts have, on occasion, dealt with this conflict by narrowing the text of the Constitution so as to exclude problematic claims from constitutional significance.

On the other hand, if one does not believe in judicial exclusivity over constitutional questions, then these problem-cases do not have to result in narrow readings of the Constitution. Assuming that, in fact, certain constitutional claims cannot rationally be the subject of adjudication, a court may choose not to “read-down” the Constitution, but to defer to legislative judgment as to how the constitutional claim should be resolved. The net effect of this model of restraint is that whereas courts may not deal with particularly complex aspects of constitutional law, then, at the very least, those areas of constitutional governance remain presumptively binding on other organs of State such as the legislature and executive. The central argument in this essay is, accordingly, that the deference-based option is always preferable to reading down the Constitution to meet concerns about the limits of the judicial capacity for adjudication.

Judicial Restraint

For many people, the power to judicially review legislation is inherently dangerous. After all, judicial review involves an unelected “elite” invalidating the product of the democratically elected legislature and thus may be said to usurp the very idea of “rule-by-the-people”. It is, in Bickel’s famous words, a “deviant institution” in an otherwise democratic polity.¹¹

At the same time, however, the Irish judiciary do not have some sprawling ungrounded power to strike down legislation based upon whatever criteria spring to the judicial mind. Whatever the case may be with other jurisdictions such as the United States,¹² the judiciary in Ireland are expressly licensed to engage in judicial review by the Constitution itself and the judiciary are guided in the practice of judicial review by the substantive provisions of the Constitution in respect of what legislation is permissible or not.¹³ Thus, judges sometimes go out of their way to emphasise that it is the Constitution, and not their own preferences, which strikes down legislation.¹⁴

¹¹ Bickel, The Least Dangerous Branch: The Supreme Court at the Bar of Politics (Indianapolis: Bobbs-Merrill, 1962).
¹² In the United States, the power of judicial review was implied first in Calder v Bull (1798) 3 US (3 Dall.) 386 but was first used in Marbury v Madison (1803) 5 US (1 Cranch) 137. That said, the “judge-made” origin of judicial review is not really a good argument against its present per se legitimacy in the United States. Rather, as Dworkin says, “no one proposes judicial review as if on a clean slate” meaning that whatever one can say about its origin, it at this point in time, may as well have an express Constitutional footing given the extent of its practice. See Dworkin, “The Forum of Principle” (1981) 56 New York University L R 469, p 472.
¹³ Article 34.3.2, Bunreacht na hÉireann, 1937 makes it quite clear that the High Court has the power to consider the Constitutionality of an Act of the Oireachtas: “Save as otherwise provided by this Article, the jurisdiction of the High Court shall extend to the question of the validity of any law having regard to the provisions of this Constitution…”. See also, Article 34.4.3, Bunreacht na hÉireann, 1937 in relation the Supreme Court. Judicial review per se is therefore quite legitimate.
¹⁴ For dicta to this effect see National Union of Railwaymen v Sullivan [1947] IR 77, p 100 per Murnaghan J (“[T]he object of stating a principle in the Constitution is to limit the exercise by the Legislature of its otherwise unlimited power of legislation”); Buckley v The Attorney General [1950] IR 67, p 70 per Gavan Duffy J in the High Court (“…[T]he Constitution entrusts to the Courts of Justice,
This kind of argument can (and has) allowed judges to disclaim personal responsibility for the practice of judicial review along the lines of “it’s not me, it’s the Constitution”. Such passing of the judicial buck is however, quite illusory. The Constitution needs interpretation, and interpretation is, at its root, informed by the interpreter.\(^{15}\) This does not mean that the Constitution is a hopeless mass of indeterminacy as Critical Legal Studies once tried to persuade us.\(^{16}\) Rather, as the numerous responses to Critical Legal scholarship have argued,\(^{17}\) the Constitution is better regarded as under-determinate, in the sense that it cannot be viewed as a series of wholly determinate edicts which are dispassionately and deductively

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\(^{15}\) As with most statements in Constitutional law, this draws one into a complicated jurisprudential debate which, in this case, concerns the true source of moral-political judgment in adjudication. Very few deny that morality plays a role in adjudication, but people disagree over where that morality comes from. On one side of the fence, scholars like Michael Perry, Joseph Raz and Frederick Schauer believe that the moral choice is that of the judge. On the other hand, Ronald Dworkin believes that whereas morality plays a role in adjudication that morality is already embedded in the law. See generally Dworkin, \textit{Laws Empire} (London: Fontana, 1986). Present space constraints prevent a detailed examination of these views so suffice it to say that Dworkin’s belief that morality is “in the law” is part of this general theory of how “right answers” can be found to legal disputes – which, as most recognise, is a kind of constructive legal morality. A judge is supposed to gather the relevant legal materials, and choose the answer that best “fits” the materials at hand thereby making the law “the best it can be” in relation to the question asked. So, Dworkin can say morality is “in the law” because his conception of what the law “is” – i.e an ongoing project in protestant interpretation – is itself a manifestation of constructive morality. Thus, the judge does not have moral choice in what the law is because, for Dworkin, the \textit{right} legal method will yield the right answer. And the right legal method reflects Dworkin’s conception of what interpretation is. But, as is well recognised, Dworkin’s view of interpretation itself proceeds from an un-argued premise that his conception of interpretation is self-evidently correct. Since it is reasonable to believe that we can disagree with Dworkin over what the nature of interpretation is it is reasonable to believe that his conception of interpretation, is itself a moral choice. See, Rubenfeld, “Legitimacy and Interpretation” in Alexander, ed, \textit{Constitutionalism: Philosophical Foundations} (Cambridge: Cambridge University Press, 1998), p 194. Thus, a judge practicing the Dworkinian method still exercises moral choice – it’s just a choice in respect of method rather than substance. Thanks are due to Dr. Oran Doyle of Trinity College, Dublin for bringing the Dworkinian notion of embedded morality to my attention, and Dr. Aileen O’Byrne of the University of Leicester for an enlightening discussion on the topic.


applied to the case at bar. Under-determinate as the Constitution may be, it cannot plausibly be invoked to support any kind of what Endicott may refer to as a “crazy claim” – it is not radically indeterminate. Under-determinacy, however, still leaves a role for the application of judgment in choosing between different readings of the under-determinate, but not radically indeterminate Constitution and, of course, there are reasonable concerns about the criteria which judges use in making such judgments.

So, on the one hand, the Irish Constitution clearly empowers the judiciary to strike down legislation. On the other hand, there remain pressing concerns about how this power is to be exercised. The challenge for constitutional theory is to provide an account which, as Ely argued, is designed to reach a proper balance between pressing concerns about the suitability of the judiciary to second guess legislative measures, and the generally recognised values of fettering the forces of majoritarianism through the protection of some form of human rights. This is where the notion of judicial restraint comes in. The Constitution, under-determinate as it is, could conceivably be read to support a host of linguistically or semantically plausible claims which may then fall to be enforced by the judiciary. Whereas there may be little doubt that the judiciary could read the Constitution to include such claims, the real question is whether they should do so. To restrain the judiciary then, is to find ways to shackle the judiciary from engaging in its allegedly anti-democratic practice of judicial review to the extent that the under-determinate text of the Constitution may actually permit. Judicial restraint theory says to the Courts “we know you can do it, but here are the reasons why you should not.”

As I have said, the purpose of this short essay is to argue that it is comparatively advantageous to approach the question of the extent to which the judiciary should be restrained in constitutional interpretation through a methodology of working out how the power to authoritatively interpret the Constitution should be shared between courts and the legislature. However, it is very important to recognise that I do not mean to say that the judiciary should generally be deferential in the exercise of judicial review. In fact, nothing in this essay says anything about the substantive question of when, and in what cases deference is really legitimate. All I wish to argue is that insofar as constitutional theory must work out the limits of the judicial power, it can better to do this by working out the circumstances (if any) where constitutional labour can be shared between the courts and legislature than by utilising other approaches sometimes used by the Irish judiciary to delineate between the legislative and judicial function. It is a methodology for how to approach the general question of judicial restraint with which argument is concerned, not with conclusions about how restrained or deferential the judiciary should actually be.

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18 Ibid.
20 For a classic expression of such concerns, see Hogan, “Unenumerated Personal Rights: Ryan’s Case Re-Evaluated” (1990-92) Irish Jurist 95
22 The classic exposition of such a theory is, of course, Bickel, supra note 11 in particular at Ch 4 “The Passive Virtues”.
Models of Judicial Restraint

The power to judicially review legislation is exercisable only on the basis that legislation violates some substantive edict of the Constitution such as the right to freedom of association\(^23\) or the equality clause.\(^24\) These, and others like them, can reasonably be regarded as the “grounds” of constitutional review. It stands to reason, then, that the more grounds of review which exist, the greater the potential of the exercise of the allegedly democratically suspicious judicial power to invalidate legislation. One way, then, to restrain the judicial power is to restrict or narrow the grounds of judicial review. The logic is simple – the less scope to review, the less review there is, and the less of a threat there is for democracy. What I will call the “interpretative” model of judicial restraint seeks to restrain the judiciary through imposing some set of rules to regulate judicial interpretation of the Constitution in order to limit the amount of grounds of review which can be found within the Constitution.\(^25\)

The deference-based model, on the other hand, describes where one achieves judicial restraint not solely through interpretative means, but through rules allocating decision-making power (either in whole, or in part) over a particular constitutional issue to the legislature. If a particular constitutional issue could fairly be regarded as being unsuited to adjudication, the deference-based model would still regard that issue as “constitutional ground” but defer to legislative discretion in respect of what that ground actually required in the case at bar.

The concept of deference has been described in considerable detail in the flood of literature surrounding the Human Rights Act, 1998 so it is not proposed to offer any detailed description here.\(^26\) Rather, and by way of brief explanation, the concept of deference assumes that both the legislature and the judiciary must interpret the Constitution in performing their functions – the legislature must interpret the Constitution when enacting law and the court must interpret the Constitution in evaluating law. If a court has a power of independent judicial review, it has the power to reach conclusions on the constitutionality of challenged laws through the exercise of its own, independent judgment. If a court acts deferentially it dilutes this power in accordance with the weight it attributes to legislative Constitutional interpretation (ie the legislature’s decisions on the constitutionality of its laws). This is illustrated in the diagram below with the legislature’s power of interpretation represented by the grey shaded area and the Court’s power represented by the white shaded area:-

\(^23\) Article 40.6.1.iii, Bunreacht na hEireann, 1937.
\(^24\) Article 40.1, Bunreacht na hEireann, 1937.
\(^26\) For a more detailed overview see Foley, supra note 5, pp 80-87.
In example A the court’s power of interpretation is independent of the legislature’s. In example B the legislature’s power of constitutional interpretation crosses over from the legislative sphere and resonates within the judicial sphere. Therefore, the legislative interpretation of the Constitution (i.e. that the challenged legislation is constitutional) shapes the judicial interpretation of the Constitution. Deference, in short, is about figuring out the extent to which courts should “care” about the legislature’s own constitutional deliberations. Judicial restraint is therefore achieved by figuring out the range of cases where this kind of deference is appropriate.

The key difference between the models just described is that the interpretative model can require the Constitution to be narrowed beyond what may reasonably be regarded as its “plain” or “fair” meaning to meet concerns about the judicial capacity. Suppose, for example, that we have some reason to believe that the general issue of corporate expression raises issues which may be beyond the judicial capacity for independent adjudication. This may then, be a case for judicial restraint. Such restraint, however, may be achieved in two ways. First, the court may say “corporate expression is not protected expression” and thereby avoids the problems which corporate expression may create for adjudication. The difficulty here is that it is by no means clear that guarantees of free expression, either at the Irish constitutional level under Article 40.6.1.i or in Article 10 of the European Convention on Human Rights really exclude corporate expression from their protective embrace. Indeed, it could be argued that “reading” the text to exclude protection for such expression, requires more of an argument than reading the text to include such protection. The second approach, however – which follows the deference-based model – allows one to address concerns about judicial capacity without the cost of narrowing the Constitution. This is for the simple reason that “troubling” interpretations of the Constitution which may, inter alia, create serious problems for judicial competence, could be left over for legislative decision, without reading the Constitution to exclude such protections.

**Irish Experience of the Interpretative Model**

The argument which follows relies on a distinction between reading the Constitution and thinking about the consequence of what you may read into it. It states that where a court sincerely believes that adjudication upon a constitutional claim which

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27 See eg Market Intern Verlag GmbH & Klaus Beerman v Germany (1990) 12 EHRR 166. Again, I do not mean to say that corporate expression does create problems for adjudication or that it should be the subject of deference. I simply mean to use it as an example here.
can be fairly regarded as grounded in the constitutional text is beyond the competence of the judiciary, then it is better for the court to defer to legislative discretion rather than to narrow the text of the Constitution to meet its concerns about the suitability of judicial adjudication. In the next few pages I attempt to place this argument in a practical context by examining two substantive areas of Irish constitutional equality law. These are the Supreme Court’s interpretation of Article 40.1 in *MhicMhathúna v The Attorney General*28 and the general approach of the Irish courts to the “human personality doctrine”.

I argue that, in both cases, judicial decisions can fairly be regarded as examples of the interpretative model of judicial restraint. In both cases I argue that the ambit of the equality guarantee of Article 40.1 is artificially narrowed beyond what can fairly be regarded as its proper content in order to meet concerns about the institutional competence of the judiciary. I argue that, in both cases, assuming that the judiciary sincerely believed that their practical institutional competence was implicated, it would have been preferable to vent this opinion by deferring to legislative discretion and thus upholding a proper reading of Article 40.1, rather than narrowing its substantive embrace.

*MhicMhathúna v The Attorney General*29

In this case a married couple claimed that various provisions of the tax and social welfare code unlawfully discriminated between two parent and single parent family units.30 Such discrimination, it was alleged, occurred in two situations. First, discrimination was alleged in respect of how tax free allowances were calculated by reference to dependant children. At one point both married and most single parent families enjoyed a tax-free allowance in accordance with the number of dependant children in the family. Over a period of time from the late 1970’s to the mid 1980’s, this was gradually abolished in the case of married couples but retained for most classes of single parent families.31 Second, the plaintiffs drew attention to the fact that an unmarried mother would receive, through a combination of allowances, a

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29 [1989] IR 504. This case is sometimes described as “*MacMathúna v The Attorney General*” rather than “*MhicMathúna v the Attorney General*”. The difference in spelling reflects the feminine adoption of the otherwise masculine second name by Una MhicMathúna (as she became) upon her marriage to Seamus MacMathúna. Whereas both titles have been used in the literature, Una MhicMathúna is the first-named plaintiff in the case.
30 A particular feature of the case was the plaintiffs’ desire to compare their situation not with the position of the single parent, but with the position of the unmarried mother. It is arguable that this was intended as part of an argument designed to show that the provisions challenged constituted an “inducement not to marry” for the purposes of Article 41, *Bunreacht na hÉireann*, 1937. In actual fact, the High Court commented quite unfavourably on this comparison and preferred to use the single parent rather than the unmarried mother as the relevant comparator. For present purposes, however, nothing turns on this.
31 As Carroll J recounts, s.141 of the Income Tax Act, 1967 (No 6 of 1967) originally provided for a tax-free allowance of £240. That was reduced to £218 by s.2 of the Finance Act, 1979 (No 11 of 1979) and then to £195 by s.4 of the Finance Act, 1980 (No 14 of 1980) and to £100 by s.2 of the Finance Act, 1982 (No 14 of 1982). Section 4 of the Finance Act, 1986 (No 13 of 1986) finally abolished the allowance. However, s.4 of the Finance Act, 1979 (No 11 of 1979) had introduced a new s.138A into the Income Tax Act, 1967 (No 6 of 1967) for a similar allowance for single parents. As the position stood under the Finance Act, 1986 (No 13 of 1986) that allowance stood at £1500 for widowed parents and £2000 for all other single parents.
greater net amount of social welfare assistance than a married mother in cases where both mothers had the same number of children.\textsuperscript{32}

Before we continue with \textit{MhicMhathúna}, it is important to clarify a very important point about equality law under the Irish Constitution. In considering cases under Article 40.1 of the Constitution, the courts, it is submitted, have developed two tiers of review. This can be explained with the following example. Suppose that the (hypothetical) Single Mothers Act, 2004 provides that a special allowance is payble to single mothers who live alone.\textsuperscript{33} In this Act, “living alone” is defined so as to exclude living with anyone else, including same sex flatmates. If a Court was to proceed only on the first tier of review, then its function would be limited to considering whether a legitimate distinction existed between single mothers living alone and other comparators – \textit{ie} some state of facts that shows that single mothers living alone are like or unlike the relevant comparator.\textsuperscript{34} The essence of the first tier

\textsuperscript{32} This was based on the fact that the Social Welfare Act, 1973 (No 10 of 1973) introduced a form of social assistance for unmarried mothers – an unmarried mothers allowance which combined children’s allowances, was said to produce the discrepancy.


\textsuperscript{34} See eg \textit{State (Hunt) v Donovan} [1975] IR 39. This concerned an arguably anomalous (and since repealed) aspect of criminal procedure. Whether one could ultimately appeal against sentence only (\textit{ie} not sentence \textit{and} conviction) was premised on whether one had plead guilty in the District Court or whether one had waited to plead in the Circuit Court. Finlay J (with whom the Supreme Court tersely agreed) held that any disadvantage wreaked upon the accused was by his own choice to plead or not to plead at the District Court. However, notably absent is any analysis on the quality of the discrimination as related to each class. Hogan & Whyte seem to suggest that \textit{O’Brien v Manufacturing Engineering Ltd Co} [1973] IR 334 also represents a failure to recognise the second tier. See Kelly, \textit{The Irish Constitution} (4\textsuperscript{th} ed by Gerard Hogan & Gerry Whyte) (Dublin: Butterworths, 2003), p 1361. \textit{O’Brien} concerned a shortening of the limitation period within which one could bring suit against an employer for injuries sustained through his negligence if, and only, if one accepted statutory compensation under the Workmen’s Compensation Act, 1934 (No 9 of 1934). Of this it is said that:-

\textit{[W]here the Supreme Court appeared content to uphold legislative classifications even though the quality of the classification may not have borne any reasonable relation to the quality of difference between the situations which it was sought to regulate.}

On other hand, at p 1378, the editors of \textit{The Irish Constitution} seem to cite \textit{O’Brien} as an example of the use of proportionality in equal protection suggesting that, in fact, the Court \textit{did} consider the merits of the actual treatment meted out rather than simply considering whether the plaintiff and comparator where “alike”. It may be the case, however, that Hogan & Whyte wish to draw attention to the fact that whereas the Supreme Court did not expressly relate the treatment to the quality of the distinction, the Court was willing, in a very general sense to consider the extent or “effect” of the difference in treatment but not necessarily that the court was linking that consideration to the difference between the plaintiff and comparator. Indeed, the court noted, at p 366, that the period in question was

\textit{[N]ot unreasonably short to enable a person not suffering from any disability to ascertain whether or not he has a common-law cause of action}

On the one hand, the talk of reasonableness suggests that the court has actually considered the reasonableness of the difference in treatment as against the actual difference between the workman who accepted compensation and the workman who did not. On the other hand, the Court \textit{does} seem to be – and relatively abstractly – saying that this limitation period \textit{itself} is not unreasonably short without actually dealing with the question of whether (even if it is abstractly “reasonable”) it is reasonable to effect a difference in treatment between the two classes of workman. The problem, I think, in \textit{The Irish Constitution} originates discussing \textit{O’Brien} under the heading of “proportionality” and with close association to the Supreme Court’s rejection of second-tier analysis in \textit{MhicMhathúna}. This may lead one to believe that the citation of \textit{O’Brien} is to support the notion that courts have
Interpretative and Deference Based Models of Judicial Restraint In The Irish Constitution

of review is that this is the only legitimate enquiry the Court may make. If it upholds the distinction then that ends the matter.

However, there is a reasonable argument both in respect of principle and on the constitutional text itself that a constitutionally sustainable discrimination is not proved simply by showing that the plaintiff and the alleged comparator are "unalike". For example, a mentally handicapped person and a non-mentally handicapped person may not be "alike". However, this should not mean that any differential in detention provisions for the mentally firm and infirm is automatically sustainable. It is arguable that a court should consider whether a proper relationship exists between the distinction or classification made and the treatment meted out on the basis of that distinction or classification. This enquiry constitutes the second tier of equality and it would require the court to consider whether the special allowance granted to single mothers living alone bore any legitimate relationship to the distinction between single mothers living together and single mothers living alone.

Although she rejected the plaintiffs’ case in the High Court, Carroll J seemed willing to conduct judicial review under Article 40.1 on both tiers:-

The position of a single parent is different to the position of two parents living together. The parent on his or her own has a more difficult task in bringing the children up single handedly because two parents living together can give each other mutual support and assistance. I have no doubt that the role of a single parent is more difficult than that of two parents and...the Oireachtas recognised that and attempted to alleviate it...Therefore a state of facts exists as between single parents and married parents living together which justifies an additional tax-free allowance for the single parents.

It is reasonably clear then, that Carroll J believed that she was entitled to consider not only the factual difference between the comparators (the first tier), but also the extent to which the treatment handed out accordingly was "justified" by that difference (the second tier). Whereas the Supreme Court upheld the High Court decision and approved most of Carroll J’s reasoning, it went on to point out that

accepted the second-tier, in contrast to MhicMhathúna when in fact, O’Brien does not seem to go this far.

35 See for example the comments of Costello P in R.T. v Director of Central Mental Hospital [1995] 2 IR 65. See also Kelly, supra p 1379.

36 For examples of judicial review on the second tier, see eg State (M) v Minister for Foreign Affairs [1979] IR 73 (Davitt P discussing relationship between classification of infants as legitimate/illegitimate and treatment in respect thereof); Quinns Supermarket v The Attorney General [1972] IR 1 (Walsh J holding that the question of religious discrimination did not begin and end with the classification at hand but required the court to consider the relative necessity of the treatment meted out pursuant to that classification); Dillane v Ireland [1980] ILRM 167 (Henchy J holding that differential in treatment must be capable of supporting classification); Murphy v the Attorney General [1982] IR 241 (Kenny J’s recognition that discrimination as a whole, and not just classification must be reasonable); See also Brennan v The Attorney General [1983] ILRM 449 (Barrington J in the High Court suggesting that all discrimination must related to a legitimate legislative purpose. This, of course, does not mean automatic acceptance of the second-tier. However, Barrington J did also state that persons within a classification must be treated fairly. This tends to suggest some, if not total, acceptance of the second-tier.).

“[o]nce…justification for disparity arise[s], the Court is satisfied it cannot interfere by seeking to assess what the extent of the disparity should be”.38

As Hogan & Whyte have pointed out, the Supreme Court, with this *dictum*, is essentially holding that judicial review on the second tier of equality is forbidden.39 Thus arguments about the substance of the relationship between classification and treatment were not legal-constitutional arguments or, in the terminology used above, it is not a ground of constitutional review.

The Supreme Court’s View of Article 40.1

Article 40.1 provides that “all citizens shall, as human persons, be held equal before the law”. It also provides that the State, in its enactments, shall have “due regard” to “differences of capacity, physical and moral, and of social function”. It is well recognised at this point that Article 40.1 is not a guarantee of absolute equal treatment for all persons in all cases. Rather, equality itself demands something else – the Aristotelian concept of equality for equals and inequality for unequals.40 It is arguable that this very conception of equality, with support from the constitutional text, supports a very different conclusion to that reached by the Supreme Court.

It is arguable that the notion of “due regard” necessarily involves some variable standard in respect of what the State is entitled to do in relation to how it treats people who may be, to use the language of Article 40.1, of different physical or moral capacity or who may have different social functions. The text does not say that the State may treat people who are not alike in any way it wishes. Rather, it says that the State, in its enactments, must take *due regard* of differences between people. To take “due regard” of differences in social, moral or physical capacity does not necessarily mean that a simple difference in such capacity opens the door to radically different treatment. Rather, “due regard” seems to imply that whereas a difference in capacity may exist, the relevance that this has for the form of treatment to be meted out is variable and will depend on the case at hand, or at least on some set of criteria about what it means for treatment to take “due regard” of differences in capacity. Thus Article 40.1 seems to import the Aristotelian notion that equality is about taking *proportionate* account of differences between people.41 Contrary then to the conclusion of the Supreme Court that the second tier was not a ground of constitutional review, it is quite arguable that the Constitution says it is.

The Supreme Court’s Motivation

From a perspective which is concerned about judicial involvement in matters which touch on legislative policy, the very idea of equal protection may seem quite dangerous. Article 40.1 clearly envisages that the State will make decisions in its enactments in relation to matters of social function and physical and moral capacity. Moreover, many classifications reflect administrative arrangements taken in pursuit

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39 Kelly, supra, note 34, p 1379.
40 See the comments of Walsh J in *de Burca v The Attorney General* [1976] IR 38, p 68.
of a particular social or economic policy. Therefore, it is at least understandable that a court may fear that it is treading upon the legislature’s toes when conducting equality review. One may not agree with this view, but one must understand that another may hold it.

Indeed, if a court was wary of involving itself in matters of social or economic policy, then the second tier of review may seem to be very suspicious. Consider the facts in *MhicMhathúna*. The plaintiffs’ argument, if read through the second tier of equality review, amounted to the proposition that, although married couples and single parents may be “un-alike”, the actual differential between the provision of child support and tax-free allowances did not properly reflect the differences that did exist between the plaintiffs and the comparator. If a court was to conduct review, then it would, in theory, have to be able to decide that the treatment meted out did or did not correspond with such differences that did exist as between the plaintiff and comparator. This of course means that the court must have some concept of what the relationship between classification and treatment should be because one must have some concept of what is “right” before one knows what is “wrong”. Thus, if a court is generally worried about either its normative competence or practical institutional ability to conduct judicial review, it may become very worried when asked to conduct review on the second tier because there is a good deal of room to second guess legislative policy decision-making.

Indeed, there is evidence to suggest that the Supreme Court’s motivation for the decision in *MhicMhathúna* was reached primarily on the basis of concerns about the consequences of judicial involvement in the second tier of equality review. In delivering the judgment of the Court, Finlay CJ opined that the very challenge to the provisions of the tax and social welfare code raised “questions of the application by the Oireachtas in its statutes of the resources available as between various objects and persons or categories of persons”.  

He then proceeded to cite, at length, the well-known judgment of Costello J in *O’Reilly v Limerick Corporation* and approved Costello J’s famous discussion of the distinction between distributive and corrective justice. The thrust of that distinction is, of course, that the courts are ill-equipped both jurisprudentially and practically to consider questions which involve a tug on national resources.

These, it is submitted, are the kind of arguments that one would expect to see supporting an argument that a particular constitutional claim implicates matters beyond the capacity of adjudication. Indeed, to anyone familiar with Irish constitutional law, the invocation of *O’Reilly* is something of a “conversation stopper”. It can be read as representing the (controversial) argument that the court is simply not permitted to adjudicate on matters with distributive overtones. The drift of the citation of *O’Reilly* in *MhicMhathúna* is arguably that the Supreme Court felt that the nature of the plaintiffs’ claim was one which raised complicated issues of judicial competence. As it concerned matters of taxation and the distribution of national resources, it was not one for judicial resolution. Rather, it raised “[m]atters within

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44 Such a conclusion would not be without precedent. In respect of deference in taxation see *Madigan v the Attorney General* [1986] ILRM 136 and in the American context see *Nordlinger v Hahn*
Interpretative and Deference Based Models of Judicial Restraint In The Irish Constitution

the field of national policy, to be decided by a combination of the executive and the legislature that cannot be adjudicated upon by the courts.\(^{45}\)

This is the critically important link in the Court’s reasoning. The Court clearly believes that equality review on the second tier, at least in this type of case, is something which is not appropriate for the Court. The Court’s response is to follow the interpretative model and to hold that the second tier of equality review is not part of equality review generally. Thus, in order to address concerns about the legitimacy of judicial constitutional guardianship, the constitutional text is narrowed in a highly artificial and strained manner. Because a particular issue was believed to be inappropriate for judicial resolution that meant it could not be a constitutional issue at all.

The reasons, however, which seem to motivate the Supreme Court in MhicMhathúna to narrow the Constitution through the interpretative model are very similar to the reasons which courts in other jurisdictions have used to defer to the legislature. In the first place, the issue at hand concerns taxation and fiscal policy. This is a classic area of deference in, for example, the United States\(^{46}\) and indeed in Ireland too.\(^{47}\) The issue at hand also raises issues of social and economic policy. Again, the spectre of social and economic policy decisions underpinning impugned legislation is a standard reason for deference given by courts in other jurisdictions.\(^{48}\)

I do not mean to say that the Court should have deferred in MhicMathúna because it lacked competence to adjudicate on the plaintiffs’ claim. I simply mean that insofar as it seems reasonable to propose that the Supreme Court believed that it lacked the competence to conduct judicial review, a better vent for such institutional self-doubt is to accept the more appropriate reading of Article 40.1 and to defer in respect of what it actually required in the case at bar. Whatever the method through which the Court could have deferred, the result would have been that the more plausible interpretation of Article 40.1 would have been upheld which would remain binding on the State and thus the Oireachtas would be bound to consider the second level of equality in its enactments. The actual approach of the Court, however, is a

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\(^{45}\) [1995] 1 IR 484, p 499.

\(^{46}\) See eg Nordlinger v Hahn (1992) 505 US 1; Royster Guano Co v Virginia (1920) 253 US 412; State Board of Tax Commissioners v Jackson (1931) 283 US 527. For examples of how the judicial role may shrivel when faced with issues of national resource distribution see Sinnott v Minister for Education [2001] 2 IR 545; T.D v Minister for Education [2001] 4 IR 259. See also O’Reilly v Limerick Corporation [1989] ILRM 181 and, in the British context see R (Smith) v Barking and Dagenham London Borough Council [2002] All ER (D) 266.

\(^{47}\) In the British context see eg Poplar HARCA Ltd v Donoghue [2002] QB 48 at 71; R v DPP ex parte Kebilene [2000] 2 AC 326, p 381; International Transport Roth GmbH v Home Secretary [2002] 3 WLR 344, at 377. In the Canadian context see eg Newfoundland (Treasury Board) v Newfoundland Association of Public Employees 2004 SCCDJ 3222, para 114. For examples in the context of the ECHR see eg James v The United Kingdom (1986) 8 EHRR 123; Tre Trackörer Aktiebolag v Sweden (1991) 13 EHRR 309; Engel v The Netherlands (1979-80) 1 EHRR 647; Stjerna v Finland (1997) 24 EHRR 195.
disproportionate response to concerns about judicial competence. It narrows the extent to which the Constitution binds the legislature and, indeed, the executive,\textsuperscript{49} the public administration, other state institutions and, by virtue of the apparent horizontal effect of the equality clause, private persons and all this is arguably in response to concerns about how suited particular equality claims are to judicial adjudication.

However, some advocates of realpolitik might not be persuaded that there is a practical difference between the scenario in which a court reads the Constitution down and the situation where a court defers to the legislative view of what the Constitution actually requires. Therefore, some argument towards this end seems to be required. As we have seen, the Supreme Court’s decision in \textit{MhicMhathúna} relegates the second-tier of equality review from constitutional significance. The Supreme Court, essentially, has told the plaintiffs to take their claim to Leinster House.\textsuperscript{50} Suppose then, taking this advice to heart, the plaintiffs begin a campaign of political lobbying for their cause. However, once they arrive at Leinster House (metaphorically speaking) they find that their claim – being purely political – has to take its place in the political bazaar and to fight for priority and attention among other purely political issues.\textsuperscript{51}

The second way for the court to approach the case would be to acknowledge that there is a compelling case for the second-tier of equal protection. However, the court may reasonably point out that it does not have the capacity to make any detailed conclusions about how that aspect of the Article 40.1 right \textit{should} be vindicated and therefore, it may not be in a position to second-guess the relationship between classification and treatment. The plaintiff, again, is told to go to Leinster House. This time, however, the plaintiff is armed with more than a political argument that must fight for attention amongst other political arguments. Rather, the plaintiff is taking a constitutional claim to the legislature. Assuming that the legislature is, in fact, constitutionally responsible, then it follows that the plaintiffs claim enjoys a superior priority to claims which are not “backed by the Constitution”. So, insofar as one can accept the idea that the legislature \textit{might} be constitutionally responsible, then there is a significant difference between being told to go to Leinster House with

\textsuperscript{49} Thus ignoring the possibility that the legislature could act, in some cases, as a check on executive abuse of equal protection through, for example, the claw-back of delegated powers in cases of abuse.

\textsuperscript{50} See the comments of Costello J in \textit{O’Reilly v Limerick Corporation} [1989] ILRM 181, p 195.

\textsuperscript{51} The point here is inspired by Tushnet’s criticism of Ely’s theory of judicial review in \textit{Democracy and Distrust}, supra note 21. Ely argued that judicial review was legitimate when correcting defects in representation within the political sphere. Tushnet pointed out, however, that if one could use judicial review to secure perfect representation for minorities, it would remain that they have minority representation. They would therefore simply move from being the perennial losers outside the political process, to being the perennial losers on Capitol Hill. Short of providing some kind of durable protection against majority action (whether through rights or some other conception such as Ely’s increased protection for discrete and insular minorities who are the victim of “prejudice”), minorities will always lose. See Tushnet, \textit{Red White and Blue: A Critical Analysis of Constitutional Law} (London: Harvard University Press, 1988), pp 94-99. See also, Sunderland, “Constitutional Theory and the Role of the Court: An Analysis of Constitutional Commentators” (1985-86) 21 Wake Forest L R 855; Ackerman, “Beyond Carolene Products” (1985) 98 Harvard L R 713; Sager, “Rights Skepticism and Process-Based Responses” (1981) 56 New York University L R 417.
Interpretative and Deference Based Models of Judicial Restraint In The Irish Constitution

a purely political claim and being told to go there armed with a constitutional argument.52

The Human Personality Doctrine

Article 40.1 provides that all citizens, shall, as human persons, be held equal before the law. As a result of the italicised phrase, a body of case-law has emerged which holds that the reference to the human person in Article 40.1 limits the embrace of the equality guarantee to essential aspects of the human personality.53 According to this view, the guarantee addresses citizens only insofar as legislative intrusion bears on that which “make[s] [us] human beings”.54 The “human personality doctrine”, as it is known, is often criticised, but as Doyle has perceptively pointed out, it is not always criticised for the right reasons.55 The text of Article 40.1 does seem to envisage some form of human personality doctrine and so arguments which attack the doctrine en masse are, perhaps, better viewed as arguments for the amendment of the Constitution rather than for a particular interpretation of the text.56

Aside from such reformist argument, there are two ways in which one can read the limitation of equal protection to the essential attributes of the human person.57 The first reading holds that Article 40.1 is not concerned with discrimination in relation to activities that one carries on “in life” because that does not implicate an essential

52 If on the other hand, one does not believe that the legislature will be constitutionally responsible, then a very obvious conclusion presents itself: there is no reason to defer in the first place and no matter how the bad the judiciary are, they should deal with the question so long as its fairly viewable as a relevant constitutional issue because we are looking for the comparatively best institution to “do” constitutional law. See Komesar, “Slow Learning in Constitutional Analysis” (1993) 88 Northwestern University L R 212, p 217: (“The correct analysis is comparative institutional, not single institutional”). Usually Quinns Supermarket v The Attorney General [1972] IR 1 is taken as the relevant authority on which to rest this doctrine. However, the doctrine arguably began in Macauley Minister for Posts and Telegraphs [1965] IR 345 and/or The State (Nicholau) v An Bord Uchtála [1966] IR 567 and seems to have been employed in the reasoning of the Supreme Court in East Donegal Co-Operative v The Attorney General [1970] IR 317.

53 Per Walsh J in Quinns Supermarket v The Attorney General [1972] IR 1. This doctrine has been invoked to hold that artificial persons cannot rely on Article 40.1. Thus, the fact that a Minister of State was sued in his capacity as a corporate sole was sufficient in Macauley Minister for Posts and Telegraphs [1965] IR 345 to oust the application of Article 40.1. A similar, if not identical attitude can be found in East Donegal Co-Operative v The Attorney General [1970] IR 317. Whereas the Supreme Court per Walsh J denied an Article 40.1 claim on the basis that the relevant corporate entities were all treated similarly, it is very arguable that intra-class equality can in fact produce inequality vis-à-vis those outside the class. The failure to realise this quite basic point again suggests a weakness in the guarantees application to artificial persons. In more direct terms it was held in Quinns Supermarket v The Attorney General [1972] IR 1 that a body corporate could not plead Article 40.1 and this was re-iterated by Kenny J in Abbey Films v The Attorney General [1981] IR 158. See however Mulloy Minister for Education [1975] IR 88 where a claim succeeded on the basis of Article 44 where certain benefits in pay were not given to the plaintiff because he was a priest.

54 See Doyle, supra note 41, at 133-135. For a similar point see Connelly, “The Constitution” in Connelly ed, Gender and the Law in Ireland (Dublin; Oak Tree Press, 1993), p 25.


56 See Doyle, supra note 41, pp 126-132.
attribute of the human person.\textsuperscript{58} This reading holds it important to look to the context of the discrimination and if that context goes beyond a narrow focus on an essential attribute of the human person, then there is no equality issue known to our Constitution. The second reading holds that Article 40.1 can be concerned with discrimination in relation to activities we carry on in life provided that the basis for the discrimination is an essential attribute of the human person.\textsuperscript{59}

The difference between these two approaches can be illustrated with \textit{Murtagh Properties v Cleary},\textsuperscript{60} where the human personality doctrine was invoked to deny the application of Article 40.1 where the discrimination related to the trading activities or conditions of employment of the plaintiffs. In \textit{Murtagh}, the basis of the discrimination was gender but the discrimination was in the context of employment conditions. The context-based approach (applied in \textit{Murtagh}) thus operated to deny the constitutional argument as the context of the discrimination overwhelmed it’s basis notwithstanding that the basis was arguably an essential attribute of the human personality. A similar approach was used by the High Court in \textit{de Burca v the Attorney General}\textsuperscript{61} when it held that sex based eligibility criteria for jury service was analogous with discrimination on “trading and employment conditions" and so outside the purview of Article 40.1.\textsuperscript{62}

\textsuperscript{58} Ibid.
\textsuperscript{59} Ibid. Doyle offers a vivid example: “As part of a general campaign against Jewish people, it is stipulated that all Jews should wear a yellow star on their clothes for ease of identification. [The context-based approach] would, if pursued to its logical conclusion, hold that this is merely discrimination within the context of clothing and fabric design and, as such, does not prejudice the essential attributes of the human person. In contrast [the basis of discrimination approach] could conceivably hold that the discrimination in question implicitly rests on an assumption that Jewish people are intrinsically inferior to others in the community. If religion was considered to be a human attribute, the constitutionally guaranteed ideal of human equality would be subverted by such an assumption” \textit{Ibid.}, at 129

\textsuperscript{60} [1972] IR 330. The context of \textit{Murtagh} was not judicial review of legislation, but the special feature of Irish constitutional law which holds that the constitution can create horizontal effects between private persons as well as vertical effects between the State and the person. It is submitted, however that the core logic used in respect of the human personality doctrine transcends this aspect of \textit{Murtagh}.

\textsuperscript{61} [1976] IR 38.

\textsuperscript{62} One can detect similar strands in \textit{Murphy v The Attorney General} [1982] IR 241 (so long as one view’s marriage as an aspect of the human personality). It is important, however, to be quite clear that the problem with this approach is that the context of discrimination is used to overwhelm the fact that discrimination may have occurred on the basis of an essential attribute of the human personality. There are, however, other cases where the courts seem to refer to the context-based approach but where, on the facts of said cases, it is hard to see how any discrimination could be related an essential attribute of the human personality. See eg \textit{Madigan v the Attorney General} [1986] ILRM 136; \textit{Greene v Minister for Agriculture} [1990] 2 IR 117; \textit{Browne v The Attorney General} [1991] 2 IR 58. So, whereas the Court may refer to the “context” of the discrimination, it cannot be said that it overwhelms a claim of discrimination on the basis of an essential attribute of the human personality such a claim could not be made out. In these cases, the courts could have, perhaps, upheld the basis of discrimination approach but held that no discrimination occurred in relation to an essential attribute of the human person. This is what Barrington J did in the High Court in \textit{Brennan v The Attorney General} [1983] ILRM 449. The Supreme Court, however ([1984] ILRM 355) seemed to distance itself from Barrington J’s approach and held that the inequality complained of in \textit{Brennan} related not to the treatment of the plaintiffs as human persons but “rather to the manner in which as owners and occupiers of land their property is rated and taxed”. Whereas it may be argued that the discrimination in \textit{Madigan} was not on the basis of an essential attribute of the human person, it is arguable that by distancing itself from Barrington J’s approach, the Supreme Court seemed to hint at the wider context-
As between the “basis of discrimination” and “context of discrimination” approaches, it is submitted that the former represents a better reading of Article 40.1. The text itself provides that all citizens, as human persons, shall be held equal before the law. To plead an unconstitutional discrimination then, one must show that such differential in treatment relates to an essential attribute of the human person. Conversely, discrimination is permitted if it is not in relation to such an attribute. In Murtagh, however, the basis of discrimination (gender) was such an attribute. The approach actually taken masks the basis of the discrimination with context and therefore removes the protection against discrimination on the basis of the essential attributes of the human person which Article 40.1 seems to offer. As Connelly puts it:

The Supreme Court should overrule earlier restrictive interpretations of Article 40.1, and allow that its material scope extends to all aspects of human existence – even if the bases of discrimination covered by the provision are limited, by virtue of the phrase ‘as human persons’, to the essential attributes of the human being.

It may not be unreasonable to suggest that the use of the restrictive context-based approach has allowed the courts to avoid “squaring up” to issues of equality which may involve a complex social policy backdrop. By refusing to entertain claims by reason of the context-based approach, the court avoids dealing with complicated cases of discrimination even though their operative basis may be an essential attribute of the human person. In short, the basis of discrimination approach seems to leave the door open for a far wider range of claims under Article 40.1 than the “restrictive” context-based approach. And, given the often social policy soaked context of equality issues, it is at least arguable that the context-based approach may have been used as one way of lessening judicial intrusion into what may be perceived as a classical realm of legislative privilege.

In contract, there has been a striking lack of use of the doctrine or any explanation of the role of “context” in areas that are closely related to the administration of justice and criminal law. The human personality doctrine has rarely been mentioned in cases dealing with the “forensics” of the administration of justice or criminal law.

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63 See Doyle, supra note 41, p 135.
64 Connelly, supra note 55, p 25.
65 See Kelly, supra note 34, p 1379 (describing instances where the doctrine is not used as examples of courts “fac[ing] up squarely to the equality issues presented to them”. See also Doyle, supra note 41, p 172.
66 The term “forensic” is adopted from Kelly, supra note 34, p 1345, n100.
67 It was not mentioned by the Supreme Court in Dillane v Ireland [1980] ILRM 16 (dealing with rights of common informers to recover costs for prosecutions), nor by any member of the Supreme Court in de Burca although it featured heavily in the judgment of Pringle J in the High Court [1976] IR 38 (issue of discrimination in jury selection). See also The State (DPP) v Walsh and Conneely [1981] IR 412 where there was no mention of the doctrine in considering the application of Article 40.1 to a presumption of coercion by husband over wife in respect of criminal offences committed in the presence of her husband. See also O'Shea v DPP [1988] IR 655 which concerned power of the DPP (under s.18 of the Criminal Procedure Act 1967 (No 6 of 1967)) to substitute counts on an indictment after the preliminary examination provided that they were based on documents and information
It has also been held that there is a general requirement of equality in extradition applications without discussing how the human personality doctrine was relevant at all. In more recent times the courts have considered a range of equality arguments in the context of the criminal law and the administration of justice without any consideration of the doctrine. For example, Ó Beoláin v Fahy concerned a claim that the State had unconstitutionally failed to provide Irish translations of the rules of court and road traffic legislation necessary to conduct one’s own case through Irish. Hardiman J held that the failure of the State to make such provision was a denial of equality to the plaintiff and what is more, he held this without any discussion as to how any “essential attributes of the human personality” were involved. It is also interesting that cases dealing with equality issues that arise during the conduct of a trial have failed to mention the human personality doctrine. For example, and without any mention of the human personality doctrine, it has been held that a trial judge cannot allow an accused person to become the object of discrimination. Equally, a general principle of “equality in court” has been enunciated without any discussion of the doctrine. In all these cases, there is no explanation of how the relevant “context” does not, as it did in Murtagh, condemn the claim to failure – it is not even mentioned.

It is arguable that these are the kinds of issues which may be traditionally associated with what one may see as a quintessentially judicial function, perceived to be unrelated to issues of legislative policy decision – namely the administration of justice in criminal law issues. It is not beyond the realms of possibility then, that the human personality doctrine, particularly when invoked in the context-based form, has been used as something of an escape mechanism to allow the judiciary to, on occasion, avoid interfering in particular policy laden areas.

available at the preliminary examination. It was claimed that this was discriminatory on the basis the substitution power removed the ability of the accused to effectively examine witnesses at the preliminary examination because counsel would, of course, tailor his examination of the witness relative to the charge to be met. Whereas the Court was quite clearly giving a reasoned (albeit obiter) argument as to why the discrimination claim failed, there is no reference to the human personality doctrine, which could quite arguably have disposed of the matter. McMahon v Leavy [1984] IR 525.

Director of Public Prosecutions (Stratford) v O’Neill [1998] 2 IR 383 (constitutionality of s.4(1) of Summary Jurisdiction over Children (Ireland) Act, 1884 considered in part on basis of Article 40.1 but no mention of human personality doctrine). See also, Grealis v DPP [2000] 1 ILRM 358 (no mention of doctrine in scrutiny of s.1(4) of the Interpretation (Amendment) Act, 1997 (No 36 of 1997) under the banner of Article 40.1; Murphy v GM [2001] 4 IR 113 (Proceeds of Crime Act, 1996 (No 30 of 1996) considered under Article 40.1 without reference to doctrine).

Ó Beoláin v Fahy [2001] 2 IR 279.

The People (AG) v O’Driscoll (1972) 1 Frewen 351.

In The State (Keegan) v Stardust Victims Compensation Tribunal [1986] IR 642.

Again, I do not mean that this perception is correct. Rather, I simply offer this as a way to understand the case-law.

Ó Beoláin provides a stunning insight into how Hardiman J seems to have double standards in respect of the distinction between distributive and corrective justice apparently so sacred to his judgments in Sinnott v Minister for Education [2001] 2 IR 545 and T.D v Minister for Education [2001] 4 IR 259. Clearly, the direction to the State that Irish translations of official documents must be provided will involve a serious level of expenditure and consequently will involve some decision as to how to re-distribute funds from some other area to that end. Whereas this was a reason to deny an autistic child a proper education in Sinnott and to deny secure accommodate to children desperately in need of it in TD, it does not seem to be a reason to deny the Courts aid towards facilitating a defence in a criminal proceeding.
As with *MhicMathúna*, it is arguable that we see the interpretative technique of reading down the Constitution in order to, perhaps, meet concerns about the suitability of judicial involvement in particular kinds of equal protection cases and just as with *MhicMathúna*, it is arguable that a deference based approach would have been preferable. The immediate consequence of the “context-based” version of the human personality doctrine is to remove particular types of equality claims from the jurisdiction of the court (i.e. those where the basis of discrimination may be an essential attribute of the human person but where the context of that discrimination is something wider). The knock-on effect, however, is that because a whole range of constitutional equality protection is removed from constitutional significance, the Oireachtas (and indeed the executive) may contemplate inequality so long as the “context” of the discrimination washes over the “basis” of the discrimination a-lá-*Murtagh*. If, as I have argued, the context-based version of the human personality doctrine can plausibly be viewed as response to judicial fears about the court’s own competence to become involved in complex issues of social or economic policy then this is a disproportionate response. The court, insofar as it seems to believe that some equal protection issues are beyond its competence, should at least hold that the legislature must have regard to equality in respect of the less restrictive interpretation of the human personality doctrine.\(^{75}\)

**Conclusion: The Allocation of Constitutional Power – Single or Multiple Institutional?**

There are certain constitutional claims which, although they can fairly be regarded as grounded on the constitutional text, raise serious issues about judicial capacity to adjudicate thereupon. In such cases, the judicial supremacist may face a dilemma. On his best account of judicial capacity, he believes that the claim at hand is beyond judicial capability. However, he cannot entertain the notion of authoritative decision making power on constitutional issues being vested with any institution other than the judiciary. Thus, in order to meet his concerns about judicial capacity, the judicial supremacist may read the Constitution “down” so as to exclude the question at hand from constitutional significance. The price of judicial supremacy in this case is the remoulding of the Constitution in order to meet *bona fide* concerns of judicial capacity.

On the other hand, one who is at least open to the idea of sharing constitutional labour has another option. Like the judicial supremacist, he sincerely believes that the claim, fairly grounded in the Constitution raises issues beyond the judicial capacity for adjudication. However, unlike the judicial supremacist, he does not believe that the only way to deal with the limits of judicial capacity is to read the Constitution so as to exclude problematic cases from constitutional significance. He may hold that whereas the issue at hand can fairly be regarded as protected by the Constitution, the judiciary lacks actual capacity to deal with what protections the right at issue may actually require in the case at bar (*eg* complicated decisions on matters implicating particular patterns of resource distribution). He may therefore defer to

\(^{75}\) Again, I should point out that I do not mean that so that, in fact, equal protection claims which occur in the context of, for example, employment conditions, are actually outside the capacity of the Courts. Rather, I simply mean to say that insofar as the courts may hold to this viewpoint, there are better vents for it than holding to the context of discrimination approach.
the judgment of another institution in respect of that question. This argument is quite modest – it simply advances the idea that deference can provide a better vent for concerns about judicial competence than interpretative models of restraint. In short, approaching the general question of judicial restraint by working out which constitutional issues should be decided by which institutions can have the advantage of permitting judicial restraint without restrained readings of the Constitution.

It is submitted, that any approach which denies the relevance of deference focuses far too narrowly on the judiciary. The Constitution is not only relevant in court. Rather, the legislature, the executive, and the administrative arms of the State must apply the Constitution themselves as a guide in their activities. Deferring, and keeping the Constitution “intact” at least maintains this obligation vis-à-vis the State rather than deleting it from constitutional significance in response to concerns about judicial competence.

Of course, this leads one inexorably to the larger question which is when and to what extent judicial deference to legislative constitutional interpretation is, in fact, legitimate. Should, for example, deference be limited to, what Dyzenhaus refers to as “respect” whereby the court may treat legislative interpretations of the constitution with greater weight then the argument of other parties, or indeed, its own independent determination? Or is it ever legitimate to defer a constitutional question entirely to legislative decision holding it to be, essentially, non-justiciable? Moreover, what are legitimate rationales for deference? Can we justify deference by relying on democratic theory, or must we only defer where courts lack a practical institutional ability to decide the relevant constitutional question? These, however, are questions for another day. For the moment it is simply hoped that Irish courts may begin to see analysis of the deference question as, at least, presumptively relevant to their decisions.

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76 See eg Hunt, supra note 1, p 352.