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Reasonable accommodation in Irish constitutional law: two steps forward and one step back – or simply out of step?

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ABSTRACT

By ratifying the United Nations Convention on the Rights of Persons with Disabilities (CRPD), Ireland has committed to implementing the principle of reasonable accommodation in multiple contexts. To date, however, it has failed to expand existing legislative measures. This article analyses the potential of the Irish Constitution to encompass a reasonable accommodation duty and meet Ireland's CRPD obligations. It examines the constitutional model of equality, as well as judicial conceptualisations of disability, and argues that the Constitution is capable of accommodating a more robust legislative standard for reasonable accommodation than often thought, which is compatible with the CRPD. It also contends that recent decisions offer potential for the development of a constitutional reasonable accommodation duty. However, these apparent gains are fragile and the current constitutional capacity to accommodate CRPD requirements is undermined by continuing judicial contestation. The Constitution should therefore be amended so that Ireland can meet its international human rights obligations.

Keywords: reasonable accommodation; disability; UN Convention on the Rights of Persons with Disabilities; CRPD; article 40.1; equality; Irish Constitution.

INTRODUCTION

Barrington J famously opined that the 'concept of equality before the law is probably the most difficult and elusive concept contained in the Constitution'.[1] This is amply demonstrated by the jurisprudence of the Irish courts. Convoluted and inconsistent interpretations indicate profound gaps in judicial approaches to equality. Nowhere is this more evident than in the case law addressing the capacity of the Constitution to encompass the principle of reasonable accommodation. Reasonable

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1 *Brennan v Attorney Genera*l [1983] ILRM 449 (HC) 479.

accommodation, though not always judicially referred to as such, involves adapting systems and processes in response to individual needs and is essential for ensuring equality in practice for persons with disabilities. However, its position in Irish constitutional law remains deeply contested.

The capacity of the Constitution to encompass a reasonable accommodation principle matters because, to date, the two main drivers for the development of an Irish duty of reasonable accommodation – the Framework Employment Directive[2] and the United Nations (UN) Convention on the Rights of Persons with Disabilities (CRPD)[3] – are international and limited in effect. The Framework Employment Directive overrides national law but applies only in the employment context; it is therefore of no assistance in the many other contexts where reasonable accommodation may be required. The CRPD (ratified by Ireland in 2018) applies the duty of reasonable accommodation in multiple contexts. However, it has no domestic effect in Ireland without legislative implementation. As yet, this has been sadly lacking, and Ireland's only statutory duties in relation to reasonable accommodation long pre-date its ratification of the CRPD.[4]

The Constitution represents a third driver in the Irish context, which (paradoxically) may serve both to expand and curtail the scope of reasonable accommodation, and which directly impacts on Ireland's ability to meet its international obligations. The potential for expansion lies in the constitutional equality guarantee, though the exact scope of this remains contested and legal development has been hampered by restrictive doctrines and limited judicial engagement with equality concerns. However, there are indications of a more positive approach in some recent decisions which suggest not only that the equality guarantee mandates the provision of reasonable accommodation in some circumstances, but that the duty may extend to contexts not yet addressed by legislation. The potential for curtailment lies primarily in competing constitutional provisions, most notably the right to private property, which has been interpreted as restricting legislative ability to

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2 Council Directive 2000/78/EC of 27 November 2000 establishing a general framework for equal treatment in employment and occupation (Framework Employment Directive).

3 UN General Assembly, Convention on the Rights of Persons with Disabilities A/RES/61/06.

4 The sole attempt to update current equality law in light of the CRPD lapsed with the dissolution of the Dáil (Parliament) in early 2020. For a detailed analysis of the Employment Equality Acts 1998–2015 and implementation of the CRPD in Ireland, see Lucy-Ann Buckley and Shivaun Quinlivan, 'Reasonable accommodation in Irish equality law: an incomplete transformation' (2021) 41(1) Legal Studies 19.

implement the reasonable accommodation duty. In a curious tension, therefore, constitutional law has been used to develop a principle of reasonable accommodation in some contexts, while simultaneously limiting it in others.

Given Ireland's international obligations in respect of reasonable accommodation and the inadequacy of legislative implementation to date, this article asks if the constitutional equality guarantee is capable of accommodating Ireland's CRPD obligations. To this end, it focuses on two key sub-questions. First, how far does the Constitution permit or limit a statutory reasonable accommodation duty? Second, how far does the Constitution *impose* a reasonable accommodation duty, independent of legislation?

The article begins by outlining the nature of reasonable accommodation in the CRPD and how it fits with particular models of equality and disability. It then examines the model of equality enshrined in the Irish Constitution, as well as judicial conceptualisations of disability, to evaluate the potential scope for reasonable accommodation in constitutional law. In terms of *permitting* reasonable accommodation, the article argues that the limiting effects of the private property guarantee have been overstated and that the Constitution is capable of accommodating a more robust legislative standard than often thought, which is compatible with the CRPD. However, the legislature has been reluctant to put this to the test. In terms of *requiring* reasonable accommodation, the article contends that recent decisions represent two steps forward from previous restrictive interpretations of both equality and disability and offer greater potential for the development of a constitutional duty. However, these apparent gains are fragile and are undermined by an unresolved tension between the Supreme Court and lower courts. The article concludes that the capacity of the current equality guarantee to accommodate CRPD requirements is uncertain and is undermined by continuing judicial contestation. It should therefore be amended so that Ireland can meet its international human rights obligations.

THE CONCEPT OF REASONABLE ACCOMMODATION

The legal concept of reasonable accommodation has become intrinsically associated with disability discrimination but originates in American religious discrimination law.[5] Indeed, it could be argued that the Irish Supreme Court decision in *Quinn's Supermarket Ltd*

5 Code of Federal Regulations: 29 CFR § 1605.2: reasonable accommodation of an employee's religious practices is required by the Civil Rights Act 1964, title VII, s 701(j) unless it would amount to 'undue hardship'.

v Attorney General[6] represents an early acknowledgment of the principle of reasonable accommodation on the grounds of religion. The Americans with Disabilities Act 1990 (ADA) included the first application of the concept of reasonable accommodation as a tool to address disability discrimination. The influence of the ADA cannot be overestimated and is arguably even more extensive externally than internally. So suited is the concept of reasonable accommodation to disability equality that the principle pioneered in the ADA has migrated into legislative enactments worldwide,[7] culminating in the principle of reasonable accommodation being enshrined as a fundamental building block underpinning the CRPD.

The CRPD was the fastest negotiated human rights treaty in history. At the time of writing, it has been ratified by 181 countries, including every member state of the European Union (EU), as well as the EU itself. As Buckley and Quinlivan have noted,[8] the CRPD's influence is extensive, and it has been cited and relied on in the jurisprudence of the Court of Justice of the European Union,[9] the European Court of Human Rights[10] and the European Social Charter (Revised)[11] as well as by the Irish Supreme Court.[12] This paper therefore contends that the CRPD represents a broad consensus at European level and that the concepts enshrined therein should guide our understanding of relevant principles and concepts, such as reasonable accommodation. Indeed, Ireland's ratification of the CRPD requires internal implementation in order to comply with the Convention.

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6 *Quinn's Supermarket Ltd v Attorney General* [1972] IR 1 (SC). Here the Supreme Court accepted the necessity to adapt the system in response to the needs of a particular group. This differs somewhat from the CRPD understanding of reasonable accommodation, which is a tool for the individual rather than the group.

7 Jerome Bickenbach, 'The ADA v the Canadian Charter of Rights: disability rights and the social model of disability' in Leslie Pickering Francis and Anita Silvers (eds), *Americans with Disabilities: Exploring Implications of the Law for Individuals and Institution* (Routledge 2005) 342.

8 Buckley and Quinlivan (n 4 above) 1.

9 See eg Joined Cases C-335/11 and C-337/11 R*ing and Skouboe Werge*; C-406/15 *Milkova*; C-395/15 *Daouidi*; C-363/12 *Z v A Government Department*.

10 See eg *Glor v Switzerland* (2009) App no 13444/04; *Kiyutin v Russia* (2011) App no 2700/10; *Alajos Kiss v Hungary* (2010) App no 38832/06; *Guberina v Croatia* (2016) App no 23682/13.

11 See eg *European Action of the Disabled (AEH) v France Complaint* No 81/2012 Decision on the Merits, 11 September 2013; *Mental Disability Advocacy Center (MDAC) v Bulgaria*, Complaint No 41/207; *Mental Disability Advocacy Center (MDAC) v Belgium*, Complaint No 109/2014.

12 *Nano Nagle School v Daly* [2019] IESC 63.

The CRPD is fundamentally a human rights instrument with 'an explicit, social development dimension'.[13] Significantly, it views persons with disabilities as right-holders, consistent with what is often described as the move from charity to rights.[14] It adopts innovative and effective modes of implementation, including the expansion of implementation duties beyond the state to the private sector.[15]

Discrimination is broadly conceived under the CRPD, which requires that 'all forms of discrimination, including denial of reasonable accommodation' be prohibited.[16] The CRPD further defines reasonable accommodation at article 2 as:

> Necessary and appropriate modification and adjustments not imposing a disproportionate or undue burden, where needed in a particular case, to ensure to persons with disabilities the enjoyment or exercise on an equal basis with others of all human rights and fundamental freedoms.

In a detailed analysis of reasonable accommodation in the CRPD, Buckley and Quinlivan have highlighted that the duty to accommodate has two constituent elements.[17] The first element is the duty to provide a modification or adjustment deemed necessary and appropriate in a particular case to ensure that a person with a disability is able to enjoy or exercise a right on an equal basis with others. This is a responsive duty, which addresses the barriers specific to the individual in question. Importantly, in determining what accommodations are necessary and appropriate, the duty-bearer should engage in dialogue with the person requiring the accommodation. This positions the person with a disability as a 'stakeholder whose voice must be heard'.[18] The second element of the duty is that an accommodation should not impose a disproportionate or undue burden on the duty-bearer; this is also an individualised assessment. Buckley and Quinlivan emphasise that the determination of whether an accommodation gives rise to a disproportionate or undue burden should involve more than mere financial assessment and highlight other relevant factors, such as potential benefits to third parties and the disruption likely to be caused by the proposed accommodation.[19]

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13 UN Department of Economic and Social Affairs, CRPD.

14 Michael Ashley Stein, 'The paradigm shift from welfare to rights' (11 January 2010).

15 Frédéric Mégret and Dianah Msipa, 'Global reasonable accommodation: how the Convention on the Rights of Persons with Disabilities changes the way we think about equality' (2014) 30 South African Journal on Human Rights 252.

16 CRPD, art 2.

17 Buckley and Quinlivan (n 4 above) 5.

18 Ibid 9.

19 Ibid 7.

Article 5 of the CRPD requires states parties to ensure that there is 'effective legal protection against discrimination'.[20] This is a requirement on all 181 states parties 'to ensure that reasonable accommodation provisions are enshrined in law as an immediately enforceable right in all areas of law and policy'.[21] However, as will be discussed later in this article, Ireland's ability to legislate in this area has been restricted in practice by the Irish Constitution. The reasons for this largely stem from the constitutional model of equality and the limited judicial engagement with more widely accepted concepts of both equality and disability.

THE SIGNIFICANCE OF EQUALITY AND DISABILITY MODELS

The ability of the Constitution to encompass a reasonable accommodation duty compliant with the CRPD depends on the model of equality it adopts. Formal equality demands similar treatment for people in similar situations; applying an Aristotelian approach, those who are differently situated may be treated differently, though the disparity of treatment should be proportionate to the degree of difference. Under formal equality, people should not be treated differently on the basis of factors which are deemed irrelevant, such as gender, race or disability. Legally, this is manifested in the concept of direct discrimination, where the primary focus is on parity of treatment and the purity of the decision-making process, rather than the fairness of the outcome. In practice, formal equality is effectively blind to structural power imbalances, and the language of equality masks an insistence on particular social norms (for example, expectations regarding hours of work or methods of accessing information).[22] Formal equality has no minimum standards – any treatment is acceptable, so long as it is the same for everyone. 'Different' treatment of those who are regarded as 'similar' is perceived as contrary to equality, leaving little space for reasonable accommodation. While the Aristotelian model offers some room for differential treatment, too often a finding of 'difference' results in exclusion or disadvantage.[23]

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20 CRPD, art 5(2).

21 Committee on the Rights of Persons with Disabilities, *Concluding Observations on the Initial Report of Germany* (13 May 2015) CRPD/C/DEU/CO/1 [14(b)].

22 For a detailed critique of the formal equality model, see Sandra Fredman, *Discrimination Law* 2nd edn (Oxford University Press 2011) 8.

23 Martha Minow, *Making All the Difference: Inclusion, Exclusion, and American Law* (Cornell University Press 1990).

Substantive equality also assumes a general principle of similar treatment; however, this may be ameliorated by special treatment in particular cases in the interests of fairness. Unlike formal equality, substantive equality focuses on the effects of a particular rule or practice, rather than processes and motivations. Legally, this is manifested in the concept of indirect discrimination, which focuses on disparate impact. Substantive equality also recognises that different treatment may be needed where there are genuine differences in situation, such as disability. In this understanding, reasonable accommodation is not only permitted, but required, to compensate for the disadvantages experienced by some groups and ensure full equality in practice. However, substantive equality does not challenge existing norms or practices, but rather seeks to enable those who are disadvantaged to satisfy them. It may therefore be criticised for its limited ability to tackle entrenched structural inequalities.

As Buckley and Quinlivan note, the principles of substantive equality permeate the CRPD.[24] The CRPD's stated purpose is 'to promote, protect and ensure the full and equal enjoyment of all human rights ... by all persons with disabilities',[25] and equality and non-discrimination are cross-cutting principles that apply to all other articles.[26] All substantive rights are stated to apply 'on an equal basis with others', and the Convention explicitly requires proactive measures by states to achieve this.[27] Uniquely in international human rights treaties, the CRPD expressly defines discrimination as including the denial of reasonable accommodation,[28] so the right to reasonable accommodation therefore also applies to the exercise of all other rights under the Convention. Buckley and Quinlivan contend that this strong vision of equality is essential to address the historic and continuing exclusion and marginalisation of persons with disabilities.[29] They note that the CRPD Committee has recently argued that the Convention is based on a new equality model, known as transformative or inclusive equality, incorporating a range of dimensions based on principles of fair distribution, recognition, participation and the accommodation

24 Buckley and Quinlivan (n 4 above) 2.

25 CRPD, art 1.

26 Committee on the Rights of Persons with Disabilities, *General Comment No 6 (2018) on Equality and Non-Discrimination*, CRPD/C/GC/6 (General Comment No 6) 12.

27 See eg Committee on the Rights of Persons with Disabilities (n 21 above); *Concluding Observations on the Initial Report of Greece* (24 September 2019) CRPD/C/GRC/CO/1; and *Concluding Observations on the Initial Report of India* (24 September 2019) CRPD/C/IND/CO/1.

28 CRPD, art 2.

29 Buckley and Quinlivan (n 4 above) 3.

of difference.[30] Unlike formal and substantive equality, which are essentially corrective in nature, transformative equality seeks to tackle exclusionary practices that may well be considered unobjectionable under prevailing norms.[31] Exclusion and disadvantage are to be addressed by rethinking rules and expectations and using positive measures to overcome inequality, rather than allowing for exceptional treatment. The objective is thus both normative and systemic change. However, Degener has emphasised that there is still a role for both formal and substantive equality in addressing particular kinds of discrimination.[32]

The CRPD's emphasis on substantive equality is supported by its model of disability. Rejecting a medical disability model – where difficulties experienced by persons with disabilities are attributed to their impairments and require medical solutions – the CRPD is said to have adopted a social understanding of disability.[33] In this view, barriers derive not from an impairment, but from exclusionary social structures and practices, which have a disabling effect.[34] This is most evident in article 1 of the CRPD, which states that: 'Persons with disabilities include those who have long-term physical, mental, intellectual or sensory impairments *which in interaction with various barriers* may hinder their full and effective participation in society on an equal basis with others'. However, the CRPD itself notes that 'disability is an evolving concept',[35] and the conceptualisation has been further refined in recent years by the development of a human rights model of disability, which has been adopted by the CRPD Committee.[36]

The relationship between the human rights model of disability and the social model of disability is somewhat contested. Some commentators contend that the human rights model goes beyond the social model by acknowledging the human dignity of persons with disabilities as the basis of their equal human rights in multiple contexts and recognising

30 General Comment No 6 (n 26 above) 8. For a further discussion of the proposed equality dimensions, see Fredman (n 22 above) 25.

31 Hester Lessard, 'Book review: Inclusive Equality: Relational Dimensions of Systemic Discrimination in Canada, by Colleen Sheppard' (2011) 49(1) Osgoode Hall Law Journal 159.

32 Theresia Degener, 'Disability in a human rights context' (2016) 5(3) Laws 35.

33 Ibid.

34 For a discussion of the social model, see Rannveig Traustadottir, 'Disability studies, the social model and legal development' in Oddný Mjöll Arnardóttir and Gerard Quinn (eds), *The UN Convention on the Rights of Persons with Disabilities* (Martinus Nijhoff 2009) 3–4.

35 CRPD, Preamble, para (e).

36 Degener (n 32 above).

the impact of impairment as well as socially constructed barriers.[37] Hence, Degener contends that the human rights model is a progression rather than a replacement of the social model, which 'offers a roadmap for change', not merely an explanation of disadvantage.[38] By contrast, Lawson and Beckett argue strongly against the perception that the human rights model builds on the social model, contending that it is complementary and supportive of the social model. They propose a complementarity thesis, whereby 'the relationship between the two models is one in which neither can be viewed as an improvement on the other because each has distinctive roles to play'.[39] Whatever, the position adopted, commentators apparently concur that both the social model and the human rights model 'are valuable tools'[40] for those striving to achieve equality.

The existence of a reasonable accommodation duty is contingent on the model of disability, as it interacts with the model of equality. The medical model essentially attributes any difficulties experienced by a person with disabilities to personal limitations; the impact of social barriers therefore remains invisible, and the presumption of neutrality is beyond contestation. This speaks directly to a formal equality model, which likewise assumes social neutrality, ignores the impact of context and structural conditions, and locates problems in the individual. Both models therefore effectively serve to legitimate existing norms. As Rioux comments: 'When the source of the inequality is located in the individual in this way, there is a ready rationale for social inequality and for limiting social entitlement.'[41] By contrast, the social model of disability focuses on the impact of social context, relationships and environment, and the need to eliminate socially constructed barriers.[42] Like substantive equality, therefore, it emphasises the need to remove obstacles and ensure the ability to participate equally. Impairment is thus seen as a difference that must be accommodated, to ensure real equality in practice. This approach is strengthened further by the human rights model of disability and a transformative approach to

37 Ibid; see also Sarah Arduin, 'Article 3: general principles' in Ilias Bantekas, Michael Ashley Stein and Dimitris Anastasiou (eds), *The UN Convention on the Rights of Persons with Disabilities: A Commentary* (Oxford University Press 2018).

38 Degener (n 32 above).

39 Anna Lawson and Angharad E Beckett, 'The social and human rights models of disability: towards a complementarity thesis' (2020) International Journal of Human Rights 1.

40 Ibid.

41 Marcia Rioux, 'Towards a concept of equality of well-being: overcoming the social and legal construction of inequality' (1994) 7(1) Canadian Journal of Law and Jurisprudence 127, 131.

42 Traustadottir (n 34 above) 9.

equality, where structural transformation, including the removal of barriers, is essential to ensure equal participation and the vindication of human rights.

While transformative equality and the human rights model of disability best describe our present understanding of the CRPD, they are not essential for the recognition of a constitutional reasonable accommodation duty that is compliant with the Convention. However, the foregoing discussion highlights that any scope for such a constitutional duty requires, at a minimum, a substantive approach to equality and a social understanding of disability. The following sections will discuss the extent to which these preconditions are satisfied in Irish constitutional jurisprudence.

EQUALITY IN IRISH CONSTITUTIONAL LAW

Article 40.1 of the Irish Constitution provides that:

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

In international terms, Irish Constitutional jurisprudence is 'remarkably underdeveloped',[43] with a somewhat stagnant view of equality. Commentators have highlighted its static understanding of equality, noting that the 'debate about differing conceptions of equality has, to a large extent passed Article 40.1'.[44] The Constitution Review Group noted that the 'narrow wording' of the equality guarantee and its restrictive judicial interpretation 'have been widely observed and criticised'.[45] For this reason it recommended significant changes to article 40.1, though these have not been progressed.[46]

A key focus of criticism was the introduction of the so-called 'human personality doctrine', which limited the protection of article 40.1 to 'human persons for what they are in themselves rather than to any lawful activities, trades or pursuits which they may engage in or follow'.[47] Thus, it was said, article 40.1 'relates to their essential

43 Gerard Hogan, Gerry Whyte, David Kenny and Rachael Walsh, *Kelly: The Irish Constitution* 5th edn (Bloomsbury 2018) 1562. See also Oran Doyle, *Constitutional Equality Law* (Thomson Roundhall 2004) 74.

44 Ibid.

45 Constitution Review Group, *Report of the Constitution Review Group* (Stationery Office 1996) 195.

46 Ibid 204.

47 *Quinn's Supermarket Ltd* (n 6 above) 13–14.

attributes as persons, those features which make them human beings. It has ... nothing to do with their trading activities or with the conditions on which they are employed.'[48] This is described as the context approach[49] and as having 'virtually emasculated the guarantee of equality'.[50] A constitutional right of action could not arise unless a potentially offending enactment related to some facet of the human personality, as opposed to a person's interactions with society – an almost impossible standard to meet in practice. This has reasonably been described as 'an exceedingly narrow view of the equality guarantee – almost suggesting that human personality could exist in a void'.[51] Invariably, it is a person's interactions with society that give rise to discriminatory situations, such as a denial of education, employment opportunities, or access to goods and services. By conceptualising the person as entirely atomistic and prohibiting only those activities that impacted on the essence of being human, the human personality doctrine placed an insuperable barrier in the path of any claim to reasonable accommodation.

More recent cases suggest that the focus has shifted from the context of discrimination to the 'basis of discrimination'.[52] In *Brennan v Attorney General*, Barrington J emphasised that: 'Article 40.1 is not dealing with human beings in the abstract but with human beings in society',[53] a view echoed by the Supreme Court in *Re Article 26 and the Employment Equality Bill 1996*.[54] In theory, this should offer greater scope for reasonable accommodation. However, as discussed below, the decision in *Re Employment Equality Bill 1996* placed other constitutional obstacles in the path of reasonable accommodation.

Apart from applying the 'human personality' doctrine, the courts have traditionally held that article 40.1 does not contain a substantive right to equality, but simply prohibits arbitrary and invidious discrimination in state actions. This is evidenced most starkly in *Murphy v Attorney General*,[55] where the plaintiffs, a married couple, were treated less favourably than an unmarried couple for tax purposes. Although they ultimately succeeded on other grounds, the Supreme Court held that there was no breach of article 40.1. The court stated

48 *Murtagh Properties v Cleary* [1972] IR 330 (HC) 335.
49 Hogan et al (n 43 above) 1582; Oran Doyle, *Constitutional Law: Text, Cases and Materials* (Clarus Press 2008); Doyle (n 43 above) 74.
50 Hogan et al (n 43 above) 1582.
51 J M Kelly, 'Equality before the law in three European jurisdictions' (1983) 18 Irish Jurist 259, 265.
52 Hogan et al (n 43 above) 1586; Doyle (n 49 above) 103.
53 *Brennan* (n 1).
54 *Re Article 26 and the Employment Equality Bill 1996* [1997] 2 IR 321 (SC).
55 *Murphy v Attorney General* [1982] 1 IR 241 (SC).

that a legislative inequality is not itself repugnant to the Constitution 'if *any* state of facts exists which may reasonably justify it'.[56] In *Murphy*, the unequal treatment meted out by the tax code could be balanced against the 'many favourable discriminations made by the law in favour of married couples'.[57] This position is surely untenable; by this rationale most discrimination could be balanced against some other 'favourable discriminations' made by law. The court's absolute deference to the legislature in relation to potential justifications for inequality has led *Murphy* to be described as the 'low-water mark of the equality guarantee'.[58]

The doctrinal limitations outlined above reflect a judicial reluctance to engage with equality principles, and in practice the courts have generally been reluctant to invoke the equality guarantee, even in relatively straightforward cases. Thus, in *Murtagh Properties v Cleary*,[59] the court preferred to find an implicit constitutional right to earn a livelihood than to rely on the explicit equality clause to deal with an obvious case of direct gender discrimination. More commonly, the reluctance to invoke the equality guarantee is demonstrated by a judicial willingness to rely on other substantive constitutional norms to uphold discriminatory legislation.[60] The Supreme Court has also emphasised that the legislature must be given 'considerable latitude' when addressing financial matters, and that the burden of demonstrating that a law is unconstitutional is 'formidable'.[61]

Notwithstanding this reluctance to engage, there is some judicial recognition of suspect classifications. In *Re Article 26 and the Employment Equality Bill 1996*,[62] it was held that all legislative classifications should attract some scrutiny by the courts, but that some 'suspect' classifications (such as sex, race, language, or religious or political opinions) should attract stricter scrutiny.[63] However, this has not been consistently applied. In *MD v Ireland*,[64] the Supreme Court upheld legislation which provided for the criminalisation of boys but not girls for underage sexual intercourse. The court justified the discrimination by reference to potential harmful effects on girls of

56 Ibid 284 (emphasis added).
57 Ibid.
58 James Casey, *Constitutional Law in Ireland* 3rd edn (Sweet & Maxwell 2000) 456.
59 *Murtagh Properties* (n 48 above).
60 See eg *Lowth v Minister for Social Welfare* [1993] IR 339 (HC), [1998] 4 IR 321 (SC).
61 Ibid.
62 *Re Employment Equality Bill 1996* (n 54 above).
63 Ibid 347.
64 *MD v Ireland* [2012] IESC 10; [2012] 2 ILRM 305.

unwanted pregnancies. It did not engage with the 'suspect classification' but stated that the legislature was entitled to additional latitude in respect of legislation dealing with matters of social controversy.[65] As Mitchell highlights, 'deference is entirely inappropriate for suspect classifications because by their very nature, it was thought that the Constitution held that such classifications can very rarely be valid.'[66] The 'suspect classification' position was subsequently reaffirmed in *Fleming v Ireland*,[67] where the Supreme Court noted the existence of 'categories, where as a matter of history, it is possible to detect the operation of conscious or unconscious prejudice'.[68] Clearly, these categories could include disability; however, the Supreme Court stated that 'classification by reference to age or disability may be suspect or may be easily explained. Benefits granted by reference to age or disability may be easy to justify.'[69] It therefore appears that disability may attract less strict scrutiny than characteristics such as race or gender. While potentially disadvantageous (if a denial of benefits could also be easily justified), this approach might also offer greater scope for reasonable accommodation and positive equality measures (discussed further below).

It has long been established that article 40.1, in keeping with a formal equality model, prohibits direct discrimination, but the position with regard to indirect discrimination is less clear. For this reason, the Constitution Review Group recommended amending article 40.1 to capture expressly both direct and indirect discrimination.[70] The principal barrier to clarity has been judicial unwillingness to adopt a substantive approach to equality. The issue was recently addressed by the Supreme Court in *Fleming*,[71] which addressed the constitutionality of the Criminal Law Suicide Act 1993. The plaintiff in *Fleming* suffered from multiple sclerosis, an incurable and progressive condition that left her severely physically incapacitated. She wished to be allowed to die at a time of her choosing but needed assistance to end her life. While suicide is not a criminal offence under the 1993 Act, assisting another person to commit suicide constitutes a criminal offence, punishable by up to 14 years' imprisonment. The plaintiff alleged that the Act disadvantaged people with significant physical disabilities, such as herself, in comparison with persons who were in a position

65 Ibid [50].
66 Ben Mitchell, 'Constitutional equality law after Fleming v Ireland' (2014) 37(1) Dublin University Law Journal 252, 263.
67 *Fleming v Ireland* [2013] IESC 19.
68 Ibid [130].
69 Ibid.
70 Constitution Review Group (n 45 above) 204.
71 *Fleming* (n 67 above).

to commit suicide without assistance. She therefore contended that it was incompatible with the equality guarantee. *Fleming* thus offered a classic indirect discrimination argument: while facially neutral, the Act in practice disadvantaged persons with disabilities.

The Supreme Court judgment appeared to blend direct and indirect discrimination. Direct discrimination normally consists of differential treatment based on a protected characteristic. Referencing direct discrimination, however, Denham CJ stated:

> Discrimination may be shown if the class of persons or of activity chosen is formulated unfairly to include or exclude. If the classification is motivated by a discriminatory intent or reveals a prejudice then a classification, though apparently neutral, may be impermissible. Few examples, if any, of this are to be found in modern legislation.[72]

This suggests that direct discrimination may also occur where an ostensibly neutral rule has an impermissible motivation, such as a hidden motivation to exclude. This is not quite indirect discrimination, which normally focuses on impact rather than motivation; instead, it appears to represent a hybrid of direct and indirect discrimination.

In relation to indirect discrimination, Denham CJ continued:

> It is often the case that neutral laws will affect individuals in different ways: in the absence of impact on a fundamental right that does not normally give rise to any unconstitutionality.[73]

She concluded:

> The Court does not consider that the constitutional principle of equal treatment before the law ... extends to categorise as unequal the differential indirect effects on a person of an objectively neutral law addressed to persons other than that person.[74]

From this, it appears that the Supreme Court did not completely reject a constitutional application of indirect discrimination, though it did not uphold the claim on the facts. The court essentially construed the criminal liability provision in the 1993 Act as directed only at the plaintiff's partner, as the person who would have to assist her to commit suicide. The consequences of the provision for the plaintiff herself could therefore be ignored and did not count as indirect discrimination. Whether an indirect discrimination claim might be upheld in other circumstances remained undecided.

Following *Fleming*, it is still unclear whether indirect discrimination is captured by article 40.1. All that can be said with certainty is that facially neutral categorisations based on a discriminatory intent

72 Ibid [131].
73 Ibid [132].
74 Ibid [136].

are discriminatory, and that an indirect impact on a fundamental constitutional right might be discriminatory. Neither requirement was satisfied in *Fleming*. Indirect discrimination is notoriously difficult to apply in practice,[75] but the Supreme Court in *Fleming* effectively made it almost impossible for an action to succeed. While the (partial) recognition of indirect discrimination could have represented a step towards a more substantive equality model, the Supreme Court's restrictive conceptualisation and application represents a step backwards.

The doctrinal constraints and limited engagement with equality identified above suggest little scope in article 40.1 for reasonable accommodation. However, a final feature of article 40.1, known as 'the proviso', is that the state may 'have due regard to differences of capacity, physical and moral, and of social function'. In *MD v Ireland*, Denham J considered that the two statements in article 40.1 'should not be treated as if they were in separate compartments … The second is concerned with what the first sentence means.'[76] It is therefore clear that article 40.1 does permit legislative distinctions between people. As Walsh J famously stated in *De Búrca and Anderson v Attorney General*:

> … Article 40 does not require identical treatment of all persons without recognition of differences in relevant circumstances but it forbids arbitrary discrimination. It imports the Aristotelian concept that justice demands that we treat equals equally and unequals unequally.[77]

Nevertheless, the courts have struggled with the application of equality principles to differing circumstances, as the proviso's scope for legislative distinctions based on 'differences' and 'social function' has proved problematic.[78] Two separate issues arise here: the extent to which differential treatment may be permitted under the proviso, and the extent to which it may be required. In terms of *permitting* differential treatment, it has generally been emphasised that a distinction may be justified 'if it is not arbitrary, capricious, or otherwise not reasonably capable, when objectively viewed in the light of the social function involved of supporting the selection or classification complained of'.[79] This approach again prioritises state discretion, once it has any perceived reasonable basis. Direct discrimination may therefore be justified in Irish constitutional law, though the standard is not the same

75 Dagmar Schiek, Lisa Waddington and Mark Bell (eds), *Cases, Materials and Text on National, Supranational and International Non-discrimination Law* (Hart 2007) 323.

76 *MD* (n 64 above) 44.

77 *De Búrca and Anderson v Attorney General* [1976] IR 38 (SC) 68.

78 Constitution Review Group (n 45 above) 202.

79 *Dillane v Ireland* [1980] ILRM 167 (SC) 169.

as the statutory defence of objective justification in equality legislation (discussed below). However, it appears that the courts may be moving towards a test that aligns more closely with the statutory test. In *Dokie v DPP*,[80] the plaintiff, a non-national, challenged the constitutionality of an immigration law provision that required non-nationals to produce on demand a valid form of identification, and in some cases an immigration registration certificate also. Failure to comply without good reason would result in criminal liability. The plaintiff alleged that this provision amounted to a disproportionate interference with her right to equality with Irish citizens under article 40.1. Finding for the plaintiff, the court held that 'legislative infringement on rights contained in article 40.1 must satisfy the proportionality test'.[81] Kearns P cited with approval the view of Costello J in *Heaney v Ireland* that any restriction on the exercise of a right must be proportionate.[82] In *Heaney*, Costello J stated:

> The objective of the impugned provision must be of sufficient importance to warrant overriding a constitutionally protected right. It must relate to concerns pressing and substantial in a free and democratic society. The means chosen must pass a proportionality test. They must:-
>
> (a) be rationally connected to the objective and not be arbitrary, unfair or based on irrational considerations;
> (b) impair the right as little as possible, and
> (c) be such that their effects on rights are proportional to the objective.[83]

These principles bear a close resemblance to the established criteria for objective justification in equality legislation, where a measure must be based on a legitimate aim, and the means of achieving that aim must be appropriate and necessary (essentially, a proportionality test).[84] It is to be hoped that this more balanced approach prevails over the previous 'capriciousness' test, as a vital safeguard against unfair disadvantage.

In terms of *requiring* differential treatment, the situation is more complex. The early signs were not propitious, due to the decision in *Draper v Attorney General*.[85] The plaintiff had multiple sclerosis and was unable to go to a polling station to cast her vote, as this would have caused her severe physical discomfort and could potentially have been life threatening. She contended that the electoral laws that authorised a postal vote or special assistance for certain classes of voters, but which excluded her, constituted a breach of the equality guarantee.

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80 *Dokie v DPP* [2010] IEHC 110.
81 Ibid.
82 *Heaney v Ireland* [1994] 3 IR 593 (HC).
83 Ibid 607.
84 See eg Employment Equality Acts 1998–2015, s 22(1)(b).
85 *Draper v Attorney General* [1984] IR 277 (SC).

She sought declarations that facilities be made available to enable her to exercise her franchise. Effectively, she sought a reasonable accommodation – different treatment that would enable her to vote, as others could. Dismissing her action, O'Higgins CJ stated:

> The case made by the plaintiff in this action rests entirely on the failure of the State to provide special facilities for her and for those similarly situated. In the opinion of the Court, such failure does not amount to an interference by the State in the exercise of the right to vote … Nor is it, in the opinion of the Court, a breach by the State of the provisions of s. 1 of Article 40. While under this Article the State could, because of the plaintiff's incapacity, have made particular provisions for the exercise by her of her voting rights, the fact that it did not do so does not mean that the provisions actually made are necessarily unreasonable, unjust or arbitrary. For the reasons already stated, the Court could not so find.[86]

This approach has been described as 'Aristotle-lite',[87] as the Supreme Court failed to grasp the concept of treating unequals unequally. Due to her disability, the plaintiff was not equally situated to the majority of voters and required different treatment. However, the court stated that the state's failure to make different provision for her did not violate the equality guarantee. *Draper* clearly indicates that the proviso, while permissive, is not mandatory, and that differential treatment of those who are differently situated is not considered an essential aspect of equality.

However, a different approach was taken subsequently in *DX v Judge Buttimer*.[88] This involved a judicial review of the refusal of a judge to permit the plaintiff to be accompanied and assisted by a Ms S during his family law proceedings. The plaintiff had undergone a laryngectomy, which made his speech difficult to understand and depleted his energy. The plaintiff depended on Ms S for support, but more particularly she was familiar with his speech and could have assisted him in the initial hearing. Hogan J, in the High Court, noted that article 40.1 obliges the courts to ensure that all persons are 'held equal before the law'. He stated:

> In practical terms, this means that the courts must see to it that, where this is practical and feasible in the circumstances, litigants suffering a physical disability… are not placed at a disadvantage as compared with their able bodied opponents by reason of that disability, so that all litigants are truly held equal before the law in the real sense which the Constitution enjoins.[89]

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86 Ibid 290–291.

87 Doyle (n 43 above) 73.

88 *DX v Judge Buttimer* [2012] IEHC 175.

89 Ibid [14].

The decision is significant as it envisages a meaningful role for the equality guarantee in ensuring that litigants are not disadvantaged. It suggests that disparity of treatment may be required in some circumstances to prevent inequality; effectively, this is a move from formal to substantive equality, more compatible with the CRPD.

The issue of providing different treatment to persons with disabilities was again considered in *Fleming*. As discussed above, *Fleming* also provided some (faint) indications of a move towards a more substantive model of equality. The High Court cited *DX* with approval, stating that, in respect of 'persons with disabilities within appropriate limits of feasibility and practicality, Article 40.1 will … permit … separate and distinct legislative treatment of persons with disabilities so that all "are truly held equal before the law …"'.[90] This indicates that, at the least, reasonable accommodation measures are permissible under article 40.1. It appears that the High Court viewed reasonable accommodation as a potential 'cure' for an indirectly discriminatory act, stating:

> The Court is prepared to allow that inasmuch as the 1993 Act failed to make separate provision for persons in the plaintiff's position by creating no exception to take account of the physical disability which prevents the plaintiff taking the steps which the able bodied could take, the precept of equality in Article 40.1 is here engaged. But, again, for all the reasons which we have set out with regard to the Article 40.3.2, we consider that this differential treatment is amply justified by the range of factors bearing on the necessity to safeguard the lives of others …[91]

The first sentence suggests that a failure to make separate provision for persons with disabilities might amount to a breach of article 40.1, indicating that reasonable accommodation might be mandatory under the equality guarantee. However, the second sentence suggests that, because the impugned provision was justifiable on public policy grounds, there was no unlawful discrimination, and so no need for reasonable accommodation. This indicates that reasonable accommodation *might* be mandatory where it could remedy unlawful discrimination.

In a marked step back from this position, the Supreme Court adopted a largely formal approach to equality, concluding:

> While it may be open to the Oireachtas to consider making some distinction between persons, it cannot be said that any such distinction is required in this case by the Article 40.1 rights of the appellant.[92]

This suggests that reasonable accommodation measures may be constitutionally permissible but are not mandatory. However, although the rejection of a duty of reasonable accommodation appears

90 *Fleming v Ireland* [2013] IEHC 2 [121].
91 Ibid.
92 *Fleming* (n 67) [136].

to be conclusive, the same paragraph also emphasises the context of the decision, specifically the 'important objective'[93] of the impugned section in protecting the equal right to life of all persons under article 40.3. It must also be recalled that the Supreme Court had also (apparently) limited the application of indirect discrimination to the context of protecting constitutional rights, and that it had already determined that no such right was at stake in the plaintiff's case. As Mitchell notes, the 'accommodation of difference and protections against indirect discrimination ... are simply two versions of the same phenomenon; both are protections against inequalities that arise from the effects of facially neutral laws'.[94] It follows that, if the court were unwilling to find indirect discrimination where constitutional rights were not at stake, it would also be unwilling to uphold a principle of reasonable accommodation: the one is the mirror of the other. By inference, if the court were willing to apply indirect discrimination in the context of constitutional rights, it might also infer a reasonable accommodation duty.

Overall, it is clear that the model of equality enshrined in article 40.1 is far from dynamic. Formal in nature, the scope it offers for differential treatment where persons are differently situated has not traditionally been interpreted as mandating such differential treatment. Instead, the scope of the equality guarantee has been circumscribed by restrictive judicial doctrines and arguably excessive deference to the legislature. The historic development of the article therefore does not inspire confidence in the development of a constitutional duty of reasonable accommodation compatible with the CRPD, though it suggests scope for legislative intervention, particularly given the degree of deference offered by the judiciary to the legislature to date.

DISABILITY IN IRISH CONSTITUTIONAL LAW

The 'paradigm shift' in the legal conceptualisation of disability from the medical to the social and human rights models is not yet matched in Irish constitutional jurisprudence. The Irish courts originally considered persons with disabilities solely through the prism of the medical model. In *Re Philip Clarke*,[95] the applicant was involuntarily detained as a person suspected to be of unsound mind, supposedly for his own safety. Under the relevant legislation, he could be detained without review for an indefinite period. He brought an action for *habeas corpus*, unsuccessfully challenging the

93 Ibid.
94 Mitchell (n 66 above) 256.
95 *Re Philip Clarke* [1950] IR 235 (SC).

constitutionality of his detention and the governing legislation. The Supreme Court held:

> That, though all citizens, as human beings, are to be held equal before the law, the State may, nevertheless, in its enactments have due regard to differences of capacity, physical and moral, and of social function. We do not see how the common good would be promoted or the dignity and freedom of the individual assured by allowing persons, alleged to be suffering from such infirmity to remain at large to the possible danger of themselves or others. (at 247–248)

The medical model is equally evident in the significantly more recent decision in *Draper*. Speaking for the Supreme Court, O'Higgins CJ noted that the plaintiff was unable to vote at a polling station because of her disability.[96] Locating the plaintiff's inability to vote in her failure to comply with the Electoral Acts, he failed entirely to grasp the different dynamics of disability discrimination and the nature of social barriers.

There is some evidence of a recent shift in judicial thinking. In *DX*,[97] Hogan J held that refusing to permit Ms S to assist the plaintiff had placed him at an unacceptable disadvantage, amounting to a breach of article 40.1. While not referencing the duty of reasonable accommodation in terms commonly understood from the CRPD, Hogan J stated that, where it is 'practical and feasible', litigants with a physical disability should not be placed at a disadvantage. Thus, it may be inferred that, where there is an achievable or attainable accommodation that could ensure a person with a disability is not disadvantaged, the courts should consider such an accommodation. The decision of Hogan J is directly linked to a social model of disability. He situates the 'problem' in society (the application of particular rules), rather than in the plaintiff's impairment. Hence, the court must respond to the particularities of the person's disability by allowing an exception to the rule, to overcome the disadvantage.

This apparent shift towards a social model of disability was not followed in *Fleming*. The Supreme Court there applied a medical model of disability, stating:

> Assuming for present purposes that such a complaint may give rise to a claim under Art 40.1, this effect does not, of course, result from the provisions of the law, which applies equally to everybody wishing to commit suicide. … What prevents the appellant from committing suicide is, on her own evidence, the fact of her disability.[98]

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96 *Draper* (n 85 above) 286.

97 *DX* (n 88 above).

98 *Fleming* (n 67 above) [133].

In the view of the Supreme Court, it was not the criminalisation of assisting someone to commit suicide that impacted on the plaintiff, but merely her own disability. This clearly situates the 'problem' of disability in the individual and places the onus on them to adapt to a society not attuned to their physical, mental or sensory requirements. Inability to adapt is due to a lack of personal capacity, rather than social rules or requirements. From this perspective, the Supreme Court's rejection of a duty of reasonable accommodation in *Fleming* is unsurprising. Reasonable accommodation requires society to respond to the disability of an individual, by adapting rules and procedures to allow them to participate equally with others. This is the antithesis of the Supreme Court's analysis.

It is therefore surprising that a radically different approach was adopted only a few years later by the Court of Appeal, in *DPP v Harrison*.[99] The respondent had suffered significant head injuries and the case centred on his fitness to stand trial. The court commented at length on what the right to a fair trial might mean for a person with a disability, emphasising that the right to a fair trial must include a right to reasonable accommodation, where necessary. Speaking for the court, Edwards J gave multiple examples of accommodations that might be appropriate in particular circumstances. These included sign language interpreters or induction loop facilities, accessible documentation or assistive technologies, shorter sittings, and more frequent breaks or adjournments.[100] Simplified explanations of complex or technical matters, additional time to assimilate information or respond to questions, or the provision of daily transcripts to facilitate this might also be appropriate.[101] The court clearly viewed reasonable accommodation as a responsive duty, which must be tailored to the individual's needs. Edwards J noted that the individual's requirements would need to be identified, ideally by detailed exploration pre-trial, and that expert evidence might be adduced to evaluate what would be required.[102] The trial judge should then give pre-emptive directions, as far as possible, while recognising that unanticipated issues might still arise.[103] The court concluded that, where there is a demonstrated need for reasonable accommodation in the trial process, the trial judge should make 'rigorous and meaningful' enquiries as to what was appropriate, and that every effort should be made to accommodate

99 *DPP v Harrison* [2016] IECA 212.
100 Ibid [54].
101 Ibid [57].
102 Ibid [57].
103 Ibid [59].

both the public interest in a prosecution and a defendant's right a fair trial.[104]

What is most striking about *Harrison* is that the court clearly locates the barriers to a fair trial in the structures and procedures of the court, rather than the individual. The court must therefore adapt its procedures, to vindicate the rights of the person with the disability: it cannot simply leave it to the legislature to enact a remedy. *Harrison* therefore represents a strong step towards both a social model of disability and a substantive model of equality, compatible with the CRPD.

A CONSTITUTIONAL DUTY OF REASONABLE ACCOMMODATION?

It is clear from the case law that, notwithstanding the adoption of a formal equality model, there is a (limited) place for reasonable accommodation in Irish constitutional law. This is not limited to the equality guarantee, as is evident from *Quinn's Supermarket Ltd v Attorney General*,[105] where a ministerial order restricting the opening hours for meat shops exempted kosher butchers. The Supreme Court held that this amounted to religious discrimination under article 44.2.3, but that that article had to be read in light of article 44.2.1 which guaranteed the free practice of religion. Without an exemption for kosher shops, the freedom of members of the Jewish community to practise their religion would have been affected. Although article 40.1 was not at issue, the decision clearly reflects principles of substantive equality and acknowledges that facially neutral laws may have a discriminatory effect – a principle not yet clearly established in the more obvious context of the equality guarantee.

However, the constitutional scope for reasonable accommodation in *Quinn's Supermarket* was essentially permissive, insofar as the Supreme Court conceded that a legislative distinction could be valid in the interests of substantive equality; it did not hold that such an accommodation was mandatory. In *Draper*, on the other hand, the Supreme Court made it clear that there was no constitutional obligation to provide such an accommodation under the equality guarantee. The court held that the state was merely obliged to act reasonably, and that prohibiting a postal vote was not unreasonable, in light of the potential for abuse. More recently, in *Fleming*, the Supreme Court similarly suggested that it was open to the legislature to provide an exception for persons in the plaintiff's situation, though it did not find the impugned legislation unconstitutional. All this suggests that, while reasonable

104 Ibid [60].

105 *Quinn's Supermarket Ltd* (n 6 above).

accommodation may be permitted under the equality guarantee, it is not required by it.

The permissive capacity of the Constitution is not that straightforward, however, as demonstrated in *Re Employment Equality Bill 1996*.[106] The 1996 Bill required employers to provide reasonable accommodation to employees with disabilities, unless this would amount to 'undue hardship'. The Bill then listed some factors to be considered in determining whether undue hardship existed in a particular case, including the financial circumstances of the employer. The Supreme Court held that this amounted to an impermissible interference with the constitutional right to private property in article 43. A similar right to reasonable accommodation in relation to goods and services was likewise rejected in *Re Equal Status Bill 1997*.[107]

The decision in *Re Employment Equality Bill 1996* had deeply significant repercussions on the shape of equality legislation in Ireland. The legislature abandoned the original statutory test for reasonable accommodation, based on 'undue hardship', and instead reasonable accommodation was required only where it did not give rise to more than 'nominal' costs.[108] Although this was subsequently amended in the employment context, due to the Framework Employment Directive, the nominal costs standard continues to apply in relation to goods and services. This represents a direct breach of the CRPD, which Ireland has now ratified. Although a range of legislative amendments were proposed in advance of ratification, the proposed changes to the nominal cost standard applied only to selected categories of service providers, mostly in the public sector,[109] and in any event, have now lapsed. The legislature therefore appears to assume that further interference with private property is not permissible.

In fact, this is not necessarily the case. Writing in the family property context, Buckley has argued that 'the key question appears to be whether the limitation or restriction of the transferor's property rights is justifiable as meeting a pressing social objective',[110] and that 'In determining whether delimitations of private property rights are justifiable, there is considerable deference for legislative views on social policy.'[111] In essence, the question is one of proportionality,[112]

106 *Re Employment Equality Bill 1996* (n 54 above).

107 *Re Equal Status Bill 1997* [1997] 2 IR 387 (SC).

108 Employment Equality Act 1998, s 16 (as enacted); Equal Status Acts 2000–2018, s 4.

109 Disability (Miscellaneous Provisions) Bill 2016, s 4.

110 Lucy-Ann Buckley, 'Financial provision on relationship breakdown in Ireland: a constitutional lacuna? (2013) 36(1) Dublin University Law Journal 59, 73.

111 Ibid.

and it appears that, in addition to state expropriations, 'property reallocations between individuals may be upheld, at least as part of a larger redistributive scheme'.[113] A similar proportionality test was applied in other constitutional contexts in *Heaney* and *Dokie*, discussed above. It seems highly likely that providing reasonable accommodation to enable persons with disabilities to access services and employment could be characterised as a 'pressing social need';[114] indeed, the Supreme Court effectively conceded this point in *Re Employment Equality Bill 1996*.[115]

The issue in that case essentially related to the proportionality of the intervention, as the 'undue hardship' test could be viewed as allocating social costs to private citizens in all but the most extreme cases. However, it does not follow that only 'nominal' costs can be reallocated for social purposes; indeed, a long line of cases in other contexts clearly indicates otherwise. For instance, in *Re Part V of the Planning and Development Bill 1999*,[116] the Supreme Court held that a scheme that expropriated development land for social housing, at less than the market rate in compensation, was not a disproportionate interference with the right to private property.

From this perspective, the 'disproportionate burden' test for reasonable accommodation, mandated by the CRPD, appears to fit squarely within existing Irish constitutional principles. The Supreme Court itself arguably left the way open for more nuanced intervention as Hamilton CJ highlighted a number of considerations in rejecting the 'undue hardship' standard:

> There is no provision to exempt small firms or firms with a limited number of employees, from the provisions of the Bill. The wide definition of the term 'disability' in the Bill means that it is impossible to estimate in advance what the likely cost to an employer would be. The Bill does provide that one of the matters to be taken into consideration in estimating whether employing the disabled person would cause undue hardship to the employer is 'the financial circumstances of the employer' but this in turn implies that the employer would have to disclose his financial circumstances and the problems of his business to an outside party.[117]

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112 Ibid 71.

113 Ibid.

114 *Clinton v An Bord Pleanála and Others* [2005] IEHC 84 (Finnegan P), citing Budd J in *An Blascaod Mór v Commissioners of Public Works (No 3)* [1999] IESC 4; [2000] 1 IR 6.

115 *Re Employment Equality Bill 1996* (n 54 above).

116 *Re Part V of the Planning and Development Bill 1999* [2000] IESC 20; [2000] 2 IR 321.

117 *Re Employment Equality Bill 1996* (n 54 above) 368.

Because the disproportionate burden test is responsive to the situation of the duty-bearer, it automatically considers the financial or other capacity of a business to provide a particular accommodation. It is also capable of addressing situations where the disclosure of commercially sensitive information might disadvantage the duty-bearer, though the application of means tests in multiple other contexts suggests that the disclosure of financial information in general should not be an issue. The breadth of the definition of disability does not seem relevant; one might equally argue that, because everyone has a race, a gender and an age, employers are potentially open to multiple discrimination claims that are not quantifiable in advance. All this suggests that the scope for legislative intervention may be broader than previously thought, and that the Constitution might be capable of accommodating legislative implementation of the CRPD duty.

Recent case law also suggests that the Constitution may also impose a mandatory reasonable accommodation duty in some circumstances. This is particularly seen in the High Court decision in *DX*[118] and the decision of the Court of Appeal in *Harrison*.[119] The decision in *Harrison* is particularly important, coming as it does only a few years after the Supreme Court decision in *Fleming*. In stark contrast with *Fleming*, *Harrison* adopted both a social model of disability and a substantive approach to equality. This suggests that the approach in *Fleming* is not necessarily set in stone, and that different approaches may be adopted in different contexts, by differently constituted courts, or in light of changing social or legal norms.

Harrison fits particularly well with the CRPD. Edwards J noted that the only limitation that should be put on proposals for accommodations 'is that they should be reasonably practical; they should be confined to what is strictly necessary, and they should not confer such an unfair advantage on the beneficiary as to render an unfairness to the other side, in this instance the prosecution'.[120] He also commented that 'the fact that accommodations might prolong a trial, perhaps significantly, should not be a reason in itself to discount their suitability or practicality'.[121] Effectively, this is a proportionality approach, which connects closely with the CRPD: reasonable accommodation is a necessary and appropriate measure, which does not impose a disproportionate burden on the duty bearer. The emphasis Edwards J placed on the need for 'rigorous and meaningful' enquiries as to what measures would be appropriate also fits well with the duty to consult the right-holder under the CRPD.

118 *DX* (n 88 above).
119 *Harrison* (n 99 above).
120 Ibid [56].
121 Ibid.

The decisions in *DX* and *Harrison* may perhaps be explained by the fact that substantive constitutional rights – access to justice and the right to a fair trial – were at stake, while the decision in *Quinn's Supermarket* related to the constitutional guarantee of freedom from religious discrimination. By contrast, the Supreme Court in *Fleming* held that there was no substantive constitutional right to die, and in *Draper* it held that the constitutional right to vote was contingent on compliance with statutory criteria and was not conferred solely by citizenship.[122] However, this is not an entirely satisfactory explanation. The equality guarantee in article 40.1 is not expressly limited to other constitutional rights (unlike its so-called 'parasitic' equivalent in the ECHR).[123] Clearly, therefore, if such a limitation were to be applied in practice, this would constitute an 'impermissible judicial gloss'[124] on the text of the Constitution.

It is possible to view *Draper* as an outlier, pre-dating more modern views of disability and equality. The more recent case law is arguably broadly indicative of a constitutional right to reasonable accommodation, at least in some circumstances. However, the problem of *Fleming* remains and puts the Supreme Court out of step with both the High Court and the Court of Appeal, as well as Ireland's international obligations. There have been some indications of a more social model of disability being adopted in recent Supreme Court decisions in other contexts, most notably following ratification of the CRPD. The leading decision here is undoubtedly *Nano Nagle School v Daly,* where the Supreme Court emphasised the importance of interpreting the Employment Equality Act 1998 through the prism of the Framework Employment Directive, which in turn must be interpreted in light of the CRPD.[125] It is possible that the CRPD may also influence the Supreme Court's understanding of equality, though this seems unlikely given that Ireland is a dualist state; nor has Ireland's previous ratification of other international treaties, such as the ECHR, in itself had such an effect.

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122 *Draper* (n 85 above) 287.

123 ECHR, art 14. While Protocol 12 to the ECHR provides for a general prohibition on discrimination, not linked to other rights in the Convention, Ireland has not ratified this.

124 *Radmacher (formerly Granatino) (Respondent) v Granatino (Appellant)* [2010] UKSC 42 [166] (Lady Hale).

125 *Nano Nagle* (n 12 above) [13]–[34]. See also Shivaun Quinlivan and Charles O'Mahony, 'The Irish Supreme Court judgment in *Nano Nagle School v Marie Daly*: a saga of litigation' 70(4) Northern Ireland Legal Quarterly 505.

CONCLUSION

Where does this leave the constitutional scope for reasonable accommodation? Can the equality guarantee accommodate Ireland's CRPD obligations? It seems clear that there has been some movement in relation to reasonable accommodation in recent years, and that the overall approach has moved beyond the permissive to the mandatory, in at least some contexts, most notably where other constitutional rights are held to be at stake. It also appears that there may be more scope for interference with private property rights than is commonly thought, if proportionality criteria are applied. If so, this would greatly strengthen the scope for statutory intervention and increase the potential for CRPD compliance. However, the potential for recognising a general constitutional duty of reasonable accommodation is contingent on a greater and more dynamic understanding of equality and a more social model of disability. On the evidence of *Fleming*, the only recent Supreme Court decision on this point, these elements still appear to be lacking in the constitutional context.

The constitutional scope for reasonable accommodation matters because the impact of *Re Employment Equality Bill 1996* is still being felt in the framing of the reasonable accommodation duty in the Equal Status Acts 2000–2018. The Framework Employment Directive, which led to the amendment of the reasonable accommodation duty in relation to employment, does not apply to goods and services, and as yet there is no other EU law measure in this area. Access to goods and services remains a matter for national law, where property rights are still seen as limiting the scope for a statutory reasonable accommodation duty. To date, the State has not indicated any willingness to revisit this outside of particular contexts (largely public sector) and appears to take the limitation as a given, notwithstanding its ratification of the CRPD. This is amply demonstrated by its very limited reframing of the reasonable accommodation duty in the now lapsed Disability (Miscellaneous Provisions) Bill 2016.[126] This reluctance to engage means that the right of persons with disabilities to access goods and services on an equal basis with others will never be properly vindicated without constitutional reform or the development of a constitutional avenue of redress. Similar constraints are likely to apply to any new legislative measures to introduce a reasonable accommodation duty to the multiple other areas covered by the CRPD – if any such measures are taken. Indeed, the dearth of such measures to date also indicates the need for a constitutional duty.

126 For a detailed analysis of the 2016 Bill, see Buckley and Quinlivan (n 4 above) 11.

There are undoubted steps forward represented in decisions like *DX* and *Harrison*, but these positive steps are countered by the step backward in *Fleming*. The apparent subordination of the equality guarantee to other constitutional norms, such as the right to private property, appears to have had a chilling effect on the legislature. This, coupled with the widespread critique of the equality guarantee and its interpretation,[127] and the glacial pace of change, suggests the need for more substantial reform. The amendments proposed by the Constitution Review Group nearly 25 years ago,[128] prohibiting unfair direct and indirect discrimination on grounds including disability, might indicate a suitable way forward. Ideally, this should be supplemented by an express recognition of the duty of reasonable accommodation, rather than mere permission for the State to have regard to relevant differences. It is time to amend the equality guarantee to implement a more substantive understanding of equality that is more in line with our international obligations and less out of step with comparative and international jurisprudence.

127 See eg Constitution Review Group (n 45 above), Hogan et al (n 43 above), Doyle (n 49 above); Doyle (n 43 above); Mitchell (n 66 above); Casey (n 58 above).

128 Constitution Review Group (n 45 above) 204. The Citizens' Assembly has also recently called for the amendment of Article 40.1, recommending that it should refer explicitly to gender equality and non-discrimination. See 'Recommendations of the Citizens' Assembly on Gender Equality'.