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Financial Provision on Relationship Breakdown in Ireland: A Constitutional Lacuna?¹

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Introduction

In recent decades, legislation has had an extraordinary impact on personal property rights in the context of marital and relationship breakdown. Initially under the Judicial Separation and Family Law Reform Act 1989,² and subsequently under the Family Law Act 1995³ and the Family Law (Divorce) Act 1996,⁴ courts are empowered to make a wide range of ancillary property orders on judicial separation and divorce. These include orders for the sale or transfer of property, periodical payment orders, lump sum orders, pension adjustment orders and financial compensation orders. All of these orders are discretionary. Neither spouse has an entitlement to a particular share of the marital assets, and judges are required to consider particular criteria, largely based on resources, contributions and need, before making any order.⁵ The overriding statutory requirement is that the court must be satisfied that “proper” provision has been or will be made for both spouses and any dependent family member, but no order may be made unless it would be in the interests of justice.⁶ Similar provisions have now been applied to the breakdown of civil partnerships, under the Civil Partnership and Certain Rights and Obligations of Cohabitants Act 2010.⁷ The 2010 Act also provides for financial provision to be made for “qualified” cohabitants (as defined)⁸ on the termination of a cohabitational relationship, though the orders available are more limited than on the breakdown of formal legal relationships. Orders on the termination of cohabitation are conditional on the existence of financial dependency arising from the relationship or its breakdown,⁹ although the orders themselves are not explicitly limited to addressing financial need.¹⁰ Furthermore, orders in the cohabitational context can only be made if the court is satisfied that it is

¹ Lucy-Ann Buckley, Law School, National University of Ireland Galway. I am grateful to Dr Tom Hickey, Dublin City University, for his comments on an earlier draft of this manuscript.

² Hereafter “the 1989 Act”.

³ Hereafter “the 1995 Act”. Note that the 1995 Act largely repealed and replaced the 1989 Act.

⁴ Hereafter “the 1996 Act”.

⁵ S 20(2)(a)-(j) of the 1989 Act (now repealed) lists ten such factors; s 16(2)(a)-(l) of the 1995 Act lists twelve, and the 1996 Act lists thirteen (s 20(2)(a)-(l), and s 20(3)). Criteria include the present or likely future “income, earning capacity, property and other financial resources” and the “financial needs” of each spouse.

⁶ S 20 of the 1996 Act and s.16 of the 1995 Act (as amended).

⁷ Hereafter “the 2010 Act”. S 129 again provides that provision must be “proper”, and lists the same factors for consideration as the 1996 Act.

⁸ S 172 of the 2010 Act.

⁹ S 173(2) of the 2010 Act. The orders available are orders for the transfer or settlement of property, orders for periodical or lump sum payments, pension adjustment orders and orders for provision from a deceased cohabitant’s estate.

¹⁰ Mee has argued that it is unclear whether the claimant cohabitant should be merely restored to “bare financial independence” or whether the financial dependency criterion is merely the qualifying threshold for application. He considers the second alternative more plausible, though he highlights potential injustices that this interpretation entails. See John Mee, “A Critique of the Cohabitation Provisions of the Civil Partnership Bill 2009” (2009) 4 IJFL 83 (hereafter “Mee, ‘Cohabitation Provisions’”), 88.

“just and equitable” to do so;¹¹ there is no requirement of “proper” provision, as on the breakdown of a marriage or civil partnership.

There is no doubt that the changes brought about in respect of marital breakdown were greatly needed, and were essential measures both to combat post-separation poverty and to vindicate spousal marital contributions.¹² Marital breakdown is a significant social issue in Ireland: in 2011 alone, nearly three thousand divorces were granted by the Circuit and High Courts, as well as over a thousand judicial separations.¹³ The most recent census data, in 2011, found that nearly 88,000 people in Ireland were divorced, while a further 116,000 were separated.¹⁴ Significantly more divorced and separated persons were women than men.¹⁵ Both marital breakdown and the connected issue of lone parenthood are significant indicators of poverty;¹⁶ women, in particular, are financially vulnerable following divorce and separation, due to employment and childcare patterns.¹⁷ Children also are at increased risk of poverty following divorce.¹⁸ *Census 2011* found that there were over 215,000 lone-parent families in Ireland, and that 87% of these families were headed by lone mothers. Although 40% of lone parents were single, 31.8% were separated or divorced.¹⁹

Civil partnership is a statutory registration scheme for same-sex couples. As civil partnership is a marriage-like relationship,²⁰ which may include children, it seems

¹¹ S 173(2) of the 2010 Act.

¹² Prior to the current legislation, the principal protection for non-owning spouses was the right to a share of their deceased spouse’s estate under the Succession Act 1965. Spouses received limited protection (though not ownership) under the Family Home Protection Act 1976. *Inter vivos*, spouses could only claim an interest in property owned by the other spouse under resulting trusts doctrine. However, the scope of this doctrine was limited by judicial insistence that “contributions” to the acquisition of property must be financial, combined with a refusal to attribute a financial value to domestic labour. See, e.g., *RK v MK*, (HC, 24 October 1978). Even financial contributions might not be adequate, as the contribution had to be referable to the acquisition of the property; hence, contributions towards later improvements, or towards items such as furniture, were insufficient: see John Mee, “Trusts of the Family Home: the Irish Experience” (1993) Conv. (ns) 359, or Hilary Delany, *Equity and the Law of Trusts in Ireland* (5th edn, Round Hall 2011) 185-209, for an account of the law in this area.

¹³ In 2011, 3330 applications for divorce were received by the Circuit Court in Ireland, and 2777 divorces were granted. A further 28 divorce applications were received by the High Court in the same period, and 38 divorces were granted. The Circuit Court also received 1352 applications for judicial separation in 2011, and granted orders in 1006 cases, while the High Court received 27 applications for judicial separation and granted orders in 23 cases. See Courts Service, *Courts Service Annual Report 2011*, 57.

¹⁴ Central Statistics Office, *This is Ireland: Highlights from Census 2011, Part 1* (Stationery Office 2012) (hereafter “*Census 2011*”), 23.

¹⁵ *Ibid.*

¹⁶ See Dr Evelyn Mahon and Elena Moore, *Post-Separation Parenting: A Study of Separation and Divorce Agreements made in the Family Law Circuit Courts of Ireland and their Implications for Parent-Child Contact and Family Lives* (Office of the Minister for Children and Youth Affairs 2011), 24-25.

¹⁷ *Ibid.*, 24-25 and 53-54.

¹⁸ *Ibid.*, 24-25.

¹⁹ *Census 2011*, note 14, 27.

²⁰ It is clear from s 5 of the 2010 Act that civil partnership, like marriage, is an exclusive and permanent relationship. For further analysis and contrasting views of the marriage-like status of committed same-sex relationships, see Lynn D. Wardle, “Form and substance in committed relationships in American Law”, and Robert Wintemute, “Marriage or ‘civil partnership’ for same-sex couples: will Ireland lead or follow the United Kingdom?”, both in Oran Doyle and William Binchy, eds, *Committed Relationships and the Law* (Four Courts Press 2007).

logical that similar measures are necessary and appropriate in that context also. As yet there are no data on the breakdown of civil partnerships in Ireland, but *Census 2011* found that there were over 4,000 same-sex couples living together in Ireland, of whom 166 indicated that they were married.²¹ 230 same-sex couples had children; the overwhelming majority of these couples were female.²² Concerns regarding child and female poverty may therefore arise in this context also, quite apart from issues of fairness. However, it must be noted that the 2010 Act does not provide for orders in favour of children or other dependents of the civil partners (or indeed cohabitants). The Act cannot therefore be justified in terms of addressing child poverty, except insofar as children may benefit incidentally from parental provision. Even so, the presence of children is still relevant insofar as children's needs greatly increase the economic burden on custodial parents, while simultaneously affecting their labour market participation.

The cohabitational measures of the 2010 Act are more controversial, as they may result in financial relief even though no formal legal or moral commitment was made by either party.²³ Assuming that a case can be made for legal intervention in this context,²⁴ it is worth noting that unmarried cohabitation is increasingly common in Ireland; *Census 2011* identified 143,600 cohabiting couples, an increase of 21,800 since 2006.²⁵ Although *Census 2011* noted that the majority (57.8%) of cohabiting couples did not have children, the average number of children in cohabiting families was increasing.²⁶ It therefore seems reasonable to assume that many of the same financial concerns that arise on the breakdown of marital and civil relationships could arise in this context too, as the same issues regarding lone parenthood and employment and childcare patterns are also relevant here. However, it must be noted that cohabiting couples under the 2010 Act may be of either the same or the opposite sex,²⁷ reducing the relevance of gender poverty concerns.

The very extensive powers granted to courts to make financial and property orders on relationship breakdown require a clear constitutional basis. Such a basis has been explicitly provided in relation to financial provision on divorce,²⁸ so that the only question there is whether the scheme of the 1996 Act accords with the constitutional mandate. However, the Constitution is silent on judicial separation, civil partnerships and cohabitation. How, then, can the current, radical power to make property and financial orders under the 1995 and 2010 Acts be justified? Is it, in fact, constitutional at all? Although recent case law has purported to answer these questions in the judicial separation context at least, this paper argues that there are significant flaws in

²¹ The census notes that most of these couples may have married abroad, given that the 2010 Act had only recently been passed at the time the census data was compiled: *Census 2011*, note 14, 27.

²² *Ibid.*

²³ Though in fact Mee argues that the cohabitation provisions in the 2010 Act are seriously flawed from a fairness perspective, and that many deserving claimants may be left without a remedy: Mee, "Cohabitation Provisions", note 10, 87-88.

²⁴ The Law Reform Commission noted conflicting arguments on this point in its report on cohabitation: see Law Reform Commission, *Report on the Rights and Duties of Cohabitants* (LRC 82-2006), 15-16.

²⁵ *Census 2011*, note 14, 27. It is not clear from the census data whether the total figure for cohabitants included same-sex couples; presumably it did, since the figures for same-sex couples includes both married and cohabiting couples.

²⁶ There were 0.7 children per cohabiting couple in 2011, compared with 0.6 in 2006: *Census 2011*, note 14, 27.

²⁷ S 172(1) of the 2010 Act.

²⁸ Article 41.3.2° of the Constitution, discussed below.

the reasoning adopted, and that the constitutionality of the 1995 Act is not yet quite resolved. Furthermore, the principal justification advanced by the courts to justify provision in the judicial separation context does not apply to civil partnerships and cohabitation, so that provision under the 2010 Act still lacks a constitutional foundation.

The first half of this article outlines the broad constitutional context, highlighting aspects of constitutional law of particular relevance to financial provision on relationship breakdown. The article begins by outlining the constitutional protection of the family in Ireland, and how this protection has been interpreted and applied in the context of family property issues. It then examines the significance of constitutional property rights in the context of financial provision on relationship breakdown. The article subsequently considers the potential utility of constitutional equality provisions and arguments for upholding financial redistribution mechanisms. It contends that, even without the special constitutional protection of the family, or the constitutional mandate for provision on divorce, appropriate provision for families in the relationship breakdown context is an important social policy objective which justifies the delimitation of proprietary interests, and as such is likely to be upheld on the basis of previous case law. The constitutional place of the family bolsters the importance of this objective, in the marital breakdown context at least, and this support should not necessarily be displaced by the constitutional significance attached to family autonomy. The article also contends that the family provision measures may also be supported by constitutional gender equality considerations, though this aspect must be of limited relevance in the civil partnership context.

The second half of the article examines the most recent litigation on the “proper” provision issue, the *LB* cases.²⁹ The two High Court judgments in *LB* are significant as they confirm a new understanding of the basis for making financial orders in the marital breakdown context, drawing on conceptualisations of the constitutional family to give a clear justification for the encroachment on individual property rights. However, although the *LB* litigation purportedly confirmed the constitutionality of the judicial power to make “proper” provision on both judicial separation and divorce, it is contended that the reasoning was flawed in both cases in respect of judicial separation. Furthermore, the reasoning cannot be used to justify upholding provision in the civil partnership and cohabitation contexts without significant constitutional change. Consequently, a considerable lacuna remains in Irish constitutional law. The article concludes by arguing that although the 1995 and 2010 Acts both should and probably would be considered constitutional, there is still some room for doubt.

Part A: The Constitutional Background to Financial Provision Measures in Ireland

i. Constitutional Protection of the Family and Its Implications for Property Rights

Article 41 of the Constitution “recognises the Family as the natural primary and fundamental unit group of Society, and as a moral institution possessing inalienable and imprescriptible rights, antecedent and superior to all positive law”.³⁰ The State therefore guarantees to protect the family, and also the institution of marriage, “on

²⁹ *LB v Ireland* [2006] IEHC 275, [2008] 1 IR 134; and *LB v Ireland and the Attorney General and PB* [2012] IEHC 461.

³⁰ Article 41.1.1°.

which the Family is founded”.³¹ The State also “recognises that by her life within the home, woman gives to the State a support without which the common good cannot be achieved”.³² Consequently, the State must “endeavour to ensure that mothers shall not be obliged by economic necessity to engage in labour to the neglect of their duties in the home”.³³

The Constitution does not define the term “family”, but the Supreme Court has held that it means the marital family only.³⁴ The Constitution Review Group recommended that Article 41 should be amended to include a specific permission for the Oireachtas to legislate in the interests of non-traditional relationships, arising out of social and demographic changes since the adoption of the Constitution.³⁵ To date, however, this has not happened, and the Oireachtas All Party Committee on the Constitution concluded that attempting to make such a change would be undesirably divisive.³⁶ The application of Article 41 is therefore still restricted, and cannot, as it stands, apply to civil partnership or cohabitation, and cannot be used to support financial provision in those contexts. (Indeed, it is possible that Article 41 might be used to impugn the constitutionality of the 2010 Act, if that Act were deemed to undermine the institution of marriage, though the Law Reform Commission considered this unlikely so long as non-marital relationships were not more favourably treated than marital ones).³⁷ Furthermore, the recognition of work in the home is specifically based on what may be considered anachronistic gender roles. Accordingly, unless the Constitution were amended to recognise the value of all homemaking contributions (irrespective of the gender of the contributing partner), this aspect of Article 41 must be irrelevant to male civil partnerships and cohabitational relationships at least.

Even if the constitutional interpretation of the family were to be broadened, judicially or otherwise, how much support might it offer to statutory financial provision measures? Taken at face value, Article 41 appears to import a partnership ideology into Irish law in the marital context, which might be extended to civil partnership at least, if this were deemed equivalent to marriage. The Family is clearly regarded as a unit and it is plainly envisaged that both spouses will make equally valuable marital contributions. Hogan and Whyte note that the Constitution, unlike common law, “regards marriage as a union of equals”.³⁸ While the husband’s role is implicit (as norms usually are), explicit recognition is given to the worth of homemaking and childcare, not only to the family but to society. This is consistent with the

³¹ Article 41.3.1°.

³² Article 41.2.1°.

³³ Article 41.2.2°.

³⁴ *State (Nicolaou) v An Bord Uchtála* [1966] IR 567 (SC); *McD v. L* [2009] IESC 81; [2010] 2 IR 199.

³⁵ *Report of the Constitution Review Group* (Government Publications 1996), 336.

³⁶ All-Party Oireachtas Committee on the Constitution, *Tenth Progress Report: The Family* (Stationery Office 2006), 121-122.

³⁷ Law Reform Commission, *Consultation Paper on the Rights and Duties of Cohabitees* (LRC CP 32-2004) 7-9. However, Mee has contended that the (albeit restricted) power to make orders affecting married cohabitants, under s 170(6) of the 2010 Act casts some doubt on the reasoning of the Law Reform Commission: see Mee, “Cohabitation Provisions”, note 10, 85.

³⁸ Gerard Hogan and Gerry Whyte, *JM Kelly: The Irish Constitution* (4th edn, LexisNexis Butterworths 2003) (hereafter “Hogan and Whyte”) at para. 7.6.36. This principle has been established in a series of cases where “the doctrine of equality of spouses has resulted in the abolition or restriction of discriminatory rules or provisions” (*ibid.*, para. 7.6.37), e.g. *Re Tilson, Infants* [1951] IR 1 (SC); *The State (DPP) v Walsh* [1981] IR 412 (SC); *W v W* [1993] 2 IR 476 (SC).

communitarian view that the marital partnership is akin to a joint enterprise.³⁹ For communitarians (advocating a marital community of property), each spouse has an equal stake in the marital partnership and each is equally entitled to share in the fruits of the marriage. Accordingly, one might well expect the Constitution to mandate at least a sharing approach to marital property, if not a community property regime as such.

However, the judicial interpretation given to Article 41 has generally been quite restrictive, based on separationist rather than sharing principles and emphasising independence and free will.⁴⁰ It has therefore offered little substantive benefit, even within the marital context. Article 41 is considered to protect the (marital) family against external forces; it does not create any internal rights, or confer individual family members with rights (such as property rights) against each other. Even the vaunted protection for wives and mothers has not conferred substantive rights in practice. In *L v L*,⁴¹ the Supreme Court overturned a High Court ruling of Barr J which would have given a wife a constitutional right to a share in the family home; Barr J had held that this was necessary if the Constitution was to be given “flesh and meaning”.⁴² Holding that the philosophy of Article 41 was that women should devote their time and attention to home duties, Barr J commented,

*“It is... in harmony with that philosophy to regard marriage as an equal partnership in which a woman who elects to adopt the full-time role of wife and mother in the home may be obliged to make a sacrifice, both economic and emotional, in doing so. In return for that voluntary sacrifice... she should receive some reasonable economic security within the marriage...[A]s her role... precludes her from contributing, directly or indirectly, in money or money’s worth from independent employment... towards the acquisition by the husband of the family home and contents, her work as home-maker and in caring for the family should be taken into account in calculating her contribution towards that acquisition – particularly as such work is of real monetary value”.*⁴³

The Supreme Court, however, held that the redistribution of property rights within the marriage was not mandated by Article 41, which merely entitled the State to make special provision for mothers. The Court sympathised with the plight of economically vulnerable homemakers, but held that it was not for the judiciary to provide a remedy. While an award of maintenance could be an appropriate means of ensuring that a mother was not obliged by economic necessity to work outside the home, the same could not be said of the award of a share in the home itself.

³⁹ Lucy-Ann Buckley, “Matrimonial Property and Irish Law: a Case for Community?” (2002) 53 Northern Ireland Legal Quarterly 39 (hereafter “Buckley, ‘Matrimonial Property’”), 45.

⁴⁰ Separationists consider that partnership principles have no role to play in the financial aspects of matrimony and the focus is individualistic rather than based on sharing. Although husband and wife share emotions and experiences, they remain independent individuals in respect of their property entitlements and should not have their property rights adulterated without their express consent. See, e.g., Buckley, “Matrimonial Property”, note 39, 42.

⁴¹ *L v L* [1992] 2 IR 77 (SC).

⁴² *Ibid*, 98.

⁴³ *Ibid*, 98-99.

Following *L v L*, the Matrimonial Home Bill 1993 attempted to provide for the co-ownership of all family homes, but the Supreme Court held that this was also unconstitutional.⁴⁴ The Bill was not invalidated by its transference of property rights as such, but because imposing a regime of joint ownership breached the “antecedent and superior” right of a married couple to determine who should own the family home. Imposing joint ownership on all matrimonial homes could interfere with positive decisions of the family. Although spouses could contract out of the legislation, the need to readdress ownership issues could disturb the family’s equilibrium and result in litigation. The Supreme Court therefore considered that the Bill did not constitute reasonably proportionate State intervention in the family’s affairs, but instead amounted to a failure to protect the family’s authority. Although the Supreme Court left open the possibility that provisions regarding the future acquisition of property by married couples would not be unconstitutional, particularly if contractual variation was permitted, this approach was not adopted by the legislature, perhaps because it would result in unequal protection for older spouses.⁴⁵

It seems unlikely that the Supreme Court in *Re Matrimonial Home Bill 1993* intended to place family autonomy ahead of all social considerations and redistribution mechanisms. This would effectively prohibit all redistributive measures on marital breakdown, since it could always be argued that the ownership of particular property, including but not limited to the family home, had been agreed. No such argument was advanced in *TF v Ireland and the Attorney General and MF*,⁴⁶ one of the few constitutional cases in this area (discussed in detail below). The best interpretation of *Re Matrimonial Home Bill 1993* is probably that blanket measures, unjustified by reference to the particular facts of a given case, are constitutionally prohibited. However, proportionate intervention in family affairs, based on specific circumstances, may be upheld. It should also be noted that the “family autonomy” argument would presumably be inapplicable in the civil partnership and cohabitation contexts, given that the constitutional family is marital only; to this extent, the 2010 Act is free from one doubt that might potentially affect the 1995 and 1996 Acts.

Article 41 might perhaps save other legislative measures that interfere with property rights. The Succession Act 1965 imposes a minimum level of provision for a surviving spouse and permits claims by a testator’s children where they have not been properly provided for. These aspects of the 1965 Act have never been constitutionally challenged,⁴⁷ and Forde considers that any such attack “most likely would founder on Article 41”⁴⁸ and “most likely would be upheld as a measure that protects the family and... gives recognition to the contribution of married women as acknowledged in Article 41.2.”⁴⁹ The 1965 Act may be distinguished from the situation in *L v L* as it applies after death and does not affect the use or enjoyment of property by a living owner, though clearly curtailing the owner’s testamentary powers. However, these distinguishing factors do not apply to orders made on marital breakdown or the termination of a civil partnership or cohabitating relationship.

⁴⁴ *Re the Matrimonial Home Bill 1993* [1994] IESC 5; [1994] 1 IR 305.

⁴⁵ Buckley, “Matrimonial Property”, note 39, 71.

⁴⁶ *TF v Ireland and the Attorney General and MF* [1995] 1 IR 321 (SC).

⁴⁷ The sole challenge related to the rights of non-marital children: *O’B v S* [1984] IR 316 (SC).

⁴⁸ Michael Forde, *Constitutional Law* (2nd edn, First Law 2004) (hereafter “Forde”) 754.

⁴⁹ *Ibid*, 684.

Could the “family” and “work in the home” aspects of Article 41 also support the making of financial provision on marital breakdown? The constitutional recognition of work in the home was emphasised by the Supreme Court in *T v T*,⁵⁰ though that case concerned the correct approach to “proper” provision on divorce rather than any constitutional issues as such. In *T v T*, Murray J considered that the constitutional guarantee “recognises that work in the home is indispensable for the welfare of the family, husband, wife and children, where there are children”, as well as to the welfare of the State.⁵¹ This underscored the weight to be attached to work in the home in evaluating the appropriate level of financial provision, and reflects sharing and communitarian values. In this sense, Article 41 bolsters the extension of “proper” provision to the recognition of domestic and caring contributions as well as need, albeit in the marital context only.

Of most relevance to the 1996 Act is the provision in Article 41.3.2⁵² that divorce may only be granted where, *inter alia*, “such provision as the Court considers proper having regard to the circumstances exists or will be made for the spouses, any children of either or both of them and any other person prescribed by law”. This clearly envisages financial provision of some kind, and in no way limits that provision to maintenance rather than capital redistribution. Indeed, capital redistribution may often be the only feasible means of providing for a family. Accordingly, while the Constitution does not, as interpreted, mandate asset redistribution during or because of marriage, or because of a person’s status or contributions as a wife or mother, it permits provision on divorce, and does not delimit that provision other than providing that it must be “proper”. However, it is clear that “proper” provision is more than a mere standard for relief in Irish matrimonial law; it is a mandatory pre-condition for the granting of a divorce decree.⁵³ Indeed, it has been held that referring to “ancillary relief” in the Irish context is “somewhat of a misnomer”, as provision here is the master of divorce, rather than the slave.⁵⁴ As noted previously, *Re Matrimonial Home Bill 1993* strongly suggests that that “proper” provision is not something that can be dealt with in a generic or automatic manner, and must in some way be context-dependent. This actually fits well with the discretionary scheme adopted under the 1995, 1996 and 2010 Acts, and emphasised in the divorce context in *T v T*. It also accords with what Parkinson terms “the principle of judicial restraint”⁵⁵ enshrined in all three Acts, since all specify that orders can only be made in the interests of justice.⁵⁶

In summary, therefore, Article 41 clearly not only permits proper provision on divorce, but informs the nature of that provision. It does not mandate proper provision on judicial separation or on the termination of a civil partnership or a cohabiting

⁵⁰ *T(D) v T(C)* [2002] IESC 68; [2002] 3 IR 334 (SC).

⁵¹ *Ibid*, 407.

⁵² Inserted in 1995 by the Fifteenth Amendment to the Constitution.

⁵³ *JC v MC* (HC, 22 January 2007; *The Irish Times* (Dublin, 19 February 2007)).

⁵⁴ *Ibid* (Abbott J), discussed in Inge Clissman, “Trends in Divorce: a Review of Recent Case Law” (Law Society of Ireland CPD Seminar: Divorce – Ten Years On, Dublin, February 2007, 64.

⁵⁵ Patrick Parkinson, “Quantifying the Homemaker Contribution in Family Property Law” (2003) 31 *Fed. L. Rev.* 1, 23.

⁵⁶ S 20 of the 1996 Act; s 16 of the 1995 Act (as amended); s 199(4) of the 2010 Act (civil partnership). Note that the cohabitation provisions are slightly different, as these specify that orders for financial provision may not be made unless it would be “just and equitable” to do so: s 173(2) of the 2010 Act.

relationship. However, it may support provision in the judicial separation context insofar as domestic contributions are vindicated and family need is addressed. This is particularly the case since the spouses in a separated family are still married, and hence the family falls within the constitutional ambit. What is less clear is whether Article 41 could, of itself, mandate a scheme for provision on judicial separation as extensive as that provided in the 1995 Act; without significant amendment, it clearly cannot justify provision under the 2010 Act at all.

ii. The Constitutional Right to Private Property

L v L makes it clear that the right to private property may constitute a significant barrier to redistributive mechanisms.⁵⁷ This particularly applies in the context of judicial separation and the termination of civil partnerships and cohabiting relationships, given the lack of an explicit constitutional mandate for provision in this regard. “Property” itself is not defined in the Constitution, but has been held to include tangible and at least some intangible assets.⁵⁸ The right to private property is enshrined in Article 43 of the Constitution, which acknowledges private property as a “natural right”, “antecedent to positive law”.⁵⁹ The State therefore guarantees not to infringe the right of private ownership or concomitant rights of transfer or inheritance. However, ownership rights may be regulated by “principles of social justice”,⁶⁰ and the State may “delimit by law the exercise of the said rights with a view to reconciling their exercise with the exigencies of the common good”.⁶¹ Article 43 is supplemented by a guarantee in Article 40.3.2° that the State shall “protect from unjust attack and, in the case of injustice done, vindicate the... property rights of every citizen”. The traditional view is that Article 43 protects the institution of property from State interference, while breaches of individual citizen’s particular property rights are dealt with under Article 40.3.2°. ⁶² However, the Supreme Court has more recently held that both provisions may be relevant in considering whether a particular expropriation is valid.⁶³

While Article 43 permits the State to regulate and “delimit” property rights, Article 45.2.ii goes considerably further than this, requiring the State to “direct its policy” towards the distribution of the “ownership and control of the material resources of the community” among individuals and classes so “as best to subserve the common good”. Article 45.4.1° also requires the State to “safeguard with especial care the economic interests of the weaker sections of the community”. Although the social policy provisions of Article 45 are stated not to be judicially cognisable, and to be simply for the guidance of the legislature, Walsh has demonstrated that the constitutional right to private property was originally intended to encompass broad principles of distributive justice.⁶⁴ However, fear of potential legal claims resulted in the separation of property rights and social policy concerns into different constitutional articles. Walsh contends that this “de-coupling” inadvertently

⁵⁷ *L v L* [1992] 2 IR 77 (SC).

⁵⁸ See Forde, note 48, 730.

⁵⁹ Article 43.1.1°.

⁶⁰ Article 43.2.1°.

⁶¹ Article 43.2.2°.

⁶² *Blake v AG* [1982] IR 117 (SC).

⁶³ *Re Part V of the Planning and Development Bill 1999* [2000] IESC 20; [2000] 2 IR 321.

⁶⁴ Rachael Walsh, “Private Property Rights in the Drafting of the Irish Constitution: a Communitarian Compromise” (2011) 33 DULJ 86 (hereafter “Walsh, ‘Communitarian Compromise’”).

strengthened the individualistic appearance of Article 43 and weakened the social principles intended to regulate that power.⁶⁵ She therefore contends that “[b]y removing the social context for the protection of private property that had been provided by the social principles, the drafters created a provision that appeared to favour the right to private ownership over the demands of the common good”.⁶⁶ She further suggests that this evidence of the framers’ intentions could be “constructively applied” to “help to clarify the scope of the State’s power to restrict property rights”.⁶⁷ She notes that Article 45 has been successfully invoked to bolster the constitutionality of legislative social justice measures,⁶⁸ and argues that this is appropriate, given that the purpose of Article 45 is to guide the legislature in its enactments.⁶⁹ Hence, she concludes that Article 45 may be used to justify legislative restrictions on property rights under Article 43, though not to impugn them.⁷⁰ If this is correct, Article 45 might be used to uphold a financial provision scheme on relationship breakdown, even if such a scheme would otherwise constitute a breach of property rights.

With this in mind, what is the scope of the State’s power to regulate or delimit property rights? Is it limited to State expropriations in the common interest, or can the State also redistribute property between individuals? In either case, does the validity of the infringement depend on compensation?

It is clear that limited State expropriations of property are permitted, if in accordance with law, though they are judicially reviewable.⁷¹ Notably, and unlike the “Takings Clause” under the Fifth Amendment to the American Constitution, the Irish Constitution does not explicitly require that State (or other) expropriations of private property must be compensated, either wholly or in part. However, even without adequate compensation, it is rare for legislative measures to be struck down for breaching the private property guarantee.⁷² The key issue is whether the expropriation is a proportionate means of achieving a legitimate and important social end (commonly referred to as the “principle of proportionality”). Thus, in *Re Part V of the Planning and Development Bill 1999*,⁷³ the Supreme Court held that a scheme whereby up to 20 per cent of a developer’s land could be expropriated for social housing, at less than the market rate in compensation, was not a disproportionate violation of property rights. Keane CJ considered that the statutory measure “was rationally connected to an objective of sufficient importance to warrant interference with a constitutionally protected right and... undoubtedly relate[d] to concerns which, in a free and democratic society, should be regarded as pressing and substantial”.⁷⁴

⁶⁵ *Ibid*, 109.

⁶⁶ *Ibid*. Even so, as Walsh argues elsewhere, the courts have permitted great latitude to the legislature in the interpretation and implementation of social principles: Rachael Walsh, “The Constitution, Property Rights and Proportionality: A Reappraisal” (2009) 31 DULJ 1 (hereafter “Walsh, ‘Proportionality’”).

⁶⁷ Walsh, “Communitarian Compromise”, note 64, 109; see further *ibid*, 113.

⁶⁸ *Ibid*, 111. However, she also notes that no judicial decision has used Article 45 in this way since 1984, and that the Supreme Court might decide against this approach in future (*ibid*, 112).

⁶⁹ *Ibid*, 111.

⁷⁰ *Ibid*.

⁷¹ *Buckley v AG* [1950] IR 67 (SC).

⁷² Forde, note 48, 734.

⁷³ *Re Part V of the Planning and Development Bill 1999* [2000] IESC 20; [2000] 2 IR 321.

⁷⁴ *Ibid*, 354.

It also appears that property reallocations between individuals may be upheld, at least as part of a larger redistributive scheme. For instance, in *Shirley v A O’Gorman & Co Ltd*,⁷⁵ the claimant challenged legislative provisions that permitted qualified tenants to acquire their landlord’s freehold interest in the property at a fraction of the market value.⁷⁶ The legislative policy was based on social justice for disadvantaged tenants, rather than superior use. Since the tenant in *Shirley* was a successful company, the landlord argued that the forced sale at an undervalue did not advance any social objectives but rather infringed the landlord’s property rights. However, Peart J considered that it was sufficient that the scheme as a whole had a social justice objective, even if there were aberrant outcomes in particular cases.⁷⁷

Notwithstanding the foregoing, Forde notes that “[i]t has not been resolved whether the State is permitted to take property merely in order to give it to some other individual..., who the State believes will make better use of the property and where that taking is not part of some general scheme for redistribution”.⁷⁸ The issue was partly addressed in the High Court decision of *Clinton v An Bord Pleanála*,⁷⁹ where Finnegan P accepted that “compensation cannot validate an interference with property rights that is not justified by the exigencies of the common good”.⁸⁰ However, on the facts, he felt the common good was a matter to be determined by An Bord Pleanála, though it required some “pressing social need”.⁸¹ While stating that “[t]here must be a sufficient and proper public purpose for the acquisition...which purpose cannot be achieved by lesser means”,⁸² he upheld the compulsory purchase of the plaintiff’s land on the grounds that fair procedures had been followed. Unfortunately, the Supreme Court did not ultimately address the constitutional point on appeal.⁸³

Are financial orders on relationship breakdown State expropriations, and does it matter if they are? It might be contended that they are not, since the property at issue is not taken by the State for its own use, but rather transferred between private citizens for reasons of social justice. Nevertheless, the fact remains that the citizen is deprived of property at the behest of the State; the statutory financial provision schemes, by definition, do not operate on a voluntary basis. The judiciary is a branch of State power; it is applying measures enacted by the legislature (albeit in a discretionary manner); and there are State-enforced sanctions for failure to comply, in the form of criminal contempt proceedings. In this sense, therefore, all compulsory re-allocations of property between individuals are State expropriations. For instance, in *Re Part V of the Planning and Development Bill 1999*, one might argue that the social housing measures essentially entailed taking land from its owners and reallocating it

⁷⁵ *John E Shirley & Ors v A O’Gorman & Co Ltd* [2006] IEHC 27.

⁷⁶ The provisions were s 8 Ground Rents (No 2) Act 1978 and s 7(4) of the Landlord and Tenant (Amendment) Act 1984.

⁷⁷ On appeal, the Supreme Court held that the relevant statutory provisions could have been interpreted in such a way that the landlord was not obliged to sell the freehold interest at all. Hence, the landlord did not have *locus standi* to challenge the constitutionality of the provisions, and the Supreme Court did not deal with the constitutional issues raised. See *Shirley v A O’Gorman & Co Ltd* [2012] IESC 5.

⁷⁸ Forde, note 48, 736.

⁷⁹ *Clinton v An Bord Pleanála & Ors* [2005] IEHC 84.

⁸⁰ *Ibid.*, citing Hogan and Whyte, note 38, at para 7.7.88.

⁸¹ *Clinton v An Bord Pleanála & Ors* [2005] IEHC 84, citing Budd J in *An Blascaod Mór v Commissioners of Public Works (No. 3)* [1999] IESC 4; [2000] 1 IR 6.

⁸² *Ibid.*

⁸³ *Clinton v An Bord Pleanála & Ors* [2007] IESC 19.

to those deemed in greater need of it, albeit through a State intermediary. If the State intermediary were removed from the picture, and the re-allocation were made directly, would it still be a State expropriation? It is submitted that it would, and that the net effect is no different to financial provision on relationship breakdown, although the justification for the specific measures may differ (since financial provision on relationship breakdown may be compensatory as well as needs-based).⁸⁴

In fact, however, and in line with the Constitution itself, most of the cases raising constitutional property issues do not use the language of State expropriation. For instance, in *BUPA Ireland Ltd & Anor v Health Insurance Authority & Ors*,⁸⁵ health insurance companies new to the Irish market were required to make payments to the VHI, a semi-state insurer with an older client base, under a risk equalisation scheme. McKechnie J's judgment does not discuss whether this was a State expropriation as such,⁸⁶ but rather addresses it as a restriction or "infringement" of the plaintiff's property rights, which must be justified by reference to the common good.⁸⁷ Similarly, in *In Re Article 26 and the Employment Equality Bill 1996*, forcing employers to pay for accommodative measures for disabled workers was described as a "delimitation" of their property rights, rather than a State expropriation.⁸⁸ Again, the State was required to justify this, which it failed to do, as the Bill essentially re-allocated social costs to a particular social group in an impermissible way. Accordingly, even if provision orders on relationship breakdown are not State expropriations but simply re-allocations of property between individuals, 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. This interpretation accords with the language of Article 43 itself.

In determining whether delimitations of private property rights are justifiable, there is considerable deference for legislative views on social policy.⁸⁹ This is because, as Hanna J put it in *Pigs Marketing Board v Donnelly (Dublin) Ltd*,⁹⁰ what amounts to social justice involves "questions of ethics, morals, economics and sociology" which are "beyond the determination of a court of law", but may properly fall within the remit of the legislature.⁹¹ Walsh contends, *contra* Hogan,⁹² that the principle of proportionality has been applied in a way that "privileges the public interest", and that the courts tend to give only cursory scrutiny to the impact of statutory measures on personal rights, once there appears to be any rational link with a legitimate social objective.⁹³

⁸⁴ Although financial orders on the breakdown of a cohabiting relationship are conditional on financial dependency, the factors listed for judicial consideration with regard to whether an order is "just and equitable" include compensatory factors, such as domestic contributions and contributions to the resources and earning power of the other cohabitant: s 173(3) of the 2010 Act.

⁸⁵ *BUPA Ireland Ltd & Anor v Health Insurance Authority & Ors* [2006] IEHC 431.

⁸⁶ Arguably the semi-state nature of the transferee strengthens the case that it was a State expropriation, though McKechnie J's judgment does not address this point.

⁸⁷ *BUPA Ireland Ltd & Anor v Health Insurance Authority & Ors* [2006] IEHC 431 [237-247] (McKechnie J).

⁸⁸ *In Re Article 26 and the Employment Equality Bill 1996* [1997] IESC 118; [1997] 2 IR 321, 366.

⁸⁹ Walsh, "Proportionality", note 66, 11.

⁹⁰ *Pigs Marketing Board v Donnelly (Dublin) Ltd* [1939] IR 413 (HC).

⁹¹ *Ibid*, 418.

⁹² Gerard Hogan, "The Constitution, Property Rights and Proportionality" (1997) 32 IJ (ns) 396.

⁹³ Walsh, "Proportionality", note 66, 24. Indeed, Walsh goes so far as to argue that, under current law, the State may "transfer property to another private individual or entity simply by invoking an ill-

If this is correct, it is highly likely that financial provision orders would be deemed justified by considerations of need and fairness, and as a reasonable response to the pressing socio-economic concerns (outlined in the Introduction to this article) that arise on relationship breakdown.⁹⁴ This contention is supported by Article 41 in the marital context, as discussed above, but in fact the same policy considerations would still apply under Article 43, irrespective of Article 41's provisions. In that sense, the explicit mandate for proper provision on divorce contained in Article 41 is arguably unnecessary from the perspective of permitting a significant degree of financial redistribution in the marital breakdown context. The "proper" provision requirement might therefore be better regarded as a precondition for divorce (as discussed above) rather than as a permission for financial reallocation, though it certainly supports this as well.

If Article 43 is indeed sufficient in itself as a constitutional basis for financial provision measures, there is no reason to limit its application to marital breakdown only. Unlike Article 41, it may still apply on the breakdown of non-marital relationships, providing that the problem addressed by the relevant statutory measures is sufficiently pressing. The strongest caveat that might arise here concerns cohabitation: unlike marriage or civil partnership, where the parties have made mutual commitments that might justify some level of mutual financial readjustment on the breakdown of the relationship, cohabiting couples have made no such formal commitment, and may indeed have consciously wished to avoid doing so. Hence, the basis for making the parties each other's insurers is questionable.⁹⁵ Surprisingly, the Law Reform Commission did not address the issue of constitutional property rights in its proposal for financial provision measures on the breakdown of either civil partnership or cohabitation. However, cases such as *Shirley* suggest that individuals may be required to transfer property interests to others for social justice reasons, even if there is no personal moral or legal commitment to justify such liability. In addition, it must be noted that there is no requirement to make financial provision orders on the breakdown of cohabitation (in contrast to the imperative of making "proper" provision on the termination of marriage or civil partnership). On the contrary, the court is enjoined not to make any order unless justice requires it.⁹⁶ This suggests that

defined and indefinite public benefit such as 'regeneration' or 'development'": Rachael Walsh, "The Principles of Social Justice": The Compulsory Acquisition of Private Property for Redevelopment in the United States and Ireland" (2010) 32 DULJ 1.

⁹⁴ There are some caveats: for instance, it is clear that any expropriation provisions must be applied equally and cannot be directed against a particular class or group: *An Blascaod Mór Teo v Commissioners for Public Works (No 3)* [1999] IESC 4; [2000]1 IR 6. This suggests that any redistributive provisions must be gender neutral, as is also required by Article 40.1. This aspect is discussed further in the section on constitutional equality. Expropriation might also be invalid if the same objective could easily be achieved by other means (Forde, note 48, 737, considering the judgment of the European Court of Human Rights in *Sporrong v Lonröth* (1983) 5 EHRR 35). However, it is difficult to see how a family might otherwise be provided for other than by some form of redistributive mechanism, unless the entire burden is to be placed on the State. This would effectively require citizens to subsidise some families even where there was no lack of resources, which seems both unjust and impractical.

⁹⁵ This concern was recognised by the Law Reform Commission itself: Law Reform Commission, *Consultation Paper on the Rights and Duties of Cohabitees* (LRC CP 32-2004) 20-24.

⁹⁶ This caveat also applies to provision under the 1995 and 1996 Acts, and to the breakdown of civil partnerships under the 2010 Act, but only after a positive stipulation that "proper" provision must be made.

the likelihood of financial provision orders must be significantly lower on cohabitation breakdown than on marital or civil partnership breakdown. As such, the financial provision measures for former cohabitants may be upheld as proportionate, even without the support of Article 41 (in the marital context) or the legal and moral commitment made by the parties in either marriage or civil partnership.

Although there is as yet no case law on the breakdown of non-marital relationships in Ireland, decisions to date suggest that constitutional property rights would not bar redistributive mechanisms on marital breakdown, at least. In *TF v Ireland and the Attorney General and MF*,⁹⁷ the plaintiff alleged that the judicial power under the 1989 Act to confer sole occupation of the family home on one spouse breached the titleholder's constitutional property rights. Murphy J, in the High Court, held that the power to confer sole residence entitlements on one spouse could not be considered in isolation and must be viewed in the wider context of the Act. A right of residence conferred on one spouse might well be balanced by other orders, such as maintenance, in favour of the other spouse. He therefore concluded that the power to grant a sole right of residence "is in no sense an unjust attack on the property rights of either party", but was

*"merely one feature in the difficult and unhappy task of attempting to ensure that provision is made as far as practicable in the best interests of both spouses and their dependant children in the unhappy circumstances which have arisen and which will ordinarily create severe financial as well as emotional problems for them".*⁹⁸

This view was confirmed by the Supreme Court, although the Court's examination of the property issues in this case was disappointingly brief. Hamilton CJ emphasised that granting exclusive occupation to one spouse "does not in any way purport to deprive the excluded spouse of such rights of ownership as he or she may enjoy in the family home".⁹⁹ It also did not infringe a married couple's right jointly to determine the ownership of the matrimonial home, as stated in the Supreme Court's judgment in *Re the Matrimonial Home Bill 1993*.¹⁰⁰ Hamilton CJ also emphasised that the judicial powers "are not arbitrary" but must be exercised in accordance with the legislative requirements. Furthermore, the order could be varied or discharged in appropriate circumstances. Hamilton CJ therefore concluded that the residence provision was not an unjust attack on the individual spouse's property rights, but rather "an effort by the Oireachtas to protect so far as practicable the rights of the Family and members thereof".¹⁰¹

The significance of the Supreme Court's decision in *TF* is limited, for a number of reasons. First, only two aspects of the 1989 Act's scheme for financial provision were at issue. These were s 16(a) and s 19 of the 1989 Act, both of which related to the court's power to confer on one spouse a sole right of residence in the family home. Although the Supreme Court held that these provisions must be considered in the context of the broader statutory scheme for financial provision, it is important to

⁹⁷ *TF v. Ireland and the Attorney General and MF* [1995] 1 IR 321 (SC).

⁹⁸ *Ibid*, 345.

⁹⁹ *Ibid*, 380.

¹⁰⁰ *Re the Matrimonial Home Bill 1993* [1994] IESC 5; [1994] 1 IR 305.

¹⁰¹ *TF v Ireland and the Attorney General and MF* [1995] 1 IR 321 (SC), 381.

emphasise that the constitutionality of the broader scheme was not impugned or argued, and the Supreme Court did not make any explicit pronouncements on this issue.

Second, *TF* related to the 1989 Act, which applies a different overall standard for provision to the 1995 and 1996 Acts, and for civil partnerships under the 2010 Act. Under the 1989 Act, provision must be “adequate and reasonable” in the circumstances; under the 1995 and 1996 Acts, and for civil partnerships, it must be “proper”.¹⁰² It will be contended later in this article that these standards differ, and that the difference is significant. Therefore, even if the Supreme Court had held that the entirety of the 1989 scheme for financial provision was constitutional, the same would not automatically apply to the 1995 Act, or to civil partnerships under the 2010 Act.

Third, *TF* emphasised that granting a sole right of residence to the non-owning spouse did not actually deprive the home-owning spouse of ownership. This suggests that an actual deprivation of ownership (as commonly occurs under property adjustment orders, and not always on a reciprocal basis) might be viewed differently.

Fourth, the availability of blocking orders under the current legislation must also cast doubt on the weight attached by the court to the inconclusiveness of the orders. Blocking orders are a variety of provisions which can be utilised to prevent subsequent variation of particular ancillary property orders.¹⁰³ This suggests that the current judicial separation legislation is open to constitutional challenge. On the other hand, the Supreme Court also stressed in *TF* that the judicial powers under the statutory scheme were not arbitrary, and were for the benefit of the family as a whole. This might be sufficient to counteract the constitutional danger posed by the availability of blocking orders, at least in the context of divorce, given the explicit constitutional mandate for provision in that event: the situation under the 1995 and 2010 Acts must be considered more tenuous.

iii. The Constitution and Equality

Article 40.1 of the Constitution states that all citizens, “as human persons”, shall be equal before the law. However, the State may, in its enactments, “have due regard to differences of capacity, physical and moral, and of social function”. Article 40.1 was initially restrictively interpreted to relate only to “the essentials of human personality”,¹⁰⁴ and did not relate to the treatment of persons other than in their human capacity. However, Forde notes that the reference to “human persons” “may be intended not as a restriction on the scope of the guaranteed equality but, instead, as a statement of the reason why the Constitution guarantees equality”.¹⁰⁵ Hence, all human individuals should be treated equally in equivalent circumstances. This would

¹⁰² S 16(1) of the 1995 Act originally mandated the same standard as under the 1989 Act, i.e. provision was to be “adequate and reasonable”. However, this was amended by s 52(h) of the 1996 Act.

¹⁰³ Property adjustment orders, pension adjustment orders and applications for provision from the estate of a deceased spouse may all be barred from review: s 18(4) of the 1995 Act and s 22(4) of the 1996 Act. Similar orders are available on the breakdown of civil partnerships: s 131(5) of the 2010 Act.

¹⁰⁴ *Murphy v Attorney General* [1982] IR 241 (SC), 283 (O’Higgins CJ).

¹⁰⁵ Forde, note 48, 371.

prohibit invidious discrimination on grounds of race, colour or social background, among other grounds.¹⁰⁶

More problematic was the suggestion that the guarantee “refers to human beings for what they are in themselves rather than to any lawful activities... which they may engage in...”.¹⁰⁷ Hogan and Whyte comment that this “virtually emasculated the guarantee of equality”,¹⁰⁸ as it implied “that the essential attributes of human personality operate to determine the *context* in which the principle of equality applies, as opposed to identifying the presumptively impermissible *bases* of discrimination”.¹⁰⁹ This could have excluded all commercial activities from the guarantee, and therefore “seems to attribute to human personality an unrealistically small ambit”.¹¹⁰ However, they suggest that this approach has now been “implicitly abandoned”.¹¹¹

The Constitution also provides that men and women have an equal right to an adequate means of livelihood,¹¹² but neither this nor a further stipulation that citizens should “not be forced by economic necessity to enter avocations unsuited to their sex, age or strength”¹¹³ is judicially cognisable.¹¹⁴ There is no blanket constitutional proscription on sex discrimination;¹¹⁵ nevertheless, discriminatory common law rules for husbands and wives have been struck down on foot of the equality decree.¹¹⁶ However, only once has a provision of an Act of the Oireachtas been struck down for unconstitutional sex discrimination.¹¹⁷

Differences in treatment may be upheld where they are based on real differences in situation: in *De Búrca v Attorney General*, Walsh J emphasised that the State may have regard to legitimate differences, but cannot assume that women as a group have a particular social function. He commented:

“...it is not open to the State to discriminate in its enactments between the persons who are subject to its laws solely upon the ground of the sex of those persons. If a reference is to be made to the sex of a person, then the purpose of the law that makes

¹⁰⁶ *Quinn’s Supermarkets Ltd v Attorney General* [1972] IR 1 (SC), 14 (Walsh J).

¹⁰⁷ *Ibid*, 13-14 (Walsh J).

¹⁰⁸ Hogan and Whyte, note 38, para. 7.2.40.

¹⁰⁹ *Ibid*, para. 7.2.42.

¹¹⁰ *Ibid*, para. 7.2.43.

¹¹¹ *Ibid*, para. 7.2.48, discussing *Re Article 26 and the Employment Equality Bill 1996* [1997] IESC 6; [1997] 2 IR 321.

¹¹² Article 45.2.1°.

¹¹³ Article 45.4.2°.

¹¹⁴ Even so, in *Murtagh Properties v Cleary* [1972] IR 330 (HC), Kenny J held that Article 45.2 informed the meaning of Article 40.3, so that attempts to prevent an employer from employing both men and women on the ground of sex only were unconstitutional.

¹¹⁵ Limited prohibitions are included, for instance, in relation to nationality and citizenship: Article 9.1.3°.

¹¹⁶ For instance, the doctrine that a wife’s domicile depended on that of her husband was rejected in *W v W* [1993] 2 IR 476 (SC).

¹¹⁷ In *O’G v Attorney General* [1985] ILRM 61, widowers wishing to adopt a child were less favourably treated than widows, on the basis of an “idea of difference in capacity between men and women which has no foundation in fact” (*ibid*, 65 (McMahon J)).

such a discrimination should be to deal with some physical or moral capacity or social function that is related exclusively or very largely to that sex only".¹¹⁸

Do the constitutional equality provisions have any implications for the legislative mechanisms for financial provision on relationship breakdown? It might be argued that redistributive provisions of relationship breakdown legislation favour women, in practice if not in form. Men generally earn more than women and have a larger asset base,¹¹⁹ making them more likely to give than to receive, even where legislation (like the 1995, 1996 and 2010 Acts) is apparently gender neutral. Hence, such legislation might indirectly discriminate against men, though if so, the discriminatory effect might be justified on social policy grounds, and by the "special" role of the homemaking wife and mother within the constitutional family (in the case of divorce or judicial separation).¹²⁰ In fact, even directly discriminatory measures have been upheld in Irish law.¹²¹ In *Dennehy v Minister for Social Welfare*,¹²² a provision that granted benefits for deserted wives but not for deserted husbands was upheld on the basis that it was not unjust, unreasonable or arbitrary to exclude men from the benefits. This was because desertion by men was much more frequent than desertion by women, and homemaking mothers, who were engaged in childcare, were at a greater economic disadvantage in the labour market, and had greater financial needs, than their husbands. Similarly, in *Lowth v Minister for Social Welfare*,¹²³ it was held that there was ample justification for the Oireachtas to consider that deserted wives were generally in more need than deserted husbands. Whyte criticises this on the basis that the burden of proving gender discrimination by the State rests on the plaintiff in Ireland, while in the United States the onus lies on government to justify any gender-based classification. The standard of proof is also more onerous there, as "instead of merely having to show the existence of facts which could reasonably justify the discrimination, the State has to prove the existence of a relationship between the classification and an important interest of government".¹²⁴

These cases related to the provision of State benefits, and the reallocation of private resources between spouses or former civil partners might be treated differently. In *Re Employment Equality Bill 1996*,¹²⁵ the Supreme Court held that the cost of meeting a particular social need (in that case, providing "reasonable accommodation" for disabled workers) could not be imposed on a particular group (in that case, employers).¹²⁶ However, it is submitted that the relationship and mutual commitments of spouses and civil partners are very different to those of employers and employees,

¹¹⁸ *De Búrca v Attorney General* [1976] IR 38 (SC), 71.

¹¹⁹ See, e.g., Lucy-Ann Buckley, "Irish Matrimonial Property Division in Practice: A Case Study" (2007) 21 Int'l JL Pol & Fam 48, 57-62.

¹²⁰ The constitutional position regarding indirect discrimination, or disproportionate impact, is discussed below.

¹²¹ Direct and indirect discrimination theory, as understood in the labour law context, appears to differ from the approach in Irish constitutional law. For instance, direct discrimination seems to be justified by substantive equality considerations.

¹²² *Dennehy v Minister for Social Welfare* (HC, 26 July 1984).

¹²³ *Lowth v Minister for Social Welfare* [1998] IESC 1; [1998] 4 IR 321.

¹²⁴ Gerry Whyte, "Judicial Treatment of Social Welfare Issues", in Gerry Whyte, *Social Inclusion and the Legal System: Public Interest Law in Ireland* (Institute of Public Administration 2002) (hereafter "Whyte") 160.

¹²⁵ *Re Employment Equality Bill 1996* [1997] IESC 6; [1997] 2 IR 321.

¹²⁶ This was so even though the relevant provision allowed for consideration of the financial circumstances of the employer.

and it is therefore quite appropriate and reasonable to provide for inter-party financial provision on the breakdown of such relationships. As noted in the Introduction, the case for intervention in the cohabitational context is significantly weaker, so that an unequal gender impact might be harder to justify there. However, the 2010 Act's stipulation that the court must not make orders in favour of former cohabitants unless justice requires it, and the threshold requirement of financial dependency arising from the relationship or its breakdown, may overcome this difficulty.¹²⁷

It is unclear in any event whether disproportionate impact, or indirect discrimination, is covered in the constitutional equality guarantee. Forde argues that the aggregation of married couples' incomes for tax purposes, which was struck down in *Murphy v Attorney General*,¹²⁸ could have been construed as having a disproportionate and discriminatory effect on married women by discouraging them from working outside the home.¹²⁹ However, this was not the basis of the decision, which was instead based on the provision's discouragement of marriage. A "disproportionate impact" argument was rejected in *State (Nicolaou) v An Bord Uchtála*, where adoption provisions discriminating against unmarried fathers were upheld.¹³⁰ In *Draper v Attorney General*, electoral legislation with a disproportionate impact on a disabled woman, who was unable to vote in person and wished to vote by post, was upheld.¹³¹ The Supreme Court considered that the State was merely obliged to act reasonably in the provision of voting entitlements and that prohibiting postal voting was not unreasonable, given the potential for abuse. This suggests that any disproportionate gender impact of redistributive provisions would probably be justified by overriding social needs, if indeed the concept of disproportionate impact were to be recognised at all.

However, an alternative view of equality might *require* redistribution, in the interests of distributive or substantive justice. Distributive justice stresses the just distribution of social goods. Substantive justice emphasises the unequal effect of apparently neutral measures; it then "focuses on whether a group has been unjustly subordinated", and on "group and societal responsibility for inequality".¹³² Doyle comments that this

*"makes it possible to perceive the benefits which members of the dominant group collectively gain from the continuance of deep-seated patterns of social discrimination... [T]he substantive conception of equality sees itself as a response to forms of inequality and subordination that have historically been a problem in a particular society... [It] does not accept that the courts should be neutral as between competing groups in society".*¹³³

Women are a historically disadvantaged group within Irish society, and one might argue that it is a legitimate State aim to redress the effects of gender-based social and

¹²⁷ However, the fact that financial dependency is apparently merely a threshold criterion, rather than informing the substantive content of orders, may undermine this view.

¹²⁸ *Murphy v Attorney General* [1982] IR 241 (SC).

¹²⁹ Forde, note 48, 379.

¹³⁰ *State (Nicolaou) v An Bord Uchtála* [1966] IR 567 (SC).

¹³¹ *Draper v Attorney General* [1984] IR 277 (SC).

¹³² Doyle, *Constitutional Equality Law* (Thomson Round Hall 2004) (hereafter "Doyle") 19.

¹³³ *Ibid.*

economic roles. However, as Doyle also states, “Ireland is not renowned as an egalitarian society”, and the courts have tended to take a narrow, process-oriented view of equality.¹³⁴ He notes that two arguments have been made in the case law against the judicial enforcement of socio-economic rights, which would require distributive justice. These are “that judicial enforcement of distributive justice is undemocratic” (as judges are not elected and may be going against the wishes of the legislature) and that it is also “pragmatically unwise” (as judges have no special expertise in social matters).¹³⁵

Both arguments were utilised in *O’Reilly v Limerick Corporation*,¹³⁶ where Costello J rejected the claim of members of the Traveller Community that the State was constitutionally obliged to provide them with a halting site. Costello J held that it was beyond the judicial function to evaluate and adjudicate between the many competing claims for public resources, both because judges were unqualified for this and because such an intervention breached the constitutional separation of powers.¹³⁷ Six years later, in *O’Brien v Wicklow UDC*,¹³⁸ Costello J found (on similar facts) for the plaintiffs. While his decision there was based on s 13 of the Housing Act 1988, Costello J also conceded that his views had changed in the interim.¹³⁹ However, his decision in *O’Reilly* was approved by the majority of the Supreme Court in *Sinnott v Minister for Education*,¹⁴⁰ where a young autistic man claimed that the State’s failure to provide appropriately for his educational needs breached his educational rights under Article 42 of the Constitution. Finding against the plaintiff, Hardiman J emphasised (*obiter*) the separate functions of the legislature and the judiciary, and that decisions on the allocation of public resources fell within the remit of the legislature and executive.¹⁴¹ The separation of powers argument was again used in *TD v Minister for Education*,¹⁴² where the Supreme Court rejected the claim of a minor with behavioural problems that the State had failed to provide him with the special care facilities he required, again on the basis of the separation of powers. Keane CJ expressed “the gravest doubts” that the courts should recognise unenumerated socio-economic constitutional rights.¹⁴³ Even so, Doyle argues that the Constitution does not preclude the enforcement of socio-economic rights through judicial review – assuming, of course, that such rights are found to exist.¹⁴⁴ Similarly, Whyte contends that “judicial intervention on behalf of marginalised groups whose pressing needs are studiously ignored by the political process can be defended as both constitutionally and politically legitimate”.¹⁴⁵ However, in the wake of the Supreme Court decisions in *Sinnott* and *TD*, Whyte concedes that “the portents for public interest litigation targeting social exclusion in this jurisdiction are not good”.¹⁴⁶

¹³⁴ *Ibid.*, 20.

¹³⁵ *Ibid.*, 42.

¹³⁶ *O’Reilly v Limerick Corporation* [1989] ILRM 181 (HC).

¹³⁷ *O’Reilly v Limerick Corporation* [1989] ILRM 181, 195 (HC).

¹³⁸ *O’Brien v Wicklow UDC* (HC, 10 June 1994).

¹³⁹ *Ibid.*, 3-4.

¹⁴⁰ *Sinnott v Minister for Education* [2001] IESC 63; [2001] 2 IR 505.

¹⁴¹ *Ibid.*, 707-708.

¹⁴² *TD v Minister for Education* [2001] IESC 101; [2001] 4 IR 259.

¹⁴³ *Ibid.*, 282.

¹⁴⁴ Doyle, note 132, 44. Doyle notes that the “vast majority” of case law interpreting Article 40.1 is “wholly inconsistent with a substantive interpretation” of the Article, although the wording itself is not (*ibid.*, 230).

¹⁴⁵ Whyte, note 121, 57.

¹⁴⁶ *Ibid.*, 362.

The case law on this point all relates to claimants seeking to compel the State to benefit them, out of public resources. It is likely that similar reasoning would apply should an individual seek to compel the State to make provision out of private resources, even though this would not affect public revenue: in either case, the separation of powers would prevent judicial intervention. This however is not to say that the State could not itself determine to make such provision, and that such intervention could not be justified by the constitutional equality provisions. On the contrary, given the emphasis on the legislative prerogative in cases such as *Sinnott* and *TD*,¹⁴⁷ it seems highly probable that a positive exercise of legislative discretion might well be upheld provided that (unlike *Re Employment Equality Bill 1996*) there was sufficient justification for requiring provision to be made from private as opposed to public resources. Therefore, although it seems unlikely at present that constitutional equality arguments could be used to *compel* legislative measures for financial provision on relationship breakdown, they might well be used to *support* such measures. Gender equality theory might therefore supply at least a supplementary justification for provision on marital breakdown and the demise of heterosexual cohabiting relationships. However, gender equality theory could have no relevance to provision on the breakdown of civil partnerships or same-sex cohabitational relationships, since homemaking as such is not a recognised category of discrimination.

Part B: Recent developments in the LB litigation

The most recent insights into the constitutional aspects of “proper” provision on marital breakdown derive from the *LB* litigation.¹⁴⁸ In a series of cases, the plaintiff initially challenged the constitutionality of various statutory provisions, including those permitting financial orders on divorce. Having failed there, the plaintiff subsequently sought various declarations and damages in respect of the alleged wrongful expropriation of his property by the State by means of the financial and property orders made on divorce. Both cases, featuring detailed High Court judgments by MacMenamin J and Hogan J respectively,¹⁴⁹ shed new light on the basis for upholding the legislative provisions on “proper” provision on divorce. Although the decisions did not specifically apply to the making of “proper” provision on judicial separation, it is arguable that the same reasoning would apply in that context also, though not, for reasons that will be seen, to provision under the 2010 Act. However, even the application of the reasoning to the 1995 Act is not as straightforward as it might seem, since a number of additional factors might justify a different result in the separation context, and there are also considerations that partly undermine the authority of the *LB* decisions.

¹⁴⁷ This emphasis on the legislative prerogative has continued post-*TD*; for instance, in *F v Minister for Education* [2007] IEHC 36, Smyth J stressed that, save as a “last resort”, courts “should refrain from embarking” on “questions related to distributive justice”.

¹⁴⁸ *LB v Ireland* [2006] IEHC 275; [2008] 1 IR 134; and *LB v Ireland and the Attorney General and PB* [2012] IEHC 461; [2012] 11 JIC 0905.

¹⁴⁹ Hogan J noted in *LB v Ireland and the Attorney General and PB* [2012] IEHC 461 that the earlier decision of MacMenamin J in *LB v Ireland* [2006] IEHC 275 was affirmed by the Supreme Court in July 2009. However, no written copy of the Supreme Court’s judgment is available for analysis.

In the first case,¹⁵⁰ the plaintiff challenged (*inter alia*)¹⁵¹ the constitutionality of the court's power to make ancillary financial orders on divorce under the 1996 Act, alleging that the orders made breached his constitutional property rights under Article 43. Rejecting this contention, and in line with the arguments advanced in this article, MacMenamin J emphasised that rights could be regulated and limited for the common good, so long as such intervention was reasonable, proportionate and unoppressive.¹⁵² MacMenamin J also considered that the Supreme Court had implicitly held in *TF* that "any delimiting of personal rights as arose in the Act of 1989 were not oppressive and bore a reasonable and proportionate relationship between the benefit which the legislation would confer on family members on the one hand and the interference with the personal rights of the citizen on the other".¹⁵³ This, however, may be more doubtful than MacMenamin J appeared to assume, since (as noted above) only two very limited and specific sections of the 1989 Act's financial provision scheme were at issue in *TF*.¹⁵⁴ Furthermore (again as noted above), although the Supreme Court in *TF* stressed that the challenged sections must be considered in light of the broader statutory scheme, it did so from the perspective that the orders made did not actually deprive the home owner of ownership.

Of most significance is MacMenamin J's emphasis on the nature of marriage as a civil contract that creates reciprocal obligations between the spouses.¹⁵⁵ In this regard, MacMenamin J's conceptualization of the family built on that advanced in *T v. T*.¹⁵⁶ In that case, Murray J emphasised that marriage automatically entails spousal obligations and liabilities, and that even on divorce, spouses might legally be required to continue to respect those marital obligations designed "for their mutual protection and welfare".¹⁵⁷ This was because marriage was, "in principle, intended to be a lifetime commitment and... each spouse has fashioned his or her life on that premise".¹⁵⁸ Essentially this was a reliance argument, based on legitimate expectations: if spouses could renege on their marital obligations when they divorced, this would undermine marriage itself. It would also show "complete disregard" for the homemaker's role, since she would necessarily be the one to suffer most financially (a fairness and equality argument).¹⁵⁹ This was the reason for the constitutional requirement that "proper" provision be made prior to divorce.

In terms of spousal obligations, MacMenamin J noted that there was a long-established right of spousal maintenance at common law and in the ecclesiastical

¹⁵⁰ Although this was the first case to raise a constitutional challenge, the claimant in *LB* had previously been involved in three cases: a judicial separation and a divorce in the Circuit Court, and a High Court appeal in respect of the orders made on divorce.

¹⁵¹ The Plaintiff also challenged the constitutionality of the court's power to grant a judicial separation under the 1989 Act and the court's power to order maintenance under the 1976 Act, but these aspects are not relevant for this article.

¹⁵² *LB v Ireland* [2006] IEHC 275 [43] (MacMenamin J); [2008] 1 IR 134, 147, citing the judgment of Kenny J in *Ryan v the Attorney General* [1965] IR 294 (SC), 312-313.

¹⁵³ *Ibid.*

¹⁵⁴ S 16(a) and s 19 of the 1989 Act; see the discussion in *TF v Ireland* [1995] 1 IR 321 (SC), 380-381.

¹⁵⁵ *LB v Ireland* [2006] IEHC 275 [42] (MacMenamin J); [2008] 1 IR 134, 147, citing MacCarthy J in *N (otherwise K) v K* [1985] IR 733 (SC), which was also cited by Hamilton CJ in *TF v Ireland* [1995] 1 IR 321 (SC), 373.

¹⁵⁶ *T(D) v T(C)* [2002] IESC 68; [2002] 3 IR 334.

¹⁵⁷ *Ibid.*, 405.

¹⁵⁸ *Ibid.*

¹⁵⁹ *Ibid.*

courts. This was subsequently built on by legislation, including the 1989 Act, which granted more extensive powers of provision. Again placing particular reliance on *TF*, MacMenamin J concluded that “such orders were appropriate, proportionate and in accord with the provisions of the Constitution of Ireland on the institution of marriage itself and the rights of each family member”.¹⁶⁰ In this way, MacMenamin J used Article 41 to support proportionate delimitation of property rights.

In some respects MacMenamin J’s reasoning is problematic. The common law right of support was extremely limited, effectively being restricted to the provision of necessities, for which an estranged wife could pledge her husband’s credit.¹⁶¹ It certainly did not include any power to transfer property between spouses. Any historical justification for the extensive powers of provision under the current legislation must therefore be doubtful. Furthermore, as has previously been noted, a strict perusal of *TF* does not provide a “blanket” approval of the scheme of provision under the 1989 Act, though the general tone of the decision might be considered supportive.

MacMenamin J is of course on firmer ground when discussing the property aspects of divorce legislation, since the 1996 Act is supported by a constitutional imperative. It was therefore unsurprising that MacMenamin J concluded that the 1996 scheme was within the competence of the Oireachtas. MacMenamin J held that the 1996 provisions “must be seen... as having been made to provide for and to balance the interests of the family as a whole and the members of that family unit”.¹⁶² Relying on *T v T*, MacMenamin J noted that “proper” provision must be based on a consideration of all the circumstances of the case, including those factors highlighted in the legislation.¹⁶³ Accordingly, he concluded that “proper” provision under the 1996 Act was in fact “a recognition of the constitutional obligation which the Act of 1996 was passed to serve”, and was constitutionally mandated.¹⁶⁴

While this reasoning is unexceptionable, MacMenamin J continued to stress the significance of *TF*, holding that:

*“The provisions of the Act of 1996 with regard to financial relief are in harmony with the terms of the relief that may be granted by the court under the Act of 1989. Thus, insofar as the provisions of Act of 1989 are constitutional then, (unless some fundamental distinction in principle is shown) ipso facto, the Act of 1996 must also be constitutional in its provisions. No such distinction has been urged, identified or established herein”.*¹⁶⁵

Again, however, this is questionable. Although the 1989 scheme is similar to that of the 1996 Act, the standard for provision differs (so are the two really “in harmony”?)¹⁶⁶ Furthermore, as noted above, *TF* did not in fact hold that the entirety

¹⁶⁰ *LB v Ireland* [2006] IEHC 275 [46] (MacMenamin J); [2008] 1 IR 134, 148.

¹⁶¹ See, e.g., Nigel V. Lowe and Gillian Douglas, *Bromley’s Family Law* 10th edn (Butterworths 2006) 915-916 for an account of common law duties of financial support.

¹⁶² *Ibid.*, [50] (MacMenamin J); [2008] 1 IR 134, 149.

¹⁶³ *Ibid.*, [52] (MacMenamin J); [2008] 1 IR 134, 150.

¹⁶⁴ *Ibid.*, [52] (MacMenamin J); [2008] 1 IR 134, 151.

¹⁶⁵ *Ibid.*

¹⁶⁶ This issue is discussed further below.

of the 1989 scheme was constitutional. Finally, it must be noted that MacMenamin J was not pronouncing on the significance of any possible distinction between the two Acts, since no such distinction was argued.

Although MacMenamin J's decision was apparently affirmed by the Supreme Court, no written Supreme Court judgment is available;¹⁶⁷ nor was the Supreme Court's reasoning explained in the subsequent decision of Hogan J (discussed below). Accordingly, the issues identified in this analysis lack definitive clarification.

In the most recent *LB* litigation, the plaintiff essentially contended that the various ancillary relief orders made on the parties' judicial separation and divorce constituted an unlawful expropriation of his assets by the State. As MacMenamin J had done before him, Hogan J emphasised the comments of Murray J in *T v T* regarding the nature and obligations of marriage, and the view that a failure to uphold these obligations between divorced persons would undermine the institution of marriage.¹⁶⁸

Hogan J considered that the previous *LB* litigation had established that neither the 1989 nor the 1996 Act were unconstitutional insofar as they allowed courts to make proper provision on judicial separation or divorce;¹⁶⁹ such provision was not merely permitted but required, for the reasons identified by MacMenamin J. However, for reasons previously discussed, this is questionable to the extent that MacMenamin J relied on *TF* as authority for his views. Furthermore, even if MacMenamin J correctly held that financial provision under the 1989 Act was constitutional, due to *TF*, such an endorsement could not automatically be applied to the 1995 Act, given the change in the standard of provision in the that Act (as amended). For these reasons, it is worrying that Hogan J stated in passing that the previous litigation had entailed a challenge to s 12-21 of the 1995 Act.¹⁷⁰ This was presumably an error, since the 1995 Act was not at issue in the previous litigation. Nor, indeed, had the claimant contested the constitutionality of the equivalent provisions of the 1989 Act, so in fact MacMenamin J's comments on the constitutionality of that Act were effectively *obiter*.

These caveats aside, it was noteworthy that Hogan J's decision, like that of MacMenamin J, was essentially based on the commitments undertaken by spouses in marriage, and on the need to uphold the family, which justified the limitation of personal property rights.¹⁷¹ Indeed, Hogan J described the statutory provisions that permitted property to be transferred to P's wife as

“no more than giving effect to that which is inherent in the nature of marriage. Marriage, after all, involves mutual giving and sacrifice. In practical terms this means the sharing of outgoings, expenses and, in some respects, at least,

¹⁶⁷ In the second *LB* case, Hogan J states that the Supreme Court affirmed MacMenamin J's decision in July 2009, but does not provide further details of the Supreme Court's ruling. See *LB v Ireland and the Attorney General and PB* [2012] IEHC 461 [8] (Hogan J).

¹⁶⁸ *Ibid*, [10] (Hogan J).

¹⁶⁹ *Ibid*, [12] (Hogan J).

¹⁷⁰ *Ibid*, [7] (Hogan J).

¹⁷¹ Neither judge adverted to gender equality concerns (other than a glancing and gender-neutral reference to the need to protect the homemaker).

the capital assets of the parties".¹⁷²

Both judges therefore found that the justification for the delimitation of property rights in the marital breakdown context lay in the nature of the family itself rather than on the connected but distinct social policy objective of combating hardship and consequent social ills in the post-marital breakdown context. The basis for intervention therefore lay in Article 41 rather than Article 43, except insofar as upholding marital commitments can also be interpreted as an aspect of the common good and social justice under Article 43 also. It is striking that neither judge referred to the broader social policy justifications that might also support or have influenced the financial provision measures on divorce or judicial separation,¹⁷³ though perhaps both felt that this was unnecessary since Article 41 offered an appropriate basis for intervention in the particular case.

Hogan J distinguished between the automatic division of a couple's property in a particular way, and discretionary orders of the type permitted by the judicial separation and divorce legislation. The former was impermissible "without compelling reasons"¹⁷⁴ (following the decision in *Re the Matrimonial Home Bill 1993*),¹⁷⁵ as it constituted an interference with the autonomous decision-making of the family without reference to any circumstances that might make such a decision injurious or unfair. However, Hogan J considered that "different considerations would naturally obtain" where (as here) "one spouse had potentially failed to discharge his or her duties to the other".¹⁷⁶ This was no different to imposing maintenance obligations in respect of the other spouse or dependent children.¹⁷⁷ Of course, this depends on one's interpretation of spousal "duties", since the payment of needs-based maintenance is arguably different in kind to the conferral of a proprietary interest in the property of another based on marital contributions and like considerations.¹⁷⁸

Hogan J emphasised that support (and presumably, sharing) "obligations stem from the very nature of marriage and parenthood itself and without them marriage and child-rearing would be all but impossible".¹⁷⁹ Hence, the provisions permitting such provision actually upheld and safeguarded marriage, as constitutionally required by Article 41.3.1. Seen in this light (and contrary to the view advanced earlier in this

¹⁷² *LB v Ireland and the Attorney General and PB* [2012] IEHC 461 [13] (Hogan J).

¹⁷³ Dáil Debates reveal that the Matrimonial Home Bill 1993 was premised on concepts of marital partnership, but the policy behind the 1995 Act is less clear. No clear statement of purpose was made by the Minister for Equality and Law Reform, Mr Taylor, on introducing the Family Law Bill 1994 (later the 1995 Act) to the Dáil (Dáil Deb 23 February 1994, vol 439, col 613-614). However, the 1989 Act, the financial provisions of which were largely replicated by the 1995 Act, was clearly based on a desire to ameliorate the invidious position of separated spouses, particularly wives. For instance, Senator Manning noted at the Second Stage that "The basic purpose of this Bill is to minimise the hardship and distress that can occur when marriages break down... It confers new comprehensive powers on the courts to make financial lump sum and property transfer orders to provide additional protection, in particular for dependent wives and children, by enabling the court to give them a far greater degree of security than they can obtain at present" (Seanad Deb 1 March 1989, vol 122, col 326).

¹⁷⁴ *Ibid*, [14] (Hogan J).

¹⁷⁵ *Re the Matrimonial Home Bill 1993* [1994] IESC 5; [1994] 1 IR 305.

¹⁷⁶ *LB v Ireland and the Attorney General and PB* [2012] IEHC 461 [16] (Hogan J).

¹⁷⁷ *Ibid*, [17].

¹⁷⁸ This issue is beyond the scope of this paper.

¹⁷⁹ *Ibid*, [18] (Hogan J).

article), the legislation did not involve State expropriation of assets but rather “the intra-spousal transfer of capital assets”.¹⁸⁰ In this respect, the State was “doing no more than providing for an independent resolution mechanism (i.e., by means of the judicial system) of disputes between family members in respect of the extent of such proper financial provision”.¹⁸¹

Even if the making of “proper” provision did involve such expropriation, or to the extent that it did so, Hogan J held that this was “by definition not an unjustified interference with the property rights of the affected spouse for the purposes of Article 40.3.2 since this legislation is designed to give effect to fundamental values cherished by Article 41 and is, in any event, sanctioned by Article 41.3.2”.¹⁸² Again, this emphasises Hogan J’s view that the basis for intervention lies in Article 41 rather than Article 43. Hogan J also held that there was no need for the State to compensate the transferring spouse, since this “would mean that the State had assumed a responsibility in respect of the financial obligations which one spouse owes to the other”.¹⁸³ As well as noting that a compensatory obligation on the State would encourage spouses to default on their obligations towards other family members,¹⁸⁴ Hogan J also held that compensation by the State could not be payable since the State was not taking the plaintiff’s assets, but simply providing a mechanism whereby inter-spousal financial relations were adjusted appropriately.¹⁸⁵

In one respect, Hogan J’s decision may have been *obiter*, since he acknowledged that the issues raised were largely *res judicata* insofar as similar issues had already been adjudicated in the plaintiff’s previous High and Supreme Court proceedings.¹⁸⁶ Even so, his views are likely to be highly influential, particularly since both he and MacMenamin J have advanced a new constitutional justification for the reallocation of marital property in the marital breakdown context. It is therefore important to emphasise that the *LB* cases technically only address “proper” provision in the divorce context, since (as explained above) neither the 1989 nor the 1995 Acts were actually at issue in either case. It is of course possible to make a strong argument that equivalent reasoning should apply in the judicial separation context: after all, the obligations of the marital contract and the need to protect the family are the same, whether a couple are divorcing or merely obtaining a separation order. The problem faced in both contexts is also essentially the same: the need to provide for what will henceforth be two households instead of one, from the same asset base. The provision schemes under the 1995 and 1996 Acts are almost identical, allowing “proper” provision to be tailored to the relevant circumstances. Why then should the equal constitutionality of both Acts be in doubt?

The first important point is that, although (taken at face value) the *LB* judgments considered the 1989 provision scheme to be constitutional, they did not address the difference in the standards of provision between the 1989 and the 1995 Acts. As noted previously, the 1989 Act stipulates that financial provision on judicial separation must

¹⁸⁰ *Ibid.*, [18] (Hogan J).

¹⁸¹ *Ibid.*, [19] (Hogan J).

¹⁸² *Ibid.*, [18] (Hogan J). Of course, Article 41.3.2° applies to divorce only.

¹⁸³ *Ibid.*, [19] (Hogan J).

¹⁸⁴ *Ibid.*, [19] (Hogan J).

¹⁸⁵ *Ibid.*, [19] (Hogan J).

¹⁸⁶ *Ibid.*, [21] (Hogan J).

be “adequate and reasonable”, while the 1995 Act, as amended, requires that it must be “proper” in the circumstances (the same standard as for divorce). It must therefore be asked: do these standards differ, and if they do, does this matter?

The case law suggests that the term “proper” provision entails a consideration of overall fairness as between the parties. In *T v T*, Murphy J considered that the term “proper” provision and the statutory criteria adopted in the 1996 Act clearly meant that the provision to be made went “far beyond mere ‘needs’ and probably exceeds what is comprised in the alluring term of ‘reasonable requirements’”.¹⁸⁷ Similarly, Fennelly J considered that the term “proper” was equivalent to “appropriate”, and that it was “also synonymous with what is ‘fair’ or ‘just’”.¹⁸⁸ The meaning of “adequate and reasonable” provision has not been similarly expounded, but may be assumed to intimate a somewhat lower, perhaps more needs-based standard (though it should be noted that the factors for consideration by the court are largely the same under the 1989, 1995 and 1996 Acts). More recently, the Supreme Court has defined “proper” provision as being “reasonable in all the circumstances”.¹⁸⁹ This suggests a narrower approach than the previous emphasis on fairness and justice, though it should be noted that the Court did not advocate or refer to mere “adequacy”. It is suggested here that “adequate and reasonable” provision must necessarily differ from provision that is “proper”, if only because there would otherwise have been no reason to amend the 1995 Act.¹⁹⁰

The distinction matters because a judicial separation is not in fact a divorce, and provision in this context is therefore not explicitly constitutionally mandated. Although the *LB* litigation confirms that “proper” provision is constitutional under the 1996 Act, there is no clear authority that it is constitutional on judicial separation. While it might be contended that the lengthy waiting period for divorce makes it reasonable to apply the ultimate standard for provision at an earlier date,¹⁹¹ it might equally well be argued that a lower standard of provision is appropriate where the marriage still technically subsists. After all, reconciliation may still be possible (if unlikely), and it may therefore be inappropriate to make “final” orders at the separation stage. Furthermore, there is likely to be a lengthy period of adjustment, during which the parties’ needs may remain fluid. In this sense, the lengthy waiting period for divorce may be both advantageous and disadvantageous – advantageous in permitting a realistic evaluation of the parties’ future needs before making final provision, but disadvantageous in making them wait so long for that provision. All of this weakens the degree of intervention that might be supported by Article 41 on judicial separation.

It might be contended that the Constitution merely gives “proper” provision as a necessary precondition for divorce, without however specifying how long previously that provision may be made. Article 41.3.2.iii states that the court must be satisfied

¹⁸⁷ *T(D) v T(C)* [2002] IESC 68; [2002] 3 IR 334, 399.

¹⁸⁸ *Ibid.*, 413.

¹⁸⁹ *G v G* [2011] IESC 40 [25] (Denham CJ).

¹⁹⁰ There is no explanatory memorandum for the change, which was made in s 52(h) of the 1996 Act; nor was the change discussed in the Dáil prior to enactment.

¹⁹¹ Spouses must have lived apart for four of the five years preceding an application of divorce (s 5(1)(a) of the 1996 Act), but only for one year prior to a consensual judicial separation (s 2(1)(d) of the 1989 Act).

that “proper” provision “exists or will be made”; why, then, should not that provision be made some years previously, on judicial separation? Viewed this way, “proper” provision on judicial separation may be implicitly constitutionally sanctioned. This, however, seems unlikely. For instance, one can easily envisage a couple with religious scruples that prohibit divorce, who nevertheless wish to avail of judicial separation. Is “proper” provision constitutional in this context? It is suggested that it must be questionable, at least, since the “implied mandate” argument does not provide a stand-alone sanction for provision on judicial separation. The “implied mandate” argument is further attenuated by the fact that the 1996 Act does not require the terms of a judicial separation order to be considered in making “proper” provision on divorce, though it does specify that the terms of a valid and subsisting separation agreement must be considered.¹⁹² While the courts in practice can and do take such prior orders into account,¹⁹³ the fact that there is no legislative requirement to do so undermines any implicit extension of the ambit of Article 41.3.2.iii to the judicial separation stage.¹⁹⁴

Overall, therefore, the potential distinctions between the divorce and judicial separation contexts weaken the utility of Article 41 as the sole or primary constitutional basis for financial orders under the 1995 Act. It is submitted that the strongest argument in favour of proper provision on judicial separation is that it is a proportionate intervention in an important and pressing issue of social concern. Marital breakdown is both common and linked to issues of poverty and social justice. Consequently, legislative intervention is both appropriate and necessary, irrespective of whether the marriage is finally being dissolved. Although this article has emphasised how Article 41 may support the necessary redistributive measures, both in terms of policy and as a mandate for distribution on divorce, it has also argued that Article 41 is not in fact essential to permit such measures since Article 43 already permits such intervention. Further constitutional support for the financial provision measures of both the 1995 and 1996 Acts may derive from the equality provisions, though again these aspects are best regarded as supplementary only, since they have only limited application to financial provision under the 2010 Act.

Financial provision under the 2010 Act in the wake of the LB litigation

If there is doubt as to whether the *LB* reasoning would apply to judicial separation, what of civil partnerships and cohabitational relationships? A discretionary system of provision applies also on the breakdown of these relationships; indeed, the legislative provisions for financial orders on the termination of civil partnership are virtually identical to the provisions of the 1995 and 1996 Acts. The “proper” provision standard applies also on the breakdown of civil partnerships, though not to the end of cohabitation; this distinction is presumably based on the “marriage-like” status of civil partnerships, as compared with the lack of legal commitment of cohabitants. As noted in the Introduction to this article, many of the same problems may arise on the

¹⁹² S 20(3) of the 1996 Act.

¹⁹³ See, eg, *RG v CG* [2005] IEHC 202. In the Supreme Court decision of *SN v PO'D* [2009] IESC 61, Fennelly J seemed to treat a consent judicial separation as if it were a separation agreement, in terms of the statutory obligation to “have regard” to the terms of the settlement.

¹⁹⁴ Naturally, an “implicit extension” justification for “proper” provision could not apply in relation to the breakdown of a civil partnership; still less could it justify provision on the breakdown of a cohabitational relationship.

breakdown of both non-marital and marital relationships. Civil partnership (if not cohabitation) may be just as premised on expectations of mutual support as marriage itself; both civil partnership and cohabitation, like marriage, may entail personal and financial self-sacrifice by either partner.

Notwithstanding the close similarities, it seems clear that, to the extent that the *LB* decisions relied on Article 41 and the need to support the institution of marriage, the reasoning could not apply to non-marital relationships. Therefore, assuming that the constitutional interpretation of the “family” remains unchanged, Article 41 cannot support redistributive measures under the 2010 Act, and the constitutional basis of that Act, if it exists, must lie elsewhere. This, of course, is entirely possible, though it would seem logical that the very similar measures in each Act should have similar justifications. Since Article 41 cannot apply to non-marital relationships, and gender equality arguments cannot apply to same-sex relationships, it is contended that the only constitutional basis that offers equal potential for upholding financial provision measures under the 1995, 1996 and 2010 Acts is the delimitation of property rights to meet a pressing social concern, under Article 43. It is therefore a matter of concern that this aspect was not addressed in the *LB* judgments.

Conclusion

The *LB* decisions provide a clear constitutional rationale for upholding very necessary provisions, at least in the marital breakdown context. Although the reasoning in both cases is flawed in some respects, the two High Court decisions confirm a new basis for upholding financial provision on marital breakdown, previously hinted at in *TF* and *T v T*. The judgments confirm that constitutional property rights are qualified in the interests of the family and society, albeit due to Article 41 rather than Article 43. This is certainly a viable basis for grounding the 1996 Act, and it may also be upheld in relation to the 1995 Act. However, due to the distinctions that may be drawn between judicial separation and divorce, it would have been useful if the judgments had placed a greater emphasis on social policy justifications for delimiting property rights under Article 43, as well as using Article 41 to support the redistributive mechanisms. This would also have permitted the reasoning to be extended to financial provision on the breakdown of civil partnership and cohabitation. As it stands, however, financial provision under the 2010 Act still lacks a clear constitutional basis.

There are good grounds of both policy and logic for extending the core reasoning in the *LB* cases to financial provision under the 1995 Act. However, since the judgments do not deal explicitly with that Act, a further constitutional lacuna remains. The gap cannot be filled simply by extending the deemed constitutionality of the 1989 Act to the 1995 Act, since (even if MacMenamin J’s interpretation of *TF* is correct) the standard applied in both Acts is not the same. The constitutional void is a cause for concern because there are significant differences between judicial separation and divorce, which might be held to justify the application of a different standard in each context. Overall, while the extension of the reasoning in the *LB* decisions to encompass the 1995 Act seems probable as well as desirable, the matter remains as yet unresolved.