THE PROPORTIONALITY TEST: PRESENT PROBLEMS

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I. INTRODUCTION

Making decisions about what the Constitution means is serious business. Indeed, it is such serious business that, notwithstanding a relatively clear power of judicial review recited on the face of the Constitution, our courts have, on occasion, stressed their circumspect role in second guessing decisions made by political institutions on particular kinds of constitutional questions. The idea here is quite simple. Both political institutions (*i.e.* the Oireachtas) and judicial institutions (*i.e.* the courts) make decisions about constitutional meaning. The battle in constitutional theory has long been fought over which of these institutions should be afforded the most power in relation to such decisions.[1] Should the courts have an entirely free hand in second guessing decisions made by the legislature where matters of fundamental rights are concerned? Or, alternatively, should the courts perhaps mark out particular areas where higher standards are required before a legislative judgment on, perhaps, "the exigencies of the common good" should be condemned?

In short, it is far too unsophisticated – both as a matter of theory, and as a matter of Irish constitutional law – to equate the Constitution immediately and inexorably with the "Constitution-in-the-courts". The court is not the only decision-maker when it comes to the Constitution and, it is submitted, our courts have rarely acted as if they are. Rather, Irish courts have routinely recognised their heavily circumspect and cautious role when it

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[1] For a more detailed account see Foley, "Diceyan Ghosts – Deference, Rights, Policy and Spatial Distinctions", (2006) 28 D.U.L.J. 77; Foley, "Presuming the Legislature Acts Constitutionally: Legislative Process and Constitutional Decision-Making", (2007) 29 D.U.L.J. 141.

comes to evaluating *legislative* decisions about what the Constitution means.[2]

In the past, concerns about the judicial role in exercising the power of judicial review tended to be vented via extreme conclusions that certain constitutional guarantees or certain types of constitutional questions were non-justiciable. Thus, the "fight", if you will, was over the relatively extreme question of whether relatively large fields of the constitutional ground should be tilled by the legislature alone. Obviously, the notion of large-scale exclusions of the judicial power tended to give way over the years as the idea of judicial supremacy became part and parcel of Irish constitutionalism.[3] The question, however, of the appropriate relationship between political and judicial institutions in respect of constitutional decision-making did not go away. The context of the question simply shifted. No longer could fears of judicial review find voice in the extreme language of decisions like *Pigs Marketing v. Donnelly*,[4] *Attorney General v. Southern Industrial Trust*[5] or *Re Article 26 and the Offences Against the State (Amendment) Bill, 1940*.[6] Rather, those fears had to be voiced within the now accepted paradigm of a *prima facie* legitimate power of judicial review. Thus, the question drifted towards the issue of the appropriate intensity of judicial review or, in more precise terms, the role of deference in judicial review. A particular flash-point in this new context has proven to be the proportionality test, adopted from Canadian law by Costello P. in *Heaney v. Ireland*.[7]

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[2] See *e.g. McDonald v. Bord na gCon (No.2)* [1965] I.R. 217, at 235; *Ryan v. The Attorney General* [1965] I.R. 294, at 312-313; *Colgan v. The Independent Radio and Television* [2000] 2 I.R. 490, at 513; *Re Article 26 and Section 5 and Section 10 of the Illegal Immigrants (Trafficking) Bill, 1999* [2000] 2 I.R. 260, at 393.

[3] See *e.g. The People (Attorney General) v. O'Callaghan* [1966] I.R. 501; *Buckley v. The Attorney General* [1950] I.R. 67; *O'Donovan v. The Attorney General* [1961] I.R. 114.

[4] [1939] I.R. 413.

[5] (1964) 94 I.L.T.R. 161.

[6] [1940] I.R. 470. The Canadian test from which *Heaney* was derived was set out in *R v. Oakes* [1986] 1 S.C.R. 103.

[7] [1994] 3 I.R. 593.

This article proposes that Irish courts have struggled in the face of proportionality review to work out the appropriate boundaries of legislative and judicial power in respect of the Constitution. The purpose, of course, is not just to offer descriptive analysis of the case-law. Hopefully, this article might assist in understanding the often under-appreciated relationship between differing conceptions of proportionality analysis and fundamentally important issues of the separation of powers. In light of this then, it can be seen that a clear and principled approach to proportionality review is a pressing requirement and, indeed, long overdue.

II. PROPORTIONALITY AND DEFERENCE

As noted above, the role of deference in judicial review of legislation has come to the fore in relation to the judicial application of the *Heaney v. Ireland* proportionality test.[8] In this respect Ireland is not alone. The Canadian Supreme Court, from whence the *Heaney* test came, has spent the better part of a decade debating (and, indeed, splitting over) the appropriate role for proportionality review in a modern constitutional democracy. But what is it about proportionality that breeds such debate? At the heart of proportionality review is the notion that the means chosen to pursue a legitimate legislative objective must "… impair the right as little as possible".[9] This can be applied in a manner which offers serious potential for second-guessing legislative or executive decision-making.[10]

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[8] [1994] 3 I.R. 593.

[9] It may be noted, however, that in relation to equality jurisprudence, the focus may be on other aspects of the well-known *Heaney* formulation discussed below. See *e.g. S.M. v. Ireland* [2007] I.E.H.C. 280.

[10] A clear judicial exposition of this can be found in *R v. Edwards Books and Art* [1986] 2 S.C.R. 713 where Dickson C.J. (who penned the test in *R v. Oakes* [1986] 1 S.C.R. 103) argued strongly against the Paretian reading. The case concerned Sunday closing laws which contained partial exemptions for retailers of the Jewish faith. However, not all Jewish retailers were exempt, only those with establishments below a particular size. In an attempt to rely on the Paretian reading of *Oakes* it was contended the exemptions were unduly narrow and that they did not restrict the free exercise of religion in the least violent way possible whilst remaining consistent with the legislative

Assume that the legislative objective "O" may be achieved in two ways – by measure 1 "M_1" and measure 2 "M_2". Achieving O by any measure will involve the infringement of a right, which can be represented as "R". However, as between M_1 and M_2 it is M_2 which, whereas remaining consistent with O, restricts R to a lesser extent than M_1. The legislature, however favour M_1 as the best means of achieving O. Therefore, the legislature believes that it is constitutionally permissible for M_1 to be used. The minimum restriction test allows the court to reject this interpretation and hold that M_2 should have been employed.[11] Failing to use M_2 means that the legislation is unconstitutional.

This has been called the "Paretian" reading of *R v. Oakes*[12] due to its close relationship with economic theories of Pareto-optimality.[13] Pareto-optimality amounts to the idea that goals which entail costs are best pursued in a way which secures the maximum benefit at the minimum cost. The goal in this case is the legislative objective. The cost is the restriction of the right at hand. The Paretian approach to proportionality requires that the goal be pursued with the least possible cost. When applied in the Paretian sense the minimum restriction test absolutely eliminates the idea of upholding the legislative choice of means as "reasonable" or "rational". The legislature *must* choose the least restrictive means. There is *nothing* to say that the test *has* to be

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objective. Dickson C.J. argued however, that the choice between different types of exemption was a "legislative choice" and that he would not "second guess" issues of legislative policy decision (para. 183).

[11] Alexy, *A Theory of Constitutional Rights*, (Rivers trans., Oxford; New York: Oxford University Press, 2002), pp. 44-110**.** See also, Alexy, "On Balancing and Subsumption – A Structural Comparison", (2003) 16 *Ratio Juris* 433. *Cf.* Habermas, *Between Facts and Norms* (Rehg trans., Cambridge, Massachusetts: MIT Press, 1996), pp. 256-259. See generally Greer, "'Balancing' And the European Court of Human Rights: A Contribution to the Habermas-Alexy Debate", (2004) 63 C.L.J. 412.

[12] [1986] 1 S.C.R. 103.

[13] See Newman, "The Limitation of Rights: A Comparative Evolution and Ideology of the *Oakes* and *Sparrow* Tests", (1999) 62 *Saskatchewan Law Review* 543, p. 574. See also Beatty, "The End of Law: At Least As We Have Known It" in Devlin, (ed.), *Canadian Perspectives on Legal Theory* (Toronto, Emond Montgomery, 1991), pp.391-394. See also, Calabresi and Melamed "Property Rules, Liability Rules and Inalienability: One View of the Cathedral", (1972) 85 Harv. L. Rev. 1089.

read in this way. Rather, it is simply the potential to read it in this way which is interesting because some courts in Ireland seem to have done just this. On the other hand some courts have reacted quite vocally against this kind of review at all. Indeed, one struggles, however, to find a body of case-law with such comparable inconsistencies and differing trajectories as Irish proportionality jurisprudence.

III. INCONSISTENCIES IN PROPORTIONALITY

A. From Cox to Tuohy

Cox v. Ireland[14] is generally taken as being the beginning of the modern use of proportionality in Ireland.[15] That case, it may be said, is taken as "concretising" the *idea* that legislation may be reviewed on the basis that it is overbroad in pursuit of a legitimate purpose – *i.e.* the notion discussed above that if legislation trespasses onto constitutional ground it must do so as little as possible. In *Cox* itself the Supreme Court struck down provisions of the Offences Against the State Act, 1939 as being, essentially, a disproportionate violation on *inter alia* the plaintiff's property rights and right to earn a livelihood.[16]

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[14] [1992] 2 I.R. 503.

[15] See *e.g.* Hamilton CJ in *Rock v. Ireland* [1997] 3 I.R. 484, at 500 and Costello P. in *Heaney v. Ireland* [1994] 3 I.R. 593, at 607 and *McCann v. The Minister for Education* [1997] 1 I.L.R.M. 1, at 10-11. See also Hogan and Whyte, *J.M. Kelly: The Irish Constitution*, 4th ed., (Dublin: Butterworths, 2003), p. 1271. However, similar means-end review existed in various forms for many years before *Cox.* See *e.g. Quinn's Supermarket v. The Attorney General* [1972] I.R. 1 and *The State (M) v. The Minister for Foreign Affairs* [1979] I.R. 73. Forms of it had been considered in relation to executive review in *Hand v. Dublin Corporation* [1991] 1 I.R. 409 and *Fajujonu v. The Minister for Justice* [1990] 2 I.R. 151. It is perhaps for this reason that Hogan and Whyte, *J.M. Kelly: The Irish Constitution*, 4th ed., (Dublin: Butterworths, 2003), p. 1270 refer to *Cox* as an example of how "… the hitherto inchoate doctrine of proportionality began to take on a more definite shape".

[16] To put it briefly, the provisions under challenge provided that a conviction in the Special Criminal Court of certain offences carried a seven year "ban" from State employment and the loss of all pension entitlements accrued before the date of conviction (assuming of course, they were accrued from public sources). The essence of the argument seems to have been that whereas the

However, it is not really possible to know whether the application of this kind of review was non-deferential or not. On the one hand, the decision seems to offer the view that the legislature must pursue its objectives with exactitude. On the other hand, perhaps the court may have believed that whereas the legislature should be entitled to a measure of discretion in choosing between alternatives, this particular choice was simply "irrational" or "unreasonable". What is relevant, however, is that *Cox* may have put the *idea* of a potentially intrusive form of means-end scrutiny squarely on the table.

Unsurprisingly then, counsel in *Re Article 26 and the Matrimonial Homes Bill, 1993*[17] argued that "the court has power to strike down legislation which goes further than reasonably necessary to secure aims which may themselves be legitimate".[18] However, Finlay C.J. only replied in argument that "[i]t is not for the Courts to take over the policy making powers of the Oireachtas".[19] So, counsel put the very idea of *Cox* means-end review before the Court, and Finlay C.J. (if not the court[20]) responded negatively by equating the idea of judicial review of legislative choice of means with an undue interference into the realm of policy.[21]

State is entitled to provide for onerous penalties to combat subversive crime, the provisions under challenge could overreach that legitimate goal and attach severe penalties for relatively trivial offences. For the sake of completeness, it should be noted that an Article 40.1 argument seems to have been made, but not considered by the Supreme Court.

[17] [1994] 1 I.R. 305.

[18] [1994] 1 I.R. 305, at 308. So, whereas the common good may be served by policies aiming at equality within marriage, this "service" of the common good was "… contradicted by the procedures [the Bill] establish[ed]", [1994] 1 I.R. 305, at 308-309.

[19] [1994] 1 I.R. 305, at 309. A decision pursuant to an Article 26 reference must be a single decision and it must be a decision of the court. Finlay C.J. made this remark only in argument which preceded judgment and which is abstracted in the report at 308-312.

[20] The Court actually struck down the legislation under challenge as, in the words of Hogan & Whyte, "… a disproportionate interference by the State with the rights of the married family"; *J.M. Kelly: The Irish Constitution*, (4th ed., Dublin, Butterworths, 2003), p. 1272.

[21] This, it may be recalled, is *precisely* the kind of argument which Marshall J.A. relied on in *Newfoundland (Treasury Board) v. Newfoundland Association of Public Employees* 221 D.L.R. (4th) 513, [2002] N.L.C.A. 72. In that case,

More interesting, however, is that the Supreme Court in *Tuohy v. Courtney*[22] introduced a relatively deferential standard of review without any express mention of *Cox:*

> The Court is satisfied that in a challenge to the constitutional validity of any statute in the enactment of which the Oireachtas has been engaged in such a balancing function, the role of the courts is not to impose their view of the correct or desirable balance in substitution for the view of the legislature as displayed in their legislation but rather to determine from an objective stance whether the balance contained in the impugned legislation is *so contrary to reason and fairness* as to constitute an unjust attack on some individual's constitutional rights.[23]

In the context of the case, which concerned the constitutionality of aspects of the Statute of Limitations 1957 Hamilton C.J. went on to point out that: "[w]hat this Court must do is to ascertain whether the extent and nature of such hardship is *so undue and so unreasonable* having regard to the proper

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Marshall J.A. seemed to argue that a mode of constitutional review which encompasses the policy choices of the legislature was contrary to the separation of powers. He even argued that the least restrictive means test of *Oakes* was wholly unconstitutional. Marshall J.A. even argued that enquiring into the rationality of the connection between means and end was illegitimate as it involved the review of a legislative policy decision. In a unanimous decision, the Supreme Court utterly rejected this approach. See *Newfoundland (Treasury Board) v. Newfoundland Association of Public Employees* [2004] 3 S.C.R. 381, [2004] S.C.C. 66. Costello J. made something of a similar argument when counsel in *The Attorney General v. Paperlink* [1984] I.L.R.M. 373 contended that if the State monopoly on post delivery was organised differently then it would be less restrictive of the right to earn a livelihood, but would still serve the objectives of its parent legislation. However, he held that the monopoly did in fact restrict the right to earn a livelihood. Costello J. would not allow the plaintiffs to argue that this restriction was illegitimate under what was effectively a proportionality test. He said that "… this court is not the forum in which to decide whether a postal service organised on lines advocated by the defendant's experts is one which meets the requirements of the common good. These are matters for the Oireachtas to determine".

[22] [1994] 3 I.R. 1.

[23] [1994] 3 I.R. 1, at 47 (emphasis added).

objectives of the legislation as to make it constitutionally flawed".[24]

Although the word "deference" is not mentioned, the *Tuohy* decision became the standard by which later courts "water-down" the potential for non-deferential application of the proportionality test.[25] That is to say that the courts *specifically* cite *Tuohy* as a reason to apply proportionality in a relatively deferential manner. Again, I am not saying that *Cox* required one to reject deference. I am simply pointing out that read in a certain way (*i.e.* by focusing on how the Court seemed to refer to the notion of the least restrictive alternative) it had the potential to limit legislative discretion in the choice of means in a very significant way. What is interesting, however, is just how, in such a short space of time, the Supreme Court in *Cox* formulates what seems to be a forerunner to the *Heaney* proportionality test, but then, without explanation as to why, seemingly "pulls back" to introduce a general standard of deference, wherever legislation can be viewed as effecting a balance between rights and competing interests. There is no attempt, whatsoever, made to discuss the potential effect of the ruling in *Tuohy* on the conclusion in *Cox* nor, it seemed, was there even a recognition that the *Tuohy* conclusion seemed to propose an alternative standard of review.

B. Heaney and Onwards

The modern formulation of the proportionality test can be found in Costello P.'s judgment in *Heaney v. Ireland* [26] where he adopted what is, effectively, the *R v. Oakes* test of Charter-compatibility applied in Canada.[27]

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[24] [1994] 3 I.R. 1, at 48 (emphasis added).

[25] Indeed, for an express judicial association between the *Tuohy* standard and deference see the decision of Kearns J. in *King v. The Minister for the Environment* [2004] 3 I.R. 345.

[26] [1994] 3 I.R. 593. It may be noted that the Supreme Court decision on appeal is reported at [1996] 1 I.R. 580, but whereas it spoke of a "proportionate" limitation on the right to silence, it did not cite or approve the more forensic test adopted by Costello P. That said, and whereas later cases do, on occasion, refer to the more general requirement of "proportionality" in the Supreme Court judgment, the dominant view is that Costello P.'s is the appropriate test.

[27] *R v. Oakes* [1986] 1 S.C.R. 103. Costello J., however, cites *Chaulk v. R* [1990] 3 S.C.R. 1303 as authority for the test.

> The objective of the impugned provision must be of sufficient importance to warrant overriding a constitutionally protected right. It must relate to concerns pressing and substantial in a free and democratic society. The means chosen must pass a proportionality test. They must:—
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> > (a) be rationally connected to the objective and not be arbitrary, unfair or based on irrational considerations;
> > (b) impair the right as little as possible, and
> > (c) be such that their effects on rights are proportional to the objective…[28]

Of course, this test can be applied both deferentially and non-deferentially. That is a given. However, what is particularly relevant is part (b) which we may refer to as the least restrictive alternative test which is an *addition* to the rationality test of part (a). Thus, at the very least, the *Heaney* test suggests that something *more* than a rational connection between means and end is required, and leaves open the possibility of arguing how deferentially the court should approach this question. Thus, as noted above, a court must decide *how* to apply the least restrictive alternative test. This can be done relatively deferentially by allowing the legislature to choose between a *range* of reasonably alternative measures, or very non-deferentially, through requiring the legislature to adopt what is actually the least restrictive means possible for limiting the right at hand – *i.e.* the Paretian reading.

My argument is that in the case-law which follows *Heaney*, the courts continue to shift between standards of review without really explaining why their choices (which, of course, reflect choices about deference) are justified *or*, in the worst cases, without recognising that different cases have made different choices.[29] Thus, the argument is not simply that are courts are

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[28] [1994] 3 I.R. 593, at 607.

[29] Or as Doyle puts it in a different context: "the courts seldom advert to differences between the standard of review which they articulate and standards

inconsistent in their application of the proportionality test but rather that this inconsistency reflects deeper – and hitherto unexplained – choices about deference and the appropriate role of the courts vis-à-vis the legislature in matters of constitutional importance. Thus, for example, where a court, without explaining why, ignores the least restrictive alternative test in favour of citing the *Tuohy* standard, it says something very serious about the separation of powers, and that is something which we should see explained in far more detail than in the case law. Of course, everything that follows depends on accepting one premise – that choosing between *Tuohy* and *Heaney* standards or cross-applying *Tuohy* into *Heaney* says something about how the court thinks about deference, but I think that is a reasonable premise.[30]

C. Dominance of Tuohy over Heaney?

In cases decided after *Heaney*, the Supreme Court continued to apply *Tuohy* as the relevant standard of review without considering (at least expressly) whether *Heaney* may have suggested "another way".[31] At the same time, however, it seems that lawyers were aware of the possibility of making proportionality-esque arguments, and argued in both *Re Article 26 and the Regulation of Information (Services Outside the State for*

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articulated in other cases". Doyle, *Constitutional Equality Law*, (Dublin: Thompson Round Hall, 2004), p. 105.

[30] For express judicial support of this premise, see *King v. The Minister for the Environment* [2004] 3 I.R. 345.

[31] For example, the *Tuohy* standard was applied in *Re Article 26 and the Regulation of Information (Services Outside the State for the Termination of Pregnancies) Bill, 1995* [1995] 1 I.R. 1, at 45 to hold that Bill to be a reasonable attempt to balance the rights of the mother and unborn child. Similarly, the Supreme Court in *T.F. v. Ireland* [1995] 1 I.R. 321, at 370, when considering the constitutionality of legislation providing for judicial separation, expressly referred to the *Tuohy* standard. What is notable about these cases is that counsel in both cases made arguments which seemed to rely, in part, on the suggestion that the legislature could have pursued their objective with less restrictive means – *i..e* invoking the essence of the proportionality test. The Court however preferred to deal in the language of *Tuohy*. Indeed, the Supreme Court specifically cited Kenny J.'s dictum from *Ryan v. The Attorney General* to further the suggestion that the court should be especially cautious when dealing with legislation which reflects choices in controversial areas of social, economic or medical policy.

the Termination of Pregnancies) Bill, 1995[32] and *T.F. v. Ireland*[33] that the legislature could have pursued the legislative objective in both cases through less restrictive means.[34] The Court, however, preferred to deal in the language of *Tuohy* rather than "square up" to the question of alternative measures.

Perhaps the most striking example of *Tuohy*-dominance was in relation to *part* of the decision in *Re Article 26 and Employment Equality Bill, 1996*.[35] The Bill under review constituted a legislative attempt to combat discrimination in the workplace, but also provided a lawful basis for certain positive discriminatory measures designed to, *inter alia*, facilitate the re-introduction of persons over the age of 50 into the workforce. The Supreme Court followed *Tuohy* as the relevant standard for review of legislation and held as follows:

> No doubt in this instance the age limit chosen does not correspond to any recognised threshold. Where, however, as here, the Oireachtas was dealing with a specific problem in ensuring that its legislative goal of equality of employment did not unnecessarily frustrate another objective of eliminating or reducing long-term unemployment, it was entitled, as a matter of social

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[32] [1995] 1 I.R. 1.

[33] [1995] 1 I.R. 321.

[34] In *Re Article 26 and the Regulation of Information (Services Outside the State for the Termination of Pregnancies) Bill, 1995* and somewhat like in *Re Article 26 and the Matrimonial Homes Bill, 1993* [1994] 1 IR 305 (discussed above) counsel argued that the rights of the unborn had not been restricted in the least possible manner. Counsel argued in respect of minors that a failure to require either parental consent or notification for the procurement of abortion information was not enough to vindicate the rights of the unborn. The court, however, was not willing to view this as a ground of review – rather, once the balance struck between rights could be viewed as "reasonable", the legislation would stand. In *TF v Ireland* it was similarly argued that a method which did less violence to the institution of marriage and family rights was available. It was said to make separation available on proof of particular circumstances lasting for twelve months was too short a period. It was contended that the same objective could be reached by a longer period which would encourage reconciliation. In the High Court, Murphy J. held that the evidence established that the period was justified – *i.e.* seemingly reaching an independent view on the legislature's choice of method.

[35] [1997] 2 I.R. 321.

> policy, to choose between fixing the relevant age at what was an appropriate level or employing another and more flexible, but it may be a less practicable, yardstick, such as the length of time an individual is registered as being one of the long-term unemployed. While it is possible to argue that the Oireachtas has made the wrong choice, that cannot amount to a finding that the classification for which they have adopted is irrelevant to the objective intended to be achieved or unfair or irrational.[36]

Later in the judgment, however, the court cites the Canadian proportionality test (*i.e.* that which *Heaney* effectively replicates) as relevant to its review of other aspects of the Bill, but not, it seems in relation to the review of age-based classifications.[37] Perhaps the Court has a sophisticated theory of equality which holds that deferential review is appropriate to age-based classifications. Indeed, one may point out that the court seems to say that certain types of discrimination other than age-based discrimination are "presumptively invalid", and that it suggests therefore that the onus of proof may shift in such cases.[38] Since an age-based classification is *not* a member of the "presumptively invalid" class, then deference should follow and hence *Tuohy* is applied with quite deferential results. The difficulty with this, however, is that it largely an *ex post facto* rationalisation which may, or may not, be what the court had in mind. Indeed, one may reasonably point out that the talk of presumptively invalid classes of discrimination may simply only shift the onus of proof onto the legislature with the *standard* of proof remaining at the level of rationality. The simple point is that one cannot tell, and that, it is submitted, is the problem.[39]

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[36] [1997] 2 I.R. 321, at 348-349.

[37] [1997] 2 I.R. 321, at 383, citing the tests in *R v. Oakes* [1986] 1 S.C.R. 103 and *Chaulk v. R* [1990] 3 S.C.R 1303.

[38] For a full argument to this effect see Doyle, *Constitutional Equality Law*, (Dublin: Thompson Round Hall, 2004), pp. 138-142.

[39] A less charitable explanation is that the court seems to rely quite strongly on American authority – *Massachusetts Board of Retirement et al v. Murgia* 427 U.S. 307 (1976) – to support its standard of review for age-based classifications. As I have argued, deference is deemed legitimate in the United States in relation to, for example, age based classifications, because *no*

D. Interplay Between Tuohy and Heaney and the Least Restrictive Alternative

On occasion, courts have cited *Heaney* as the predominantly relevant standard, but then proceeded to use *Tuohy* to infuse a measure of deference into its application – "watering down" its potential particularly in respect of the least restrictive alternative test. Of course, the Canadian Supreme Court almost immediately began to dilute the potential of *Oakes*, and thus the Irish courts are not alone in this regard.[40] My interest, however, is with precisely how the Irish courts went about this.

It may help, however, to be perfectly clear about the nature of the argument being put forward here. The least restrictive alternative limb of the *Heaney* test is the most radical aspect of proportionality here. As outlined above, the logic of the test, when taken to its extreme, is that legislation must fall where it fails to pursue a legitimate objective by taking the least restrictive means possible. This has the potentially to be *incredibly* intrusive into what one may refer to as legislative discretion and this is well recognised. It is not, therefore, entirely unreasonable to think that courts may, consistent with a particular concept of the separation of powers, believe that the least restrictive alternative test *should not* be applied in the "Paretian" manner outlined above. However, if a court is to reach this conclusion it is not unreasonable to expect to see some reasoning and argument to this effect. In short, the choice to apply the least restrictive alternative test either deferentially or non-deferentially is incredibly significant and thus, one may think, the choice

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fundamental rights are burdened. In Ireland, equality is a right in a sense greater (it seems) than that provided for in the 14th Amendment. The court may have a strong but unexpressed theory about why deference is appropriate in relation to age. It may also have a theory about why deference is not appropriate in other cases. On the other hand, it may simply be misunderstanding the relevance of American authority on equal protection principles.

[40] See *e.g. R* v. *Edwards Books and Art Ltd* [1986] 2 S.C.R. 713. For a full account see Newman, "The Limitation of Rights: A Comparative Evolution and Ideology of the *Oakes* and *Sparrow* Tests", (1999) 62 *Saskatchewan Law Review* 543.

should be clearly explained and argued in the case law. Unfortunately, however, this is not always the case.

Take, for example, Keane J.'s decision in *Iarnród Éireann v. Ireland*[41] which concerned the constitutionality of the scheme of joint and several liability under the Civil Liability Act, 1961. The plaintiff argued that less restrictive methods were available which would facilitate the objective of the Act, but at the same time do less violence to its property rights.[42] Whereas Keane J. cites from *Heaney* and makes no adverse comment about the "least restrictive alternative" test he holds that:

> As between defendants, it is provided that there can be an apportionment of blame but if a deficiency has to be made up, in the payment of damages, it is better that it should be made up by someone in default than that a totally innocent party should suffer anew. For the Oireachtas so to provide is within its competence in what is truly an area of policy.[43]

In this case, therefore, the question of lesser restrictive alternatives is associated with policy-making, such that the court must defer to the legislative choice of means. Perhaps to galvanise this, Keane J. proceeds to cite *Tuohy* to support the idea of deference when approaching an area where the legislature as sought to balance conflicting interests.[44] The quarrel here is not with the result, but with the methodology used to achieve it. If the court is willing to uncritically accept *Heaney* (as it seems it is) the court must recognise that the test will require it to decide the constitutionality of legislation partly on the basis of whether a less restrictive measure was available.

However, the *Tuohy* standard, coupled with the notion of "policy" is invoked to effectively disarm the "least restrictive alternative" limb of the *Heaney* test and focus the court's attention on the less forensic question of whether the legislation is

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[41] [1996] 3 I.R. 321.

[42] It was suggested that a mechanism whereby the court could apportion the damages owing from each party as would be just and equitable was more suited.

[43] [1996] 3 I.R. 321, at 376.

[44] [1996] 3 I.R. 321, at 376.

"so contrary to reason and fairness" as to constitute an unjust attack on rights.[45] There is a *world* of difference between those standards. There is, unfortunately, no detailed argument or reason advanced as to why the least restrictive alternative test is, effectively, abandoned and no serious argument *at all* is offered as to why the *Tuohy* standard *should* result in a dilution of *Heaney*. That is not to say such arguments do not exist. They do. Indeed, there is a perfectly reasonable argument to be made as to why it should be the other way around. The point is simply that the courts need to justify these choices in more detail, rather than simply holding (without explanation) that *Tuohy* means a plaintiff cannot succeed in challenging legislation where a less restrictive alternative consistent with the objective of the legislation can be shown. That simply begs the question.

A similar "overlaying" of *Heaney* with *Tuohy* can be seen in *Rock v. Ireland*[46] which concerned a challenge to sections 18 and 19 of the Criminal Justice Act, 1984.[47] In upholding the legislation as a legitimate encroachment onto the right to silence, the Supreme Court first cited *Heaney* as the appropriate test stating that the "principle of proportionality is by now a well-established tenet of Irish constitutional law".[48] Immediately afterwards, however, it cited *Tuohy* and presented its conclusion in the language of *Tuohy*, emphasising the deferential standard appropriate to a case of legislative "balance" and paying no close attention to what *it* just previously described as a "well-established tenet of Irish constitutional law".[49] It is unsurprising

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[45] Of course, one may point out that it may have been the "policy" aspect of the case which led Keane J. to overlay *Heaney* with *Tuohy*, but that, as I have argued elsewhere, simply leads one to query why a legislative "policy" decision is worthy of deference for that reason alone. See Foley, "Diceyan Ghosts – Deference, Rights, Policy and Spatial Distinctions", (2006) 28 D.U.L.J. 77.

[46] [1997] 3 I.R. 484.

[47] Both sections allowed a court to take inferences from an accused person's failure to answer various questions put to him or her by the Gardaí upon arrest.

[48] [1997] 3 I.R. 484, at 500.

[49] [1997] 3 I.R. 484, at 500 "[i]t is the opinion of this Court that, in enacting ss. 18 and 19 of the Act of 1984, the legislature was seeking to balance the individual's right to avoid self-incrimination with the right and duty of the State to defend and protect the life, person and property of all its citizens. In this situation, the function of the court is not to decide whether a perfect

therefore, that Hogan and Whyte cite *Rock* as an example of how the *Heaney* test has been used "interchangeably" with *Tuohy*.[50]

It can scarcely be doubted that the conclusion in *Rock* is very significant. A plaintiff seeks to win an argument by proposing that less restrictive means were available which could have been followed doing no harm to the ability of the legislature to pursue it objective. This would seem to be a mode of argumentation left open by *Heaney*. A court must choose whether to apply this deferentially or non-deferentially. That is a serious question. However, in *Rock*, as in *Iarnród Éireann*, the Court effectively holds that it will not apply the "least restrictive alternative" test in anything other than a non-deferential manner without offering any argument as to why. If one can imagine the debate over the appropriate role of deference as a conversation, the citation of *Tuohy* in this way is somewhat similar to shouting down, without engaging with, the other side of the argument proposed by *Heaney*.

Again, at the risk of frustrating the reader with repetition of this point, I do not mean either approach is right or wrong – I simply mean that the courts citation and application of standards is confusing.[51] The impression one receives from these cases is

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balance has been achieved, but merely to decide whether, in restricting individual constitutional rights, the legislature have acted within the range of what is permissible. In this instance, this court finds they have done so, and must accordingly uphold the constitutional validity of the impugned statutory provisions."

[50] Hogan and Whyte, *J.M. Kelly: The Irish Constitution*, 4th ed., (Dublin: Butterworths, 2003), p. 1277.

[51] See also *Meagher v. Leary* [1998] 4 I.R. 33, where it was argued that permitting a district court judge to impose consecutive sentences of up an aggregate of two years' duration pursuant to s. 5 of the Criminal Justice Act, 1951 (as amended by s. 12(1) of the Criminal Justice Act, 1984) was unconstitutional, on the basis that it took the offence out of the non-minor category and outside the jurisdiction of the district court as a court of summary jurisdiction under Article 38.2. Moriarty J. dealt with the constitutional question in the High Court. He cited *Tuohy* as the relevant standard of review again, suggesting that a measure of deference is required when considering a case of "balance". However, he then proceeded to point out, without further elaboration, that a proper proportionality had been effected between the conflicting rights and interests under review. The lack of forensic review may be due to his citation of the Supreme Court in *Heaney* rather than the more detailed High Court test. Citing the Supreme Court can attract some criticism

that the court either views these standards as interchangeable (which they surely are not), or is making a conscious, but *unexplained*, attempt to inject deference into the application of the *Heaney* test.[52] The latter is a perfectly respectable goal but it requires the courts to offer (as the Canadian courts have) some express reasons as to *why* the *Heaney* test should be applied deferentially. Simply saying "*Tuohy* applies when we come to examine the least restrictive alternative test" answers nothing.

Something similar can be said about the decision in *Enright v. Ireland*[53], which concerned an argument that imposing registration requirements on sex offenders could only be done by allowing the offender a chance to make submissions on what was a "regulatory burden" on his liberty.[54] Finlay Geoghegan J.'s approach was more sophisticated than that described above. The learned judge cited *Tuohy*[55] but *expressly* pointed out that the *Heaney* proportionality test "must be added" to it.[56] The difficulty, however, is with understanding exactly what this joining achieved by way of the standard of review. In her conclusions, Finlay Geoghegan J. clearly applied a proportionality test, but whereas she upheld a rational connection between objective and means, there was no express consideration of whether a less restrictive alternative was available. Rather, Finlay Geoghegan J. points out that the registration requirements were "a minimal burden".[57] However, if one accepts that rights have been limited, *Heaney* requires one to examine whether the least restrictive method has been used to effect this limitation. Whereas one may think the registration system was a minimal burden, if one accepts that it limits the right to fair procedures; that does not dispose of the possibility that such limitation was

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here, for by this point, it was clearly Costello P.'s more detailed test which had attracted judicial attention.

[52] See also McKechnie J. in *BUPA Ireland & BUPA Insurance Ltd v. The Health Insurance Authority and others* [2006] I.E.H.C. 431, at para. 238.

[53] [2003] 2 I.R. 321. The decision, and also the reasoning applied were affirmed in the later case of *P.H. v. Ireland* [2006] I.E.H.C. 40.

[54] The specific basis for this claim was the right to fair procedures under Article 40.3 and due course of law under Article 38.1.

[55] [2003] 2 I.R. 321, at 341-342.

[56] [2003] 2 I.R. 321, at 342.

[57] [2003] 2 I.R. 321, at 343.

achievable by less restrictive alternative measures. It is possible, but this is not expressly stated, that the deference in *Tuohy* has been read into *Heaney* so as to avoid an application of the least restrictive alternative test.

An interesting approach can be seen in Kearns J.'s decision in *King v. The Minister for the Environment*.[58] In his judgment, Kearns J. was relatively (indeed, unusually) express about the connection between *Tuohy* and deference. Indeed, he noted that the whole point of the *Tuohy* standard was to press the need for "deference and restraint".[59]

> When such a test is applied, along with the presumption of constitutionality, the consequence must be that a clear burden of proof is imposed upon a plaintiff and, secondly, to achieve a finding of unconstitutionality, the plaintiff must go so far as to show that the impugned legislation is "so contrary to reason and fairness as to constitute an unjust attack on some individual's constitutional rights".[60]

Kearns J. also cites *Heaney*, but expressly points out that a court may not engage in a non-deferential application of the least restrictive alternative test.[61] The effect of this, of course, is to overlay the *Heaney* test with the afore-mentioned "deference and restraint".[62] The difference here, however, is that Kearns J. is being relatively clear about what he is doing. At the same time, however, it is not clear if Kearns J. means to say review should *always* be this deferential. This case concerned a question over the constitutionality of legislative measures designed to regulate

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[58] [2004] 3 I.R. 345. The Supreme Court appeal was heard in the joined cases of *King, Cooney & Riordan v. Government of Ireland & Ors* [2006] I.E.S.C. 61 where the decision of Kearns J. was reversed.

[59] [2004] 3 I.R. 345, at 375.

[60] [2004] 3 I.R. 345, at 376.

[61] [2004] 3 I.R. 345, at 377. In this regard he cited *Colgan v. I.R.T.C.* [2000] 2 I.R. 490 (discussed later) as authority for a deferential application of the least restrictive alternative test. See also [2004] 3 I.R. 345, at 375: "The court is under an obligation to afford to the legislature appropriate deference in the manner in which it decides to exercise its discretion as to the appropriate mechanisms by which its objectives are to be realised".

[62] [2004] 3 I.R. 345, at 375.

candidature at Dáil elections; Kearns J. held that such regulation was specifically and textually empowered by Article 16.1.1°.[63] Because the Constitution allocated this power to the Oireachtas, he seemed to reason that judicial deference to its operation of the power was necessary. The difficulty, however, is knowing whether this creates an initial position which, for the purposes of Article 16 review, blends into the proportionality test, or whether the need for "deference and restraint" in the application of proportionality is a general requirement.

Kearns J.'s consideration of the Article 40.1 aspect of the claim in *King* may lend some assistance here. In a previous case – *Redmond v. The Minister for the Environment*[64] – candidature regulations requiring a monetary deposit were held unconstitutional, on the basis that the discrimination effected between those who could afford it and those who could not could have been avoided by choosing a less restrictive alternative. In this case, Kearns J. does not seem to *defer* to the "new" method of regulating candidature (which had been enacted in response to the decision in *Redmond*) for the purposes of Article 40.1, but positively approves it as being "… as good as can realistically be hoped for".[65] At the same time, he does conclude by commenting that the "Article 40 argument must also be seen in the context of what other Articles provide in this context"[66] – referring, it seems, back to his view on deference in the Article 16 analysis which may have informed his decision on the Article 40 point.

Perhaps the best that can be said is that Kearns J.'s judgment is a welcome example of expressly associating choices of standards with deference. Moreover, it is at least significant to see *some* justification being offered for deference. That said, the reading of *Tuohy* offered does not make it clear whether deference in the *Heaney* test is a general requirement in judicial review, or is simply limited to cases which have a connection to Article 16. If, indeed, it is a general requirement, then the Article 16 justification (assuming it is valid) could not explain a general practice of deference.

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[63] [2004] 3 I.R. 345, at 375.
[64] [2001] 4 I.R. 61.
[65] [2004] 3 I.R. 345, at 383.
[66] [2004] 3 I.R. 345, at 383.

E. The Deferential Application of Heaney Itself

The previous section examined cases where *Heaney* has been "watered down" through cross-reference with *Tuohy*. In this section I will examine cases where it seems that *Heaney* itself has been applied in a more-or-less deferential sense without reference to *Tuohy*. In *Murphy v. The Independent Radio and Television Commission*[67], it was argued that legislation which prevented the broadcasting of any advertisement directed towards, *inter alia*, a religious end was unconstitutional.[68] In the High Court it was argued that if the objective of the ban was to prevent offence, then it was overly broad because it caught those religious advertisements which were not offensive. Geoghegan J. rejects this: "[i]t is the fact that the advertisement is directed towards a religious end and not some particular aspect of a religious end which might be potentially offensive to the public".[69]

It is important to note that Geoghegan J. here rejects the very idea that there may be more-and-less offensive types of religious advertising. Rather, religious advertising is offensive per se. The Supreme Court, however, did not accept that *all* religious advertisements may be offensive. This, it would seem, opens the door to the argument that the ban was overly broad in its application. It is, however, at this point which the Supreme Court defers:

> [T]he Oireachtas may well have decided that it would be inappropriate to involve agents of the State in

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[67] [1997] 2 I.L.R.M. 467, High Court, [1999] 1 I.R. 12, Supreme Court.

[68] In following its statutory duty under s. 10(3) of the Radio and Television Act, 1988 the Independent Television and Radio Commission refused to allow a Dublin radio station to broadcast an advertisement for a presentation about the evidence of the resurrection of Christ. The advertisement read as follows: "What think ye of Christ? Would you, like Peter, boldly say he is the Son of the living God? Have you ever exposed yourself to the historical facts about Christ? The Irish Faith Centre are presenting for Easter Week an hour long video by Dr. Gene Scott PhD on the evidence for the resurrection from Monday, 10 to Saturday, 15 April every night at 8.30 and Easter Sunday at 11.30 am and also live by satellite at 7.30 pm. The Irish Faith Centre, 360A North Circular Road, Phibsboro". It may be noted that Dr. Scott was "Gene Scott" in the High Court and "Jean Scott" in the Supreme Court.

[69] [1997] 2 I.L.R.M. 467, at 480.

> deciding which advertisements, in this sensitive area would be likely to cause offence and which not. In any event, once the Statute is broadly within the area of the competence of the Oireachtas and the Oireachtas has respected the principle of proportionality, it is not for this Court to interfere simply because it might have made a different decision.[70]

In short, the whole question of the offensiveness of expression is for the legislature.[71] Indeed, the court specifically hints that a better tailoring may have been possible, but still defers to the legislative choice.[72]

In the somewhat similar case of *Colgan v. The Independent Radio and Television*[73] O'Sullivan J. seemed to follow the essence of this approach, holding that limitations on the freedom of expression may be sustained not only where rational, but also where they may be wider than strictly necessary.[74]

> It appears that the correct approach of this court when considering whether the infringement of a constitutionally protective right impairs that right as little as possible is to refrain from condemning a wider infringement such as a blanket ban notwithstanding that a more selective alternative is admittedly available, if a rational explanation for the wider infringement is available to the Court… Some degree of judicial

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[70] [1999] 1 I.R. 12, at 27.

[71] In this regard see the comments of O'Hanlon J. in *M.M. v. Drury* [1994] 2 I.R. 8, at 13 that "… it seems desirable that it should be left to the legislature, and not to the courts to 'stake out the exceptions to the freedom of speech'" (citing Lord Denning in *Re X. (A Minor) (Wardship: Jurisdiction)* [1975] Fam. 47).

[72] [1999] 1 I.R. 12, at 27: "[c]ounsel for the applicant, argued that it would have been possible to have had – instead of a blanket ban on religious advertising – a more selective administrative system whereby inoffensive religious advertisements would be permitted, and religious advertisements likely to cause offence, banned. No doubt this is true...".

[73] [2000] 2 I.R. 490.

[74] It is notable that O'Sullivan J. here believed that the Supreme Court in *Murphy* had held the ban was premised on the legitimate view that *all* religious and political advertisements were offensive. This, however, is what the High Court, but not the Supreme Court, held.

> restraint, appears appropriate, therefore, when the court in the context of applying the proportionality test, is considering whether a statutory infringement of a constitutional right does or does not '*impair the right as little as possible*'. This appears to me the *ratio* of the Supreme Court judgment in *Murphy*. This judicial restraint may itself be an application of the presumption of constitutionality in favour of the statutory provision attacked.[75]

A similar decision was reached by the Supreme Court in *Re Article 26 and Section 5 and Section 10 of the Illegal Immigrants (Trafficking) Bill, 1999*.[76] This Bill required that challenges by way of judicial review to deportation decisions had to be made within 14 days of the decision to deport.[77] The Supreme Court expressly stated that the Bill would not fall if a longer extended period would allow the same policy objectives to be attained, thus, it seems, rejecting the "least restrictive alternative" test as a ground of review. Relying on this decision, the High Court followed a similar approach in the recent case of *Salafia v. The Minister for Environment, Heritage & Local Government*[78] "[b]y a parity of reasoning to the instant case, it is not for the court to identify other measures that would have achieved a higher level of protection of national monuments. This does not mean that an interference in a constitutionally protected right (if one exists) is disproportionate".

F. A Different Application of Heaney?

So far I have considered cases where the *Heaney* test has been applied in a relatively deferential manner. This section examines cases which *appear* different – *i.e.* where similar express inclusions of deference or rationality are not obvious.

This point can be developed in the context of *Dunnes Stores Ireland Company v. Ryan*,[79] which formed the

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[75] [2000] 2 I.R. 490, at 512 (emphasis added).
[76] [2000] 2 I.R. 260.
[77] It should be noted, however, that an application could be made to extend time.
[78] [2006] I.E.H.C. 61.
[79] [2002] 2 I.R. 60.

constitutional leg of a relatively protracted resistance to the appointment of an "authorised officer" to inspect the books of the plaintiff company. As far as is relevant, the legislation under challenge provided that a failure to answer questions put by the authorised officer, or to co-operate with his investigation, were to be treated as criminal offences.[80] It was argued, in the classic sense of proportionality, that the objective of ensuring proper corporate governance could be met by a measure less destructive of the right to silence. It is perhaps interesting that the State argued that a rational connection between means and end would suffice, and specifically submitted that the Supreme Court decision in *Heaney* had not expressly adopted the more "forensic" test offered by Costello P.[81] The drift of these submissions seems obvious – the State was attempting to downplay the least restrictive alternative test which was the main limb of the applicants argument, and indeed had been the reason why similar legislation had been held unconstitutional in South Africa.[82]

Kearns J., however, proceeded to offer what seemed like a relatively strong application of the least restrictive alternative test in acceding to the plaintiffs' arguments.[83] So, taking into account the State's arguments, Kearns J. nevertheless seemed to view the least restrictive alternative test as having an existence independent of rationality analysis, and moreover, did not cite any

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[80] The legislation under challenge was s. 19(5) and s. 19(6) of the Companies Act, 1990.

[81] [2002] 2 I.R. 60, at 112 reciting counsel's argument: "[t]here was a rational connection between the means chosen and the objective sought to be attained. The Supreme Court in *Heaney* had not specifically adopted the four criteria set out by Costello J. in the High Court in that case. Proportionality was the critical consideration governing the Supreme Court's conclusion".

[82] See *Ferreira v. Levin N.O.* (1996) 1 B.C.L.R. 1, where the Constitutional Court of South Africa struck down comparable provisions on what was, essentially, the argument put forward by the applicant in *Dunnes Stores.*

[83] On the other hand a somewhat different approach is taken towards s. 19(5) which contained the power itself for the authorised officer to demand books. Kearns J. seemed to uphold this power on the basis of its legitimate objective, and held that any infringement of Article 40 was not enough to out-balance the public interest in this practice. However, it does seem that counsel did not argue in this context that a less restrictive method was in fact available. Those arguments seem to have been directed towards s. 19(6).

previous authority which may have supported the deferential application of that test.

The Supreme Court offered something of a similar approach to proportionality in *D.K. v. Crowley*[84], where it was claimed that provisions of the Domestic Violence Act, 1996 were unconstitutional as they permitted a court to grant a perpetual barring order on an *ex parte* application, thus not permitting the affected person a right to be heard in his defence. The Supreme Court, per Keane C.J., expressly noted that the legislation struck a balance between competing rights and interests; notably absent is any reliance on *Tuohy*.[85] Rather, the court specifically points out that in striking such a balance, the legislature may go no further than necessary.[86] The contrast with *Re Article 26 and the Illegal Immigrants (Trafficking) Bill, 1999* or *Colgan* could hardly be greater. Thus, the court held that the objective of spousal protection could legitimately be served by provision for a temporary order, pending a full hearing on notice to the respondent. There was, therefore, a method that was less restrictive of the respondent's right to be heard which the legislature had not chosen.[87]

To conclude on this point, the decision in *Redmond v. The Minister for the Environment*[88] is striking for a failure to refer to any of the authorities which would support or require a deferential application of *Heaney*. In this case, Herbert J. struck down as contrary to Article 40.1 provisions of electoral legislation which require prospective candidates to provide a monetary deposit as part of the conditions of candidature.[89]

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[84] [2002] 2 I.R. 744.

[85] [2002] 2 I.R. 744, at 757-758.

[86] [2002] 2 I.R. 744, at 757.

[87] It is notable the Court drew attention to s. 17 of the Child Care Act, 1991 as a "model" for this kind of alternative. On this point, one may note McKechnie J.'s comments in *McGonnell & Ors v. The Attorney General and the Director of Public Prosecution* [2004] I.E.H.C. 312 relying on this somewhat obvious alternative which the State did not pursue, as a distinguishing factor of the case.

[88] [2001] 4 I.R. 61.

[89] Section 13 of the European Parliament Elections Act, 1997 required a £1,000 deposit for European elections. Section 47 of the Electoral Act, 1992 imposed a similar, but less expensive, requirement for Dáil elections.

Although he does not cite *Heaney* by name, it is relatively clear that the provisions fell on the basis that less restrictive measures (namely the use of signature system) were available to serve the legislative objective of reducing the risk of frivolous, vexatious or "crank" candidates. Now, it is not unreasonable to think that a rational connection exists between this legislative objective and the deposit system. If rationality alone was the test, it is possible that the legislation would stand. However, it was the relatively strong application of the least restrictive alternative test (with no stated deference, as in cases like *Colgan*) which resulted in a finding of unconstitutionality. There was, it seems, no comfort zone of discretion allowed for the legislature in its choice of measures.

The relevance of these cases is simply this. Other decisions have been quite express about why deference is appropriate in the application of proportionality. The decisions just examined, however, are not. Indeed, the decision in *D.K.* (whether this was intended or not) reads like a specific rebuke of the previous use of *Tuohy* or the notion of "balance" to mitigate the least restrictive alternative test. If these decisions are really stronger applications of the proportionality test, then one may reasonably ask why the courts did not see fit to discuss other cases which seemed to call for quite different results. The court may have very good reasons for distancing itself from the application of deference in the *Heaney* test – the problem is simply that such reasons do not "come out" in the decisions. Rather, as Doyle has observed in a different context, the choice of standards seems relatively inarticulate.[90]

IV. CONCLUSION – THE FUTURE ROLE OF PROPORTIONALITY IN IRISH CONSTITUTIONAL LAW

Decisions about how proportionality is to be applied – whatever those choices are – reflect choices about some of the

[90] Doyle, *Constitutional Equality Law*, (Dublin: Thomson Round Hall, 2004), p. 105.

most fundamental issues in the separation of powers, and reflect one's views on the appropriate role of the court in a constitutional democracy. A deferential application of *Heaney* suggests that the courts are willing to allow the legislature the balance of decision-making power over questions of the legitimacy of limiting constitutional rights. A non-deferential application of *Heaney* suggests that the courts will require the legislature only to follow what is, on an *ex post facto* analysis, the least restrictive means possible in pursuing a legitimate legislative alternative. Any such choice between these alternatives must be clearly and cogently explained via a clear analysis of the appropriate role of deference in judicial review. This is the price of introducing the proportionality test into Irish jurisprudence. Proportionality raises these questions and the Irish courts must engage with these issues. This is precisely what the Canadian courts and, indeed, since the enactment of the Human Rights Act, 1998 what the English courts have had to do.

Thus, a fully worked out and justified theory on the application of the proportionality test requires a proper understanding of the role of deference in judicial review. Any argument to such an end is beyond the scope of this article.[91] However, the Irish jurisprudence, as it is, provides a good deal of food for thought as to what the options may be. Perhaps there is good sense in the notion that the strict Paretian application of *Heaney* would be a step too far. Maybe it is far too intrusive into legislative discretion to suggest that legislation will fall unless the absolutely least restrictive alternative was taken. On the other hand, rejecting the notion of the "least restrictive alternative" as a ground of review may seem far too deferential to legislative discretion and, indeed, a wholesale rejection of the *idea* of proportionality review. A middle ground may be appropriate. Perhaps there may be some merit in, for example, condemning legislation only in the circumstances where the means actually chosen go beyond a range of more-or-less reasonable options.

In this regard, it may be important to note that there are somewhat wider shifts occurring in Irish constitutional law which

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[91] It is, however, the subject of the author's upcoming work *Deference and the Presumption of Constitutionality* (Institute of Public Administration, Forthcoming, 2008/2009).

would seem relevant to any decision as to how the *Heaney* test should be applied. Most pertinent are the intriguing suggestions that the burden of proof may be shifting such that it may behove the state to *justify* any limitations placed on constitutionally guaranteed rights.[92] In other jurisdictions the courts have held the view that a somewhat deferential application of the least restrictive means test can be counter-balanced by such a burden of proof. In *R.J.R. MacDonald Inc. v. Canada*,[93] for example, the Supreme Court of Canada held that the courts "… will not find a law overbroad merely because they can conceive of an alternative which might better tailor objective to infringement…".[94] That reads as something of a rejection of the non-deferential application of the least restrictive means test. However, the court also pointed out that "…if the government fails to explain why a significantly less intrusive and equally effective measure was not chosen, the law may fail".[95] Thus, deference may be afforded and the State excused from the rigours of "hardcore" proportionality analysis where it can, through argument and reason, bring itself into a zone of reasonableness, whereby it argues that its choice of means, whereas perhaps not perfect, was a reasonable choice from a range of reasonable alternatives. This is simply *one* avenue whereby it may become somewhat more reasonable to insist on an application of *Heaney* proportionality which does not condemn legislation for the failure to adopt what, with the benefit of hindsight, was a less restrictive measure.

What should be clear, however, is that choices in how the proportionality test should be applied are choices which impact on and, indeed, should be informed by, wider constitutional issues such as the appropriate role of deference in judicial review. It is in this wider context that courts should appreciate the significance of

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[92] See *e.g.* the discussion in Doyle, *Constitutional Equality Law*, (Dublin: Thomson Round Hall, 2004), pp. 138-142. See also *Re Article 26 and the Employment Equality Bill, 1996* [1997] 2 I.R. 321; *An Blascaod Mór Teo v. Commissioners of Public Works* (High Court, unreported, 27 February 1998 (Budd J.); *S.M. v. Ireland* [2007] I.E.H.C. 280; *BUPA Ireland & BUPA Insurance Ltd v. The Health Insurance Authority and others* [2006] I.E.H.C. 431.

[93] [1995] 3 S.C.R. 199.

[94] [1995] 3 S.C.R. 199, at para. 160.

[95] [1995] 3 S.C.R. 199, at para. 160.

their choices in how to apply *Heaney* proportionality. This article does not, in any way, suggest that any given choice is better than another, but what it does urge is that insofar as the choices are to be made, they should be done in a clear and express manner. That, it is submitted, would be a change for the better.